IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

HENRY LINDSEY — APPELLANT

VS. — NO. 2008-KA-1717-COA

STATE OF MISSISSIPPI — APPELLEE

ON APPEAL FROM JUDGMENT OF CONVICTION BY THE CIRCUIT COURT
LEAKE COUNTY, MISSISSIPPI, CAUSE NUMBERED 08-CR-044-LE-G

REBUTTAL BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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I. LINDSEY'S ARGUMENT IS NOT PROCEDURALLY BARRED. THE RECORD EVIDENCE RAISES REASONABLE DOUBT ABOUT THE IMPARTIALITY OF THE TRIAL JUDGE.

The authorities cited by the State as supportive of its position that Lindsey has waived any right to argue that the trial judge should have recused himself *sua sponte*, cite principles in factual scenarios which are obviously distinguishable from the instant case and should not have any application.

King v. State, 821 So.2d 864, 867 para. 17 (Miss. App. 2002), arose on a petition for habeas corpus seeking relief from an adjudication of guilt in response to a voluntary petition for entry of a plea of guilty, filed by appellant. The petition was treated as a request for relief under our post-conviction relief act, Miss. Code Ann. sec. 99-39-3 (Rev. 2000); *King, supra.*, paragraphs 5,6, and 7. The opinion and the authority relied upon by its authors (*Tubwell v. Grant*, 760 So.2d 687, para. 8, para. 40 [Miss. 2000]) are clearly at odds with the pronouncements made in *Green v. State*, 631 So.2d 167 (Miss. 1994) and found at page 177 therein (*Green*, 631 So. 2d at 177). Both *King, supra.*, and *Tubwell, supra.*, apply waiver principles to facts in which a litigant knows of grounds supporting a request for the trial judge to recuse himself yet does not do so. Application of the *Green* principles are neither discussed nor harmonized. Neither is it distinguished or overruled (*Green v. State*, 631 So.2d 167 [Miss. 1994]. Clearly, these authorities do not have any application to the case before this Court.

Jackson v. State, 1 So.3d 921, 927-28, para.17 (Miss. App. 2008) and *Bryan v. Holzer*, 589 So.2d 648, 654 (Miss. 1991) are likewise distinguishable and should be given the same effect. Moreover, *Bryan, supra.*, was decided three years before *Green v. State, supra.*, and has not been

cited or followed by this tribunal in *Brent v. State*, 929 So.2d 952, paragraphs 3-6 (Miss. App. 2005), *Baldwin v. State*, 923 So.2d 218, para. 16 (Miss. App. 2005) or *Peters v. State*, 920 So.2d 1050 para. 21 (Miss. App. 2006). Following the "beyond a reasonable doubt" standard expressed in *Jackson, supra.*, imposes upon any trial litigant an almost impossible burden when attempting to overcome the presumption of impartiality. As well, such a standard is clearly at odds with the "objectively reasonable" test and the "some facts which raise some reasonable doubt about the validity of the presumption" standard espoused by the previous authors of this court. Even the State concedes (p. 4, second paragraph, Brief for the Appellee) that an objectively reasonable standard should be the rule applied to the case before the bar (*Shumpert v. State*, 983 So.2d 1074, 1078, para. 14 [Miss. App. 2008]). The burden imposed by *Jackson v. State*, 1 So.3d at 927-28 para. 17 (Miss. App. 2008) must not be followed, and Mr. Lindsey should prevail if he can demonstrate some facts harboring reasonable doubt about the impartiality of the trial judge.

It is submitted the record demonstrates just such impartiality, for even the excerpts cited by the State- in its attempts to put all remarks in context- illustrate the difficulties the trial judge was having keeping his own personal opinions about the criminal justice system and its administration from influencing the panel (Brief for the Appellee, pp. 4 and 5).

Doubtless the trial court was attempting to educate the jury in its duty to be fair and impartial as well as to concern itself with its sole mission as the arbiter of fact. Unfortunately, the attitudes and personal bias of the trial judge influence his remarks- made to panel members who are largely uneducated in the law and its application to cases brought within our jury system. In addition to the remarks already cited by Mr. Lindsey within the Brief of Appellant (p. 10), the State's own recitation of the record reveals the following additional ascerbic comments:

"You be concerned with the facts of the case and you be concerned with the law. Then there's others, like myself, who will have the responsibility of passing judgment after you've made your judgment." (Brief for the Appellee, p. 5).

