

IN THE SUPREME COURT OF MISSISSIPPI

2008-KA-01755-C0A

CALVIN BASKIN

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF CHICKASAW COUNTY, MISSISSIPPI**

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Calvin Baskin, Appellant
2. State of Mississippi, Appellee
3. Robert Sneed Laher, Counsel for Calvin Baskin, Appellant
4. Mississippi Attorney General, Jim Hood, Counsel for Appellee
5. Assistant Attorney General, Charles W. Maris, Jr., Counsel for Appellee
6. Judge Henry L. Lackey, 2nd Judicial District
7. Assistant District Attorney, Jerry Lon Stallings, Counsel for Plaintiff at trial
8. James D. Moore, Jr., Counsel for Calvin Baskin at trial

This the 4th day of May, 2009.

ROBERT SNEED LAHER

ROBERT SNEED LAHER
ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUES

COMES NOW, the Appellant, Calvin Baskin, by and through counsel, Robert Sneed Laher, and requests the Court to review the following issues:

1. The trial court erred in denying Appellant Calvin Baskin's oral Motion to Dismiss based upon insufficient evidence as the State lacked any proof that Calvin Baskin sold cocaine to William Pickens, the confidential informant, as alleged in the indictment.
2. The trial court erred in denying Appellant Calvin Baskin's oral Motion to Suppress the use of certain video/audio evidence as same was highly prejudicial to Appellant Calvin Baskin's defense because he was not afforded the opportunity to cross-examine Kobrin Pickens, a known drug dealer who was the intended subject of the surveillance video tape, due to Kobrin's unavailability at Baskin's trial.
3. The trial court erred in denying Appellant Calvin Baskin's Motion for a Judgment Notwithstanding the Verdict, or alternatively, for a New Trial due to the lack of proof that Baskin sold a controlled substance as alleged in the indictment against him.

STATEMENT OF THE CASE

(I) Course of the proceedings and disposition in the Court below:

Defendant Calvin Baskin was found guilty of the sale of a controlled substance, namely cocaine, in violation of Miss. Code Ann. §41-29-139 on June 30, 2008, following a two-day jury trial in Chickasaw County, Mississippi. (RE 10-12, CP 39-41). Thereafter, on August 6, 2008, counsel for Defendant filed a Motion for Judgment Notwithstanding the Verdict, or alternatively, for a New Trial in the Circuit Court of Chickasaw County, Mississippi. (RE 13-15, CP 44-46). It is from the denial of this Motion that Defendant Baskin appeals.

(II) Statement of the Facts:

On February 21, 2008, Defendant Calvin Baskin and Kobrin Pickens were indicted for the Sale of a Controlled Substance (cocaine) in Count I of a three count indictment which also included two other charges against Pickens only for the sale of a controlled substance. (RE 5-6, CP 1-2). The indictment included an allegation that on November 15, 2007, Defendant Calvin Baskin and Kobrin Pickens sold cocaine to a confidential informant in exchange for \$50.00. (RE 5-6, CP 1-2). A capias bond was issued and Defendant Calvin Baskin was arrested on March 12, 2008, and later released on bond. (RE 7, CP 3). Baskin waived arraignment and entered a plea of not guilty on April 14, 2008. (RE 8, CP 7). On July 29, 2008, the trial court entered an Order Severing Defendants as the co-defendant, Kobrin Pickens, had not been served with an indictment and law enforcement had been unable to determine Pickens' whereabouts. (RE 9, CP 22). The matter proceeded to trial on July 29, 2008, and concluded on July 30, 2008, resulting in a guilty verdict being rendered against Baskin. Baskin was sentenced to 20 years in prison, with 5 of those years suspended if Baskin maintains good behavior, as well as long-term participation in an alcohol and drug program, completion of his GED and fines and costs. (RE 10-12, CP 39-41).

SUMMARY OF THE ARGUMENT

The judgment of the trial court should be reversed and a new trial granted to Appellant Calvin Baskin for several reasons, the most important of which is that there was simply no evidence that Baskin was guilty of anything other than being an addict. Baskin's own testimony included an admission that he has been a drug addict for approximately twenty years, that he had two previous unsuccessful attempts at rehab and that he was high on powder cocaine on the day of the alleged sale of the controlled substance. (RE 36, 39, 40; T 173, 176, 182). Two of the State's witnesses at trial testified that Kobrin Pickens, a known drug dealer, and *not* Calvin Baskin, was the subject of the investigation that resulted in the charges against Pickens and Appellant Baskin¹. (RE 24, T 106; RE 26, T 137). The trial court erred in denying Appellant Calvin Baskin's oral Motion to Dismiss based upon insufficient evidence as the State lacked any proof that Calvin Baskin sold cocaine to William Pickens, the confidential informant, as alleged in the indictment.

