

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID LYNCH

APPELLANT

V.

NO. 2008-KA-01874-COA

STATE OF MISSISSIPPI

APPELLEE

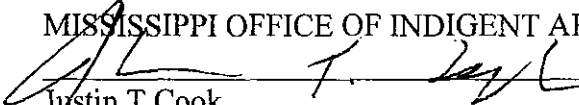
CERTIFICATE OF INTERESTED PERSONS

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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. David Lynch, Appellant
3. Honorable Dan Angero, District Attorney
4. Honorable Lester F. Williamson, Jr., Circuit Court Judge

This the 4th day of May, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
BY: 
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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S MOTION FOR A MISTRIAL WHEN THE STATE IMPROPERLY IMPEACHED THE APPELLANT WITH STATEMENTS MADE BY TRIAL COUNSEL OUTSIDE OF THE PRESENCE OF THE JURY.

STATEMENT OF THE CASE

This appeal follows a conviction of possession of contraband in a correctional facility against David Lynch and a sentence of fifteen (15) years imprisonment in Circuit Court of Clarke County, Mississippi, following a trial held September 3-4, 2008, Honorable Lester F. Williamson., Circuit Judge, presiding. David Lynch is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On the day of trial, defense counsel moved for a continuance on the grounds that multiple charges involving the same defendant were set for the docket on the same day. (T. 6). Defense counsel was under the impression that the State was seeking to bring another charge to trial. (T. 6). Defense counsel also indicated that he had intended to subpoena various witnesses. (T. 7). Despite this, the trial court denied the motion for continuance, and the Appellant went to trial.¹

According to the testimony presented at trial, on December 23, 2008, Elton Davis (Deputy Davis), a deputy with the Clarke County Sheriff's Office, was in the jailer's office area of the Clark County Jail. (T. 80). While present, Deputy Davis was informed by other law enforcement officers that there was a fire in one of the cells. (T. 80). When Deputy Davis approached the cell, there were several inmates there, including David Lynch, the Appellant in this case. (T. 82).

Deputy Davis stood at the outer door of the cell while other deputies brought the inmates outside of the cell in a single-file line. (T. 83). The Appellant was the first to leave the cell, dressed in orange pants, thermal underwear and several pairs of boxer shorts. (T. 83). Davis made the

1. Trial counsel failed to specifically raise the denial of the motion for continuance in his motion for a new trial, or, in the alternative, JNOV. (C.P. 36-37). It is longstanding precedent that the denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground, making the necessary proof to substantiate the motion. *King v. State*, 251 Miss. 161, 168 So.2d 637 (1964); *Cherry v. Hawkins*, 243 Miss. 392, 137 So.2d 815 (1962); *Lamar v. State*, 63 Miss. 265 (1885). The failure to do so, may be considered ineffective assistance of counsel on part of trial counsel. On behalf of Lynch, Appellate counsel requests that all grounds not apparent in the record and which are not specifically raised in this direct appeal be preserved so that Lynch, if necessary, may be able to present them in the procedurally proper vehicle—a motion for post-conviction relief.

Appellant place his hands against the wall and proceeded to pat the Appellant down. (T. 84-85). Deputy Davis then made the Appellant pull his orange pants down, whereupon he noticed a bulge in the front part of the Appellant's thermal underwear. (T. 85).

Deputy Davis notified the other officers and proceeded to reach down into the Appellant's underwear and recovered two cell phones, located in the front side in what was described as a "little pouch like in it." (T. 86).

Deputy Barry White (Deputy White) was also present at the Clarke County Jail at the time in question. (T. 111). Deputy White testified that he smelled something burning, and notified the other deputies. (T. 111). Deputy White testified that a group of deputies went to cell M-1, which was an eight-man cell. (T. 112). All eight people assigned to that cell were present when the deputies arrived. (T. 112). Deputy White proceeded to search the cell itself, while Deputy Davis searched the inmates. (T. 114). Deputy Davis then knocked on the glass to notify Deputy White that he had located something on the Appellant. (T. 114).