If a jury is to be selected to be finders of fact and decision maker on the guilt or innocence of the accused, why make those remarks at all? If jurors were to find the accused "not guilty", then there would be no need for anyone-juror or trial court-to pass any further judgment upon this defendant. Yet largely uneducated people had just been told, by way of implication and before the first drop of proof had been adduced, that it would be permissible to find the accused guilty and to then let the judge determine what sentence should be imposed by way of punishment.

Again there were other questionable comments made by a trial judge, in open court, before panels of lay people and before Mr. Lindsey- someone who supposedly stood clothed with the presumption of innocence but dressed in yellow prisoner's garb (Rec. p. 5)-a fact surely not lost upon anyone in the courtroom that day:

"One right that people never talk about, and which I consider and I say it all the time, is probably the most important right that you can ever have, and that's the right to be free from fear." (Brief for the Appellee, p. 5).

And again:

"You have to think again. We're not talking about the laws in Jackson or anywhere else. We're talking about your law. Every case that you consider is a law of Leake County." (Brief for the Appellee, p.5).

The sum total of these remarks would permit people largely uneducated in the ways of the law to infer that, if selected, it would be all right for them to convict persons- and in this case Mr. Lindsey- who are already criminals anyway. In so doing, they would be administering the laws of Leake County in such a way that it would be a far safer place for its denizens; free from fear and devoid of criminals walking its streets.

This writer is not unmindful of the fact that his interpretation of remarks appearing in this record and made by the trial judge, are far different from the interpretation made by the State in its attempts to place all his remarks in-what it considers to be-a proper and unbiased context. Indeed, an alternative interpretation is precisely the point the writer wishes to make. None of us- the appellate lawyers, this court- were present in the trial court when those remarks were made. None of us were prospective jury members about to participate in a function this State and Nation deem a vital cog in the administration of the law under our system of justice. If different interpretations of the remarks appearing in this trial record are made by the attorneys, then what interpretations may have been afforded by lay people, hearing them from an authority figure required by our State Constitution and laws to be neutral and detached? All who have tried cases before a jury know full well what effects the demeanor and remarks of a trial jurist can have upon those sworn to be finders of fact. It is not unreasonable to deduce that appellant's interpretations were considered by at least some members of the jury panels, and not unreasonable to deduce that this type of bias is just the sort that the spirit of Canon 3, Code of Judicial Conduct, is designed to guard against? Coupled with the failure of the trial court to issue any cautionary instructions on issues of evidence of prior bad acts and a conviction of the accused, Mr. Lindsey has demonstrated some facts illustrative of some reasonable doubt about the neutrality of the trial court, and thus has overcome the presumption that the trial judge is unbiased.

Before concluding with this portion of the argument, the writer cares to comment on the following remark of the State (Brief for the Appellee, p. 6): "Surely Lindsey does not suggest then that Judge Gordon should recuse himself in every criminal case." Mr. Lindsey makes no such suggestion. Rather, under the peculiar facts of this case-the trial of an accused who is

already known to a jury to be a convict and who is dressed in the garb of a convict (Rec. p.5, lines 3-9)-it would have been far better for the trial judge to have recused himself and thus avoid any appearance of impropriety.

II. LINDSEY SHOULD NOT BE BARRED FROM ARGUING THE PREJUDICIAL EFFECTS OF TESTIMONY ELICITED AND ATTEMPTED TO BE ELICITED ON CROSS EXAMINATION DEPRIVED HIM OF A FAIR TRIAL.

Contrary to the assertions raised by the State, Mr. Lindsey did not work his own undoing by eliciting testimony which permitted exploitation by the prosecution on cross examination. If one will peer at this record closely ((Rec. p. 40), during direct examination defense counsel asked Lindsey what happened to him on the 21st day of February, the day of the alleged offense. It was in the telling of a story where an uneducated man made reference to an "RVR", or rules violation report. No members of the jury would have learned what an RVR report or its effects were, had it not been for further cross examination by the State. Thus, it was not the question on direct, but the inadvertent reference to unindicted bad acts and their exploitation by the prosecution which ultimately led to tainted evidence depriving Mr. Lindsey of a fair trial. Therefore, *Lane v. State,* 841 So.2d 1163, 1169, para. 19 (Miss. App. 2003) does not have any application.