The State's submission of a surveillance video tape into evidence was highly prejudicial to Baskin's defense, primarily because Kobrin Pickens, the individual who was indicted along with Baskin but who was later severed from Baskin's trial because he jumped bail and fled from authorities, was unavailable for cross-examination regarding his statements made on the surveillance tape that was used to implicate Baskin in the criminal activity. Portions of the tape were shown repeatedly throughout the trial, despite objections by defense counsel related to hearsay and the inability to cross-examine the intended subject of the surveillance, Kobrin Pickens. (RE 21-23, T 103-105). Not only was the surveillance video tape erroneously allowed

¹ The only other witness for the State, crime lab employee Alisha Waldrop, was excused from any substantive testimony since defense counsel stipulated to the amount of cocaine admitted into evidence.

into evidence due to the Appellant's inability to cross-examine Kobrin Pickens, but the tape should have also been suppressed due to the one-sidedness of the contents. Several phone calls were made by Kobrin Pickens throughout the over-50 minutes of video and only the voice of Kobrin Pickens was audible on the tape during the calls. (RE 30-32, T 148-150). The video was obviously submitted into evidence to imply to the jury that Calvin Baskin was setting up the sale of cocaine when there is no proof that is what actually happened.

The trial court erred in denying Appellant Calvin Baskin's Motion for a Judgment Notwithstanding the Verdict, or alternatively, for a New Trial due to the overwhelming lack of proof that Baskin sold a controlled substance as alleged in the indictment against him. At the conclusion of the trial, despite the existence of a reasonable doubt regarding Calvin Baskin's participation in the sale of a controlled substance, the jury found him guilty. This verdict was against the weight and sufficiency of the evidence and was erroneously reached due to the undisputed testimony that Calvin Baskin did not hand any cocaine to William Pickens, the confidential informant, or to Kobrin Pickens, the co-defendant whose case was severed due to his hiding from law enforcement subsequent to his indictment. (RE 25, T 111; RE 33, T 155).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT CALVIN BASKIN'S ORAL MOTION TO DISMISS BASED UPON INSUFFICIENT EVIDENCE.

The trial court erred in denying Appellant Calvin Baskin's Motion to Dismiss based upon insufficient evidence that was made by defense counsel orally at trial because the State lacked any proof that Calvin Baskin sold cocaine to William Pickens, the confidential informant, as alleged in the indictment. The only thing Calvin Baskin is guilty of is being a drug addict. By his

own admission, Baskin has been hooked on drugs for over 20 years and has paid for rehabilitation programs for himself on two different occasions. Despite his horrible drug addiction, Baskin was surprisingly high functioning and was not an entirely unproductive member of society. He has consistently worked to earn a living since he was 17 years old, most recently for Navistar in West Point, Mississippi, manufacturing military vehicles for the United States armed forces. (RE 34-35, T 171-172). Baskin testified that he has three children and pays child support for each child. He has been married to his current wife for nine years. Although money has been tight, he has never sold drugs and has always worked to pay for the drugs to which he is sadly addicted.

The confidential informant for the subject investigation, William Pickens, testified that he had lived in Chickasaw County, Mississippi all of his life and had participated in many undercover buys, perhaps more than 40 within a year's time, and that Appellant Baskin was not known to be a drug dealer. (RE 27-29, T 145-147). Officer Michael Fowler testified that as far as he knew, Appellant Calvin Baskin had never been the subject of an investigation in Chickasaw County. (RE 25, T 113). Unfortunately, the real drug dealer in this case, Kobrin Pickens, remains at large while Appellant Calvin Baskin is serving a 20 year sentence for a crime he did not commit. Two of the State's witnesses at trial testified that Kobrin Pickens, a known drug dealer, and *not* Calvin Baskin, was the subject of the investigation that resulted in the charges against Pickens and Appellant Baskin. (RE 24, T 106; RE 26, T 137).

