



IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
IN THE COURT OF APPEALS

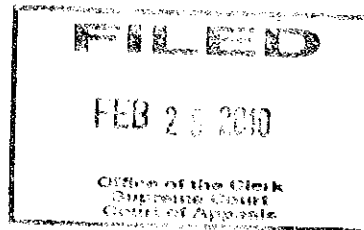
DIANN WRIGHT GOODEN

APPELLANT

VS.

CASE NUMBER 2009 - KA - 0027 - COA

STATE OF MISSISSIPPI



APPELLEE

APPELLANT'S REPLY BRIEF
ORAL ARGUMENTS REQUESTED

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INTRODUCTION

The position (s) that the State Of Mississippi takes: (1) that Diann Wright Gooden's convictions on Count II and Count III are not contrary to the overwhelming weight of the evidence; (2) that there is evidence sufficient to support the jury's verdict and (3) that a reasonable juror could find Diann Wright Gooden guilty of every element on both counts are all un - supported by the evidence that was presented at the trial of the instant matter.

SUMMARY OF THE ARGUMENT

That Diann Wright Gooden re - iterates her contention that the lower court committed reversible error in (1) that the verdict finding Diann Wright Gooden guilty of Count Number 2 of the indictment was against and / or inconsistent with the overwhelming weight of the evidence; (2) that the verdict finding Diann Wright Gooden guilty of Count 3 of the indictment was against and / or inconsistent with the overwhelming weight of the evidence; (3) that the lower court overruled Diann Wright Gooden's Motion For Directed verdict and (4) that the lower court erred in denying Diann Wright Gooden's Motion To Suppress.

ARGUMENT

I. THE JURY'S CONVICTIONS REGARDING COUNT II AND III WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

That Diann Wright Gooden states that the verdict was against the overwhelming weight of the evidence as to Count I and Count II. A new trial should be granted if the jury's verdict "so contradicts the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. *Hawthorne v. State*, 883 So.2d 86 (Miss. 2004)(Citing *Frost v. State* 453 So.2d 695 (Miss. 1984)). If the verdict is against the overwhelming weight of the evidence, a new trial should be ordered. *Holloway v. State*, 312 So.2d 700, 701 (Miss. 1975). The State Of Mississippi (i.e. hereinafter referred to as "the State") contends that Diann Wright Gooden (i.e. hereinafter referred to as Mrs. Gooden), according to the testimony of Carl Pree, changed addresses on car tag receipts which changed the taxing district, thereby reducing the cost of the tags. (TR 93).

With respects to Count II, Mrs. Gooden asserts that the State failed to meet its burden of proof for the charge of fraud. Mrs. Gooden reiterates that Bernard Marsailles could not identify Mrs. Gooden as the person that sold him the tag in question in these premises. The State attempts to "make light of the fact" that Mrs. Gooden could not be identified, where identification is clearly a "crucial element" in meeting the statute. As such, Mrs. Gooden contends that the evidence presented at the trial did not support

the guilty verdict with respects to Count II.

The State failed to introduce any evidence that Mrs. Gooden knew that the affidavit that Mr. Marsailes was presenting was false. Mr. Marsailes clearly had the affidavit executed by another Clerk and simply presented same to redeem his car tag, but there is no evidence before the Court to demonstrate that Mrs. Gooden even received the subject affidavit. As such, Mrs. Gooden maintains that the State failed to meet its burden of proof.

With respects to Count III, when inquiring whether sufficient evidence exists to support a conviction, "the relevant question 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. *Goodin v. State*, 2006 - KA - 00756 - COA (Miss. 2007) (Citing *Bush v. State*, 895 So.2d 836, 843 (Miss. 2005)). This Court must reverse and render 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. *Id.* (Citing *Edwards v. State*, 469 So.2d 68, 70 (Miss. 1985)). Emphasis added.

Mrs. Gooden reiterates in the instant "reply brief" that there was not evidence presented at the trial that demonstrates that Marcus Cannon saw Mrs. Gooden actually change his taxing district.¹ (TR 140, 141, RE 41, 42). The testimony proffered was that when Mr. Cannon arrived at the courthouse, the "paperwork" was complete. But there was never any testimony that Mrs. Gooden was seen doing anything, which is an essential element that was required to be proven by the State. (TR 145, RE 43).

In addition, the State failed to proffer any witness to demonstrate that the State Of Mississippi or even Washington County actually lost any money. Pursuant to this Court, in *Richmond v. State*, 751 So.2d 1038, 1046 (Miss. 1999), the Mississippi Supreme Court held that the State was required to prove an unnecessary element alleged in the indictment. In the instant case, each indictment concludes with the language " causing the State Of Mississippi to loose revenue to which it was entitled, in violation of Section 97 - 7 - 10 of the Mississippi Code Annotated of 1972, as amended." Now, to contend that proof of actual lost is not actually required, would be prejudicial to Mrs. Gooden.