Deputy White testified that he observed a cell phone tucked into the Appellant's thermal underwear. (T. 114). After the two cell phones were retrieved, Deputy White followed protocol and put the cell phones in his office, marking them as evidence. (T. 115). Deputy White further testified that there is a piece of paper on each window of the jail notifying inmates that cell phones are illegal in jail. (T. 118).

After being advised of his right to testify, the Appellant took the stand in his own defense. Lynch testified that he was in Cell M-1, but disagreed with the testimony offered by the two deputies. (T. 139). Lynch testified that he did not know the cell phones were on his person. (T. 140). Lynch testified further that the search did not happen at the time the deputies testified, but, rather, that

it happened at 11:30 that night. (T. 140).

Lynch testified that he had worked out with two other inmates and had gone to get in the shower. (T. 140). At that time, officers came in and did a “shake down,” which, according to the Appellant, is when officers come into a cell and search its entirety. (T. 140). Lynch testified that when officers turned the lights on, he was in the shower. (T. 141). When police arrived, Lynch was nude, with a towel wrapped around him. (T. 141-42). Lynch was ordered out of the cell, so he asked Jameer Cooper to pass him some pants, but, what was passed was a pair of thermal underwear that was tucked inside the orange jail-issued pants. (T. 142).

Lynch testified that, as soon as he put his leg into the pants, he felt the object in them, but, because law enforcement officers were pressuring him, he simply put on the pants. (T. 142). Lynch testified that he was wearing a pair of thermal underwear, one pair of boxers, and the orange pants. (T. 143). According to his testimony, Lynch was told to take off all of his clothes, which he did. (T. 145). Then, he was told to put his clothes back on, and did so accordingly. (T. 145). Lynch was then stopped and asked to take his clothes off one more time. (T. 145). Lynch admitted that the cell phones recovered were found in the long underwear that he was wearing, however, Lynch testified that the underwear was Jameer Cooper’s and not his. (T. 145-146). Lynch ultimately admitted that at first he did not know the items in question were cell phones, but, as he became aware, he decided to take his chances on being caught and not notify the jailers. (T. 172-73).

The State called Jerry Iver (Deputy Iver), another Clarke County Sheriff’s deputy as a rebuttal witness. (T. 117). Deputy Iver testified that there was no way that the event in question happened at the time the Appellant testified it did. (T. 177).

After deliberation, the jury returned a guilty verdict against the Appellant for one count of

possession of contraband inside of a correctional facility. (C.P. 32, R.E. 8). At a bifurcated sentencing hearing, the Appellant was sentenced to fifteen years in the custody of the Mississippi Department of Corrections without the possibility of probation, parole, earned release, earned time, good time, trustee status or any type of reduction as an habitual offender under Mississippi Code Annotated § 99-19-81. (C.P. 34, R.E. 9).

On November 13, 2008, the Appellant filed a Motion for a New Trial and/or Judgment Not Withstanding Verdict J.N.O.V. (C.P. 36, R.E. 10). The motion was denied the same day by the trial court. (C.P. 38, R.E. 11). That same day, feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant timely filed a notice of appeal. (C.P. 39, R.E. 12).

SUMMARY OF THE ARGUMENT

The trial court erred in overruling defense counsel's objection and motion for mistrial, thus permitting the State to cross-examine the Appellant based on statements made by trial counsel outside of the presence of the jury. This was impermissible and created reversible error.

ARGUMENT

ISSUE: WHETHER THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S MOTION FOR A MISTRIAL WHEN THE STATE IMPROPERLY IMPEACHED THE APPELLANT WITH STATEMENTS MADE BY TRIAL COUNSEL OUTSIDE OF THE PRESENCE OF THE JURY.

