

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**DONNIE RAY TUCKER**

**APPELLANT**

**VS.**

**NO. 2008-KA-1794**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**DONNIE RAY TUCKER, A/K/A  
DONNIE RAY SUMRALL**

**APPELLANT**

**VERSUS**

**NO.2008-KA-1794-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR APPELLEE**

**STATEMENT OF THE CASE**

**Procedural History**

This appeal is taken from the Circuit Court of Jones County, First Judicial District, wherein Donnie Ray Tucker, a/k/a Donnie Ray Sumrall, was tried on a charge of murder, convicted of manslaughter, and sentenced to a term of 20 years in the custody of the Mississippi Department of Corrections. (C.P.68) Aggrieved by the judgment rendered against him, Tucker has perfected an appeal to this Court.

### **Substantive Facts**

On August 15, 2006, Connie Cruise was living in a mobile home on Mary Ann Tolbert Road in Jones County. That afternoon, the defendant, his girlfriend Kelly, and his brother Jimmy Tucker [hereinafter "Jimmy"] gathered at Ms. Cruise's residence. The defendant expressed a desire to drive the Scout that Jimmy recently had bought. Jimmy told him "that it really wasn't running right," but the defendant "wanted to drive it anyway." Jimmy "handed him the keys"; the defendant climbed into the driver's seat; Jimmy got into the Scout as well; and they departed the premises. (T.70-72)

While Ms. Cruise was "standing" in the driveway "with Kelly waiting on Donnie Ray to get there," a green minivan pulled in, and the defendant exited the passenger's side of that vehicle. Ms. Cruise asked him where Jimmy was, and he replied that he was "at Vincent Spradley's house" on Old Antioch Road. The defendant and Kelly then got into his Chevrolet pick-up truck and left Ms. Cruise's driveway. (T.73-75)

Driving Jimmy's Ford Explorer, Ms. Cruise went down Old Antioch Road to Mr. Spradley's house, where she saw the Scout in the driveway. The doors had been "torn off of it." Ms. Cruise took the keys to the Scout, returned to the Explorer, and pulled out of the driveway. As she did so, she "called Lisa," Jimmy's daughter, and asked her if she knew where Jimmy was. Lisa replied that he was "at Scott Store at Tucker's Crossing." Ms. Cruise drove there and found Jimmy "standing outside," looking "[t]ired."<sup>1</sup> He told her he

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<sup>1</sup>At the time of his death, Jimmy was in poor health. He weighed approximately 450 pounds and was required to use an oxygen machine regularly. (T.148) According to his daughter, "he could barely move his right hand or do anything with his right hand." (T.171)

had called the sheriff's office to "talk to him about making papers out." Because it was late in the day, and Jimmy was fatigued, they went back to Ms. Cruise's house. (T.75-78)

At some point that evening, Rodney Parker arrived and backed his pick-up truck "to the back of the Explorer to transfer an air compressor for a job that he was supposed to do the next morning on a roof." Ms. Cruise "was still sitting in the driver seat of the Explorer and heard a vehicle." She "looked in the rear view mirror and saw a motorcycle," driven by the defendant, "pull into the driveway." The defendant "pulled his helmet off," and Ms. Cruise "could tell by his body language that he was mad." As he "was going toward Jimmy and Rodney," Ms. Cruise "got out of the vehicle going around towards him." The defendant then "pulled a gun." She said, "No, Donnie Ray, don't do this," but the defendant "pulled the trigger" and shot Jimmy approximately five times. According to her, Jimmy was not armed; nor had he threatened the defendant in any way. (T.78-80)

Ms. Cruise "turned around" and took her children "inside the house." Shortly thereafter, she "went back outside" and found Jimmy lying "face down on [the] ground trying to breathe." Ms. Cruise "screamed" for her roommate "to get his oxygen machine." The defendant "was already gone." (T.80-81)

Rodney Parker testified that "around dinner that morning, that afternoon," Jimmy had telephoned him to ask to borrow his air compressor. Mr. Parker went to Ms. Cruise's house "[a]round five" and "backed up to his truck" so that he and Jimmy could exchange compressors. "And about that time a motorcycle come [sic] down the driveway." The defendant got off the motorcycle and threw his helmet down. (T.92-94) Mr. Parker recounted what happened next as follows:

Jimmy steps back a little, and he [the defendant] runs up there and reaches in the back of his pants and pulls out a

gun. He says something like, if you want to go the pen or something, do it for a reason. Anyway, Jimmy turned and put him arm up and said, it ain't got to be this way. And he shot once, and Jimmy fell down on the ground. And he hesitated a minute and shot him two more times. And then he looks up at me and asked me if I wanted some and shot again. And I run [sic] behind the camper. My girlfriend was standing by me. I told her to get down, you know. And when he run [sic] again he shot one more time, but I didn't know in which way. And he got on his motorcycle and left.