¹Question: As it relates to your wife's vehicle, did you see Mrs. Gooden change any taxing district?

Answer: No, I called her.

II. THE JURY'S VERDICT WAS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE

The standard of review for the denial of a motion for directed verdict and judgment notwithstanding the verdict is the same. *Humphrey v. State*, 883 So.2d 86 (Miss. 2004) (Citing *Shelton v. State*, 853 So.2d 1171, 1186 (Miss. 2003.)). A directed verdict challenges the sufficiency of the evidence presented at trial. *Id.* This Court demands that the lower court reverse and render if the facts, viewed in the light most favorable to the State, point in favor of the defendant that reasonable men could not have arrived at a guilty verdict. *Id.* (Citing *Seeling v. State*, 844 So.2d 439 (Miss. 2003).

In the instant matter, the evidence presented at the trial was not sufficient to sustain a verdict for fraud. Again, the State proffered no witness that witnessed Mrs. Gooden do anything illegal. As mentioned previously, Cordell Gray testified that he never even met Mrs. Gooden and Bernard Marsailes testified that he did not know who actually gave him his tag. The testimony, as it relates to Mr. Marsailes, was that he believed that the lady that gave him the tag had long hair. The only testimony inconsistent with this, was the testimony of Marcus Cannon, a proven liar as it relates to the investigation that resulted in Mrs. Gooden's arrest and subsequent conviction.

III. THE LOWER COURT IMPROPERLY DENIED DIANN WRIGHT GOODEN'S MOTION TO SUPPRESS

The Court will reverse the denial of a motion to suppress only if the trial court's ruling was manifest error or contrary to the overwhelming weight of the evidence.

Palm v. State, 748 So.2d 135, 142 (Miss. 1999). In *Miranda*, the United States Supreme Court held that the Fifth and Fourteenth Amendments' prohibitions against compelled self - incrimination require that, prior to custodial interrogation, the accused must be advised of his right to remain silent and his right to counsel. *Chim v. State*, 2008 - MS - R0118.007 (Miss. 2008) (Citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

For a waiver of one's *Miranda* rights to be considered valid, the state must prove beyond a reasonable doubt that the waiver was made voluntarily, knowingly and intelligently. *Id.* (Citing *Coverson v. State*, 617 So.2d 642 (Miss. 1993)). A waiver is considered voluntary if it is the result of a free and deliberate choice rather than intimidation, coercion or deception. *Id.* A waiver is knowing and intelligent if it is made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

In the instant case, Carl Pree never advised Mrs. Gooden of the protections afforded pursuant to *Miranda*. Carl Pre testified that he interviewed over four thousand (i.e. 4,000) people prior to questioning Mrs. Gooden, and he stated in pertinent part that at lease five (5) such persons implicated Mrs. Gooden. Therefore,

prior to questioning Mrs. Gooden, Carl Pree knew and / or reasonably should have known that Mrs. Gooden was a suspect and that she would make self incriminating statements, thus, requiring that he advise her of her Miranda warning (s), but he failed t do so. Instead, he deceived her into believing that if she cooperated, everything would be alright. Appellant contends that the lower court committed reversible error in denying her Motion To Suppress.

Mrs. Gooden contends that she reasonably believed that while being questioned by Mr. Pree that she was not free to leave the interview. While same took place at the "clerk's office" as opposed to the police station and / or sheriff's department is of no consequence. The issue is whether Mrs. Gooden as well any other reasonable person would feel that there were not free to leave and Mrs. Gooden contends that she was not free to leave. Carl Pree never testified that he advised Mrs. Gooden that she was free to leave at anytime. In addition, Carl Pree never testified that he advised Mrs. Gooden that in the event that she answered his questions, that any and all such statements could be used against her and that she may want to consult an attorney prior to responding to any and all such questions.

Again, the record reflects a reasonable person would have felt they were in custody when Carl Pree, an investigator with the "MISSISSIPPI ATTORNEY GENERAL'S OFFICE" approached Mrs. Gooden. In addition, the conversation lasted

for more than an hour, and no where within the conversation was Mrs. Gooden allowed to leave, therefore, she was in custody and the lower court erred in denying the Motion To Suppress.

CONCLUSION

For the foregoing reasons, Appellant asserts the lower court has erred and should therefore, be reversed and same shall be rendered and/or in the alternative remanded to the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brandon I. Dorsey, the undersigned attorney and counselor in these premises,
hereby certify that I have on this day caused to be served, via United States mail,
postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to
the following:

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CIRCUIT COURT OF WASHINGTON COUNTY
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SO CERTIFIED, this the 26th day of February of _____

2010.



BRANDON I. DORSEY