The proper standard of review for the admissibility of evidence is abuse of discretion. This Court reviews a trial court's rulings on the extent of cross-examination for abuse of discretion and its rulings will be reversed only when an abuse of that discretion is shown. *Fields v. State*, 758 So. 2d 440 (¶7) (Miss. Ct. App. 1999). Even though the scope of cross-examination is broad, "the trial court in its discretion has the inherent power to limit cross-examination to relevant matters." *Mixon*

v. State, 794 So.2d 1007, 1013(¶ 20) (Miss.2001) (citations omitted). During a pre-trial motion for a continuance, defense counsel said the following: “His complaint is that I only tell him what the State says and he’s read his discovery and he’s reviewed the videos that we have been furnished by the State.” (T. 10). This was the basis for the trial court to allow the following line of questioning during the State’s cross-examination of the defendant:

Q. You are telling a completely different story from the two officers –

A. Correct. I know that. I understand that. I understand that.

Q. And it is totally different than the statements they made in December, you know that, don’t you?

A. Correct.

Q. You got to read them, didn’t you?

A. I heard them.

Q. I know. But didn’t you read those statements?

A. I heard them.

Q. Listen to my question. You read these statements.

A. No, I haven’t read these statements.

Q. Now, earlier today, not with the jury here, but Mr. Jordan had made a comment with you present that you had read over all of the discovery, is that not true?

(T. 164).

At that point, defense counsel moved for a mistrial. Outside the presence of the jury, the following arguments occurred:

[BY THE STATE]: What I said was is, outside the presence of the jury, Mr. Jordan said that you had read over your discovery. That’s all I said.

[BY DEFENSE COUNSEL]: And I don't think I've ever said that.

[BY THE STATE]: That's exactly what you said back there in the Judge's chambers. Didn't he, Judge?

BY THE COURT: Yes, sir.

[BY DEFENSE COUNSEL]: I said he had read his discovery. But you don't make that comment when the jury is sitting in the box. He has read his discovery.

BY THE COURT: This man denied exactly that under oath on the witness stand, and that is certainly a matter of fact that would be right for cross-examination. The whole issue is his credibility here.

[BY DEFENSE COUNSEL]: I agree with you, Your Honor.

BY THE COURT: And there was certainly a representation by you that he had, in fact read over his discovery.

....

BY THE COURT: So, I mean, if – it is an unusual matter for cross-examination; however, under the facts here presented, I don't think it is an inappropriate matter for cross-examination and your motion for a mistrial under those circumstances and under these circumstances here present is overruled.

I don't think there was any inappropriate question, and I'm not going to instruct the jury that there was...

(T. 165-66)(emphasis added).

Put quite simply, the State's questioning was improper impeachment. The trial court allowed the State to essentially go outside the record in attempting to impeach Lynch with a comment made by his counsel that is not and should not be treated as attributable to Lynch Himself. The Mississippi Supreme Court found reversible error in a similar case when a prosecutor used comments by a co-defendant's counsel to cross-examine a defendant. *Walker v. State*, 729 So. 2d 197 (¶14-17)(Miss. 1998). In such a case as this, where the jury must determine which party is being truthful, such

improper impeachment was undoubtedly prejudicial to Lynch.

The statement that justified the State's impeachment of the Appellant was something said outside of the presence of the jury. It was a brief statement that was made in the course of a more lengthy discussion of the Appellant's displeasure with trial counsel. The statement was not made by the Appellant himself. Rather, it was made by his counsel. Allowing the state to impeach the Appellant on the basis of the statements made by his trial counsel outside of the presence of the jury has no basis in the law and the rules of evidence in the state of Mississippi.

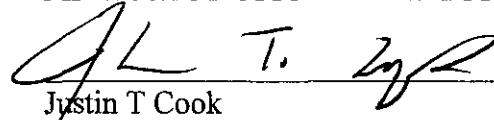
CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on a charges possession of contraband in a correctional facility, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

A handwritten signature in black ink, appearing to read "JL T. Cook", written over a horizontal line.

Justin T Cook

COUNSEL FOR APPELLANT