Admittedly, Calvin Baskin was as high as a kite on November 15, 2007, when Kobrin Pickens came to Baskin's home along with Confidential Informant William Pickens (and an unidentified female who remained in the vehicle), and because of his incoherent state of mind, Baskin's recollection of the day's events is not very clear. Similarly, the activity that is depicted

on the surveillance tape is not very clear. It is undisputed that there are portions of the surveillance tape where Calvin Baskin is not heard or seen, and the same is true for Kobrin Pickens during the time that his back was to the camera as he entered Baskin's home and again when Kobrin Pickens and Baskin were alone in the home without William Pickens, the confidential informant, and his hidden video wire. As such, the jury was erroneous in reaching the verdict that Calvin Baskin was guilty of selling cocaine to William Pickens because neither the State's witness testimony nor the video surveillance tape shows proof of this. While Baskin does not deny that Kobrin Pickens came to Baskin's home on November 15, 2007, and that he gave Kobrin \$50.00, Baskin did not sell drugs to Kobrin Pickens. The bottom line is that the video surveillance tape depicts an interaction between Baskin and Kobrin Pickens that could have multiple explanations. The conversation that was not recorded or witnessed by anyone other than the participants, Kobrin Pickens and Calvin Baskin, was explained by the only witness present at trial, Calvin Baskin. Baskin testified that he believes Kobrin Pickens came to Baskin's house on the day in question because Pickens believed Baskin was high, which he was, and he wanted to borrow \$50.00 so he could complete a sale to William Pickens. (RE 37-38, T 174-175).

Baskin's testimony was that he did not provide the drugs that were sold to William Pickens by Kobrin Pickens. (RE 38, T 175). The only thing Baskin did was loan \$50.00 to Kobrin Pickens. The action of making a loan does not a criminal make. To aid and abet the commission of a felony, one must "do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime. . . . [or] participate[] in the design of the felony." *Vaughn v. State*, 712 So. 2d 721, 724 (Miss. 1998) (quoting *Malone v. State*, 486 So. 2d 360, 363-64 (Miss. 1986)). Criminal law does not recognize guilt by association. *Davis v. State*, 586 So. 2d 817, 821 (Miss. 1991) (citing *Pryor v. State*, 239 So. 2d 911, 912 (Miss. 1970)).

Mere presence, even with the intent of assisting in the crime, is insufficient "unless the intention to assist was in some way communicated to [the principal]." *Crawford v. State*, 133 Miss. 147, 151 (1923). There is no proof that Baskin communicated an intention to assist to Kobrin Pickens in this case. Furthermore, "[p]roof that one has stood by at the commission of a crime without taking any steps to prevent it does not alone indicate such participation or combination in the wrong done as to show criminal liability, although he approve of the act." *Harper v. State*, 83 Miss. 402, 415, 35 So. 572, 573 (1903) (citations omitted). Certainly, Kobrin Pickens' mere presence at Baskin's home is insufficient to establish that Appellant Calvin Baskin is guilty beyond a reasonable doubt of the sale of a controlled substance. Again, Baskin's act of loaning \$50.00 to Pickens, even if Baskin knew it was for Pickens to make change for the purchaser of illegal drugs, does not constitute a criminal action on the part of Baskin.

In this case, Baskin's conviction hinges on tenuous evidence and virtually no direct evidence. Although William Pickens testifies that Baskin sold him crack cocaine, he was unable to state whether Kobrin Pickens or the unidentified female in the vehicle that day had any crack cocaine in their possession and admittedly only saw Kobrin Pickens handle the crack cocaine and not Appellant Baskin. Because of this lack of proof and the existence of reasonable doubt, Appellant Baskin submits that if his conviction is allowed to stand, an unconscionable injustice will be committed. *Dilworth v. State*, 909 So. 2d 731, 737-38 (¶¶21-23) (Miss. 2005).

II. THE TRIAL COURT ERRED IN DENYING APPELLANT CALVIN BASKIN'S MOTION TO SUPPRESS THE USE OF CERTAIN VIDEO/AUDIO EVIDENCE.

The trial court erroneously denied Appellant Calvin Baskin's Motion to Suppress the use

of certain video/audio evidence made orally by defense counsel at trial. The video surveillance tape was highly prejudicial to Appellant Calvin Baskin's defense for two reasons. First, because he was not afforded the opportunity to cross-examine Kobrin Pickens, a known drug dealer who was the intended subject of the surveillance video tape due to Kobrin's unavailability at Baskin's trial. And second, the video surveillance tape gave an incomplete picture of the events of November 15, 2007. Several phone calls were made by Kobrin Pickens throughout the over-50 minutes of video and only the voice of Kobrin Pickens was audible on the tape. (RE 30-32, T 148-150). There are portions of the surveillance tape where Calvin Baskin can not be heard or seen, and the same is true for Kobrin Pickens. Specifically, during the time that Kobrin Pickens' back was to the camera as he entered Baskin's home and later when Kobrin Pickens and Baskin were alone in the home without William Pickens' hidden surveillance wire.