Furthermore and as the record on pages 41, lines 15 to 29 and page 42, lines 1 through 6 demonstrate, not only did defense counsel eventually object to cross-examination of the State regarding unindicted bad acts, but to an entire line of questioning conducted by the prosecutor ("Your Honor, I would object to this entire line as irrelevant. He's here about whether or not he had a shank in his cell and it was his and not anything else." Rec. p. 42, lines 3-6). Unlike *Spicer v. State,* 921 So.2d 292, 305, para. 15 (Miss. App. 2006), trial counsel was specific in the nature of his objection and to that which he was objecting. He should not be barred from raising and

arguing this issue on appeal.

What Mr. Lindsey's trial counsel was objecting to were repeated efforts by the prosecution to elicit evidence and adduce evidence on cross examination regarding his unrelated and highly prejudicial armed robbery conviction, as well as bad conduct supposedly exhibited by the appellant during the course of his stay at the Walnut Grove Correctional Facility. The jury already knew he was confined at that facility at the time the present charge arose. No good purpose was served by the line of interrogation pursued by the State; its only effects were to inflame jury members about issues which had nothing to do with the singular matter for which Mr. Lindsey was charged-his guilt or innocence regarding possession of contraband while so confined. Unconnected and prejudicial evidence of this variety is just the sort of proof which our Supreme Court and this tribunal have condemned in past cases too numerous to mention. Its admission without cautionary instructions from the trial court deprived Mr. Lindsey of a fair trial, deprivation of a substantial right which is plain error and warrants reversal of the conviction.

Moffet v. State, 938 So.2d 321, 327, para. 22 (Miss. App. 2006) is cited by the State without its proper context. The authors of that opinion imposed duties upon defense counsel to object to improper **argument** made by the State during closing argument, and to be specific in the nature of objections regarding the same (emphasis, the writer); *Moffet v. State*, 831 So.2d pp. 321, 327, para. 22 (Miss. App. 2006). *Gray v. State*, 831 So.2d 1221, 1222-23, para. 4 (Miss. App. 2002) and *Stevenson v. State*, 244 So.2d 30 (Miss. 1971), merely expand upon the *Moffet* principle in the context of defense counsel failing to request a mistrial when faced with improper comments made by the opposition during the course of a trial.

To the same effect are the principles espoused in *Minor v. State*, 831 So.2d 1116, 1123-24

(Miss. 2002). *Minor*, however, is singularly interesting. The panel implies a reversal would have obtained had the court felt that prosecutorial conduct- the failure of defense counsel to move for a mistrial or request the jury be instructed to disregard comments notwithstanding- amounted to plain error. Therefore and even assuming counsel for Mr. Lindsey could be put in error for failure to ask for a limiting instruction or request the jury be admonished to disregard comments made by the prosecutor, the evidence elicited by the State and referred to during other cross examination of it-coupled with the omissions of the trial court- can be that type of plain error which warrants a reversal of the Lindsey conviction.

It is, therefore, submitted Mr. Lindsey must not be barred from raising these arguments on appeal. His right to a fair trial has been substantially prejudiced, which must be the subject of redress by this court.

CONCLUSION

Through error committed by the trial court, Mr. Lindsey has been deprived of a fair trial, a substantial right entitling him to a reversal of his conviction notwithstanding any asserted omission or omissions of his defense counsel. He should not be barred from raising these issues on appeal, meritorious issues warranting consideration and redress by the Mississippi Court of Appeals.

Respectfully submitted,
Henry D. Lindsey

By: Thomas A. Pritchard

THOMAS A. PRITCHARD, ESQ.
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CERTIFICATE OF SERVICE

I, Thomas A. Pritchard, one of the attorneys of record for Henry Lindsey in the above styled and numbered cause, do hereby certify that in compliance with Rule 25, M.R.A.P., I have this day deposited in the United States mail, first class postage prepaid, an original and three copies of the above and foregoing brief of appellant to the Clerk, Mississippi Court of Appeals, P.O. Box 22847, Jackson, Mississippi 39205.

I further certify that I have this day mailed via United States mail, first class postage prepaid, a true and correct copy of the above and foregoing brief of appellant to:

a. Ms. LaDonna Holland., Special Assistant, Mississippi Attorney General, P.O. Box 220, Jackson, Mississippi 39205,

b. Hon. Marcus D. Gordon, Circuit Court Judge, Leake County, P.O. Box 220, Decatur, Mississippi 39327-0220, and

c. Mr. B. Jackson Thames, Jr., Esq., Office of the District Attorney, P.O. Box 603, Philadelphia, Mississippi 39350-0603,

their usual and customary mailing addresses.

SO CERTIFIED, this the 26th day of August, 2009.

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