(T.96)

Mr. Parker did not see Jimmy pull a gun at any time; nor did he hear him threaten the defendant in any manner. (T.96) When Mr. Parker was in the process of exchanging compressors, he did not see a firearm in the back of the Explorer. (T.103)

Vincent Spradley, a distant cousin of Jimmy and the defendant, testified that on the day in question, the defendant came to his house. In view of information that he had received, Mr. Spradley asked the defendant "if he had killed his brother." The defendant "said that he had shot at him, but he didn't know if he hit him." Mr. Spradley "told him to get what he had to get and go..." (T.105-08)

At the time of this shooting, Matt Ishee was employed as an investigator with the Jones County Sheriff's Department. At 5:18 p.m. on August 15, 2006, he was dispatched to Ms. Cruise's residence. As he was en route there, he observed the defendant's wrecked motorcycle on Township Road. He found a semiautomatic handgun five or six feet from the motorcycle. (T.113-16)

After the scene of the motorcycle wreck was secured, Investigator Ishee "left and went to 28 Mary Ann Tolbert Road to assist in the investigation." There he observed Jimmy's body lying "on his back, legs together and arms out." He also saw a motorcycle helmet "probably inches away from the trailer, in front of the trailer." Looking for bullet

fragments inside the Explorer, Investigator Ishee did not find a firearm. (T.118-24)

The victim sustained three gunshot wounds, one of which was lethal. (T.148-53)

The victim's daughter, Lisa Tucker [hereinafter "Lisa"], testified that she was at Ms. Cruise's residence when the defendant told Jimmy that he wanted to "go for a ride" in the Scout. Between 35 and 45 minutes after Jimmy and the defendant left, Jimmy called her. "He sounded upset and excited like something was wrong with him." Jimmy went on to tell her that the defendant had kicked him out of the Scout, torn the doors off the vehicle and hit him in the head with a hammer. Finally, he told her that he was at the Tucker's Crossing Store "waiting on the police." (T.172-73)

After Ms. Cruise brought Jimmy back to the house, Lisa observed that "[h]is hair was messed up" and that he "had some scratches on him." He also "seemed nervous." As Mr. Parker and Jimmy were "getting the air compressor out" of the Explorer, the defendant arrived on his motorcycle and "got off and started jumping around." Jimmy "told him to leave, that the cops were coming." The defendant "pulled a gun out from the back of his pants" and "started shooting" Jimmy. Lisa testified unequivocally that her father "didn't have a gun." (T.175-77)

The defendant testified that he fired a shot after Jimmy "made a move into the back of the Explorer," where, accordingly to the defendant, Jimmy habitually stored a shotgun. (T.202-04) On cross-examination, however, he acknowledged that he had not mentioned this shotgun in his statement to the police. (T.224)



## **SUMMARY OF THE ARGUMENT**

The defendant has not begun to sustain his burden of showing that he is entitled to a new trial on the ground of an alleged *Brady* violation. The sole argument presented on this appeal plainly lacks merit.

### **PROPOSITION:**

#### **TUCKER HAS NOT SHOWN THAT HE IS ENTITLED TO A NEW TRIAL ON THE BASIS OF HIS ALLEGED *BRADY* VIOLATION**

The sole issue raised on this appeal is that the state violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to furnish the compact disc recording of a telephone conversation between the victim and his mother which occurred about an hour before the shooting. (T.262-63) The transcript of that conversation reveals that the victim told his mother that the defendant had torn the door off the Scout, beaten him about the head with a hammer, thrown away his medications, and left him in the woods. He added, "I want a gun." (Defendant's Exhibit 1)

The defendant now contends this transcript was *Brady* material and that the prosecution's failure to disclose it entitles him to a new trial. The backdrop for analysis of this issue is set out below:

[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is either material to guilt or to punishment. However, the Supreme Court also recognized that not all failures to disclose exculpatory evidence constitute reversible error, holding that "... the question is whether there is a 'reasonable probability' that the verdict would have been different but for governmental evidentiary suppression which 'undermines confidence in the \*820 outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). Soon thereafter, we adopted this principle and stated that in order to establish a *Brady*

violation, a defendant must prove the following:

**(1) that the government possessed evidence favorable to the defendant** (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and **(4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.**

(emphasis added) *Flora v. State*, 925 So.2d 797, 820 (Miss. 2006), citing *Brady*, and *King v. State*, 656 So.2d 1168, 1174 (Miss.1995).

During the hearing on the motion for new trial, the prosecutor argued there was “nothing exculpatory” about this evidence. (T.265) We maintain that position on appeal. To the contrary, the transcript shows that the victim was wounded, scared and feeling the need to defend himself. Such testimony hardly tends to exculpate the defendant. Indeed, it works against the defendant’s theory of the case, which was that he thought Jimmy had been attempting to retrieve a gun which *the defendant knew* he routinely kept in the back of the Explorer. The transcribed conversation leads to the reasonable inference that the victim did not have a gun, but that he wanted to obtain one. In any case, in the absence of proof that the defendant knew the content of this conversation at the time he shot the victim, the defendant’s statements to his mother could not be shown to have any effect on the defendant’s state of mind at the pertinent time.

Concomitantly, the state contends the defendant has not begun to sustain his burden of showing a reasonable probability that the result would have been different had this evidence been disclosed. The overwhelming proof showed that the victim was not armed at the time of the shooting and that no gun was being stored in the Explorer.

The defendant clearly has not established a *Brady* violation. He is not entitled to a new trial on this issue.

**CONCLUSION**

The state respectfully submits that the arguments presented by Tucker have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL  
STATE OF MISSISSIPPI**

  
BY: DEIRDRE McCRORY  
SPECIAL ASSISTANT ATTORNEY GENERAL

**CERTIFICATE OF SERVICE**

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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