This case can be likened to the facts presented in *n Clark v. State*, 891 So.2d 136 (Miss. 2003) where the defendant's accomplice gave a testimonial statement to law enforcement officers but refused to testify at trial; therefore, the trial court allowed the statement to be read into the record over the defense's objection. *Clark*, 891 So. 2d at 138 (¶¶ 4, 6). The Mississippi Supreme Court held that since Clark was not afforded the opportunity to cross-examine this adverse witness, his right to confront the witness was violated pursuant to *Crawford v. Washington*, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004). Certainly, the interests of Kobrin Pickens are adverse to those of Calvin Baskin as it is undisputed that Kobrin Pickens was the subject of the investigation where William Pickens was wearing a wire in an attempt to gather evidence of Kobrin Pickens' drug dealing activities. As such, Calvin Baskin was denied his right to cross-examine Kobrin Pickens, to solicit testimony regarding the interaction between Baskin, Kobrin

Pickens and William Pickens on the day in question. Furthermore, in *White v. State*, 785 So. 2d 1059 (Miss. 2001), the Mississippi Supreme Court held that to deny the accused the right to explore fully the credibility of a witness testifying against him, is to deny him the Constitutional right of a full confrontation. *Id.* at 1063 (¶12). Appellant Baskin was not given the right of a full confrontation because of the unavailability of Kobrin Pickens at the trial of this matter. Thus, Appellant Baskin submits that the trial court, knowing full well that Kobrin Pickens was unavailable for trial, erroneously allowed the video surveillance tape into evidence over the objection of defense counsel. Baskin testified that he believes Kobrin Pickens came to Baskin's house on the day in question because Pickens believed Baskin was high, which he was, and that Pickens wanted to borrow \$50.00 so he could complete a sale to William Pickens. (RE 37-38, T 174-175). This is not an unreasonable hypothesis when you consider that Kobrin Pickens was a drug dealer who had been to Calvin Baskin's house many times to sell and use drugs. Kobrin Pickens could tell by Baskin's voice that Baskin was high and Kobrin Pickens perhaps wanted to get high with Calvin Baskin, or take advantage of his current state of mind by "borrowing" \$50.00 from Baskin with no intention of repaying the loan. (RE 37, T 174). This hypothesis is not only unreasonable, but it creates reasonable doubt regarding Baskin's guilt in this matter. The unfortunate fact is, Appellant Baskin did not get the opportunity to cross-examine Kobrin Pickens to determine what he intended to do when he came to Baskin's house that day or what actually transpired outside of Baskin's presence upon Kobrin Pickens' arrival with William Pickens and the female companion. In allowing the jury to consider the video surveillance tape they were only told part of the story. Certainly, Calvin Baskin testified to his knowledge of what transpired at his house, but he had no knowledge of anything that transpired on that day outside

of his presence. Cross-examination of Kobrin Pickens would have been the only other method for attempting to uncover the truth of that matter.

Not only did the submission into evidence of the video surveillance tape deny Baskin his right to full confrontation, but also the surveillance tape constituted inadmissible hearsay to which defense counsel strenuously objected. As this Court is well aware, hearsay is an out-of-court statement offered to prove the truth of the matter asserted. M.R.E. 801(c). It is always inadmissible except as provided by law. M.R.E. 802. "The rule of non-hearsay imports an objective test. The question is not the actual subjective state of mind of the prosecuting attorney, much less of the declarant, but rather a matter of how a reasonable objective observer would under the circumstances be likely to perceive the statement." *Harrison v. State*, 722 So.2d 681, 684(¶8) (Miss.1998) (quoting *Turner v. State*, 573 So.2d 1335, 1338 (Miss.1990)). Considering the taped conversations objectively in light of all the other evidence, the most powerful evidentiary function of the taped conversations was to relay hearsay evidence to the jury tending to show Baskin's knowledge and willing participation in the sale of drugs by Kobrin Pickens to the confidential informant—to portray Baskin as an accomplice acting affirmatively to complete the sale of cocaine by doing more than merely opening the door for Kobrin Pickens and letting him borrow \$50.00. The video tape was full of hearsay and the only reasonable objective was to fill in all the blanks that the incoherent state of Calvin Baskin on the day of the sale and the unavailability of Kobrin Pickens created at trial.

III. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT CALVIN BASKIN'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, OR ALTERNATIVELY, FOR A NEW TRIAL.

The trial court erred in denying Appellant Calvin Baskin's Motion for a Judgment

Notwithstanding the Verdict, or alternatively, for a New Trial due to the overwhelming lack of proof that Baskin sold a controlled substance as alleged in the indictment against him. At the conclusion of the trial, despite the existence of reasonable doubt regarding Calvin Baskin's participation in the sale of a controlled substance, the jury found him guilty. This verdict was erroneously reached due to the undisputed testimony that Calvin Baskin did not hand any cocaine to William Pickens, the confidential informant, or to Kobrin Pickens, the co-defendant whose case was severed due to his hiding from law enforcement subsequent to his indictment. (RE 25, T 111; RE 33, T 155). As this Court is well aware, when reviewing a challenge to the sufficiency of the evidence, this Court will reverse and render only if the facts and inferences "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," . . . " *Brown v. State*, 965 So. 2d 1023, 1030 (Miss. 2007) (quoting *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005)). Comparatively, when reviewing a challenge to the weight of the evidence, this Court will overturn a jury verdict "only when it is so contrary to the evidence presented that to let it stand would sanction an unconscionable injustice." *Wilson v. State*, 936 So. 2d 357, 363 (Miss. 2006) (citing *Bush*, 895 So. 2d at 845). Appellant Baskin understands and acknowledges that a new trial should be granted on the basis of the weight of the evidence "only in exceptional circumstances, when the evidence weighs heavily against the jury's verdict." *Wilson*, 936 So. 2d at 363 (citing *Bush*, 895 So. 2d at 845). However, as is the situation here, in considering whether the evidence is legally sufficient to sustain a conviction in the face of a motion for [a] JNOV, the inquiry is "whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.'" *Id.* at 843 (¶16) (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). The critical

question in dealing with such an issue is whether," after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* The evidence will be deemed sufficient if the evidence against the defendant is such that "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense." *Dixon v. State*, 953 So. 2d 1117, 1121 (¶13) (Miss. Ct. App. 2006).

In this case, Appellant Baskin urges this Court to accept that the State's case was based on circumstantial evidence, thus raising the burden of proof for a conviction to a higher standard: the State must have proven Baskin's guilt beyond a reasonable doubt and to the exclusion of every other hypothesis consistent with innocence. *See Lynch v. State*, 877 So.2d 1254, 1268(¶ 34) (Miss.2004). Clearly, the State failed to meet this burden. A circumstantial evidence case is one where the State is 'without a confession and wholly without eyewitnesses to the gravamen of the offense charged.'" *Garrett v. State*, 921 So.2d 288, 291(¶ 17) (Miss.2006) (quoting *Kniep v. State*, 525 So.2d 385, 392 (Miss. 1988)). Baskin submits that there was certainly no confession and that the only purported "eyewitness" to the offense charged, William Pickens, testified that he never saw Calvin Baskin handle the crack cocaine and that the only person he saw with the drugs was Kobrin Pickens. Therefore, as this was a circumstantial case at best, the State's burden was to prove Baskin's guilt beyond a reasonable doubt, which it failed to do, and to the exclusion of every other hypothesis consistent with innocence, which it again failed to do. Appellant Calvin Baskin's counsel presented more than one credible possible hypothesis consistent with innocence and none of these possibilities were disproven or even discredited by the State at the trial. As such, Appellant Calvin Baskin's Motion for Judgment Notwithstanding the Verdict, or

alternatively, for a New Trial should have been granted as both the sufficiency and the weight of the evidence were lacking and the burden of proof was not met by the State.

CONCLUSION

For the foregoing reasons and authorities, and based upon the record, Calvin Baskin's conviction should be reversed and remanded for a new trial. Appellant Calvin Baskin also respectfully requests any other such relief as he may be entitled.

RESPECTFULLY SUBMITTED, on this the 4th day of May, 2009,

By: Robert Sneed Laher

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CERTIFICATE OF SERVICE

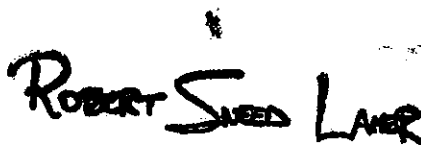
I, ROBERT SNEED LAHER, do hereby certify that I have this day served by United States mail, postage prepaid, a true and correct copy of this document to the following:

Honorable Jerry Lon Stallings
Assistant District Attorney
Post Office Box 1478
Oxford, Mississippi 38655

Circuit Court Judge Henry L. Lackey
Post Office Box T
Calhoun City, Mississippi 38916

Mississippi Attorney General Jim Hood
Post Office Box 220
Jackson, Mississippi 39205-0220

This the 4th day of May, 2009.

A handwritten signature in black ink that reads "ROBERT SNEED LAHER". The signature is written in a cursive, slightly stylized font. The first name "ROBERT" is in all caps, and "SNEED LAHER" is in a mix of caps and lowercase letters.

ROBERT SNEED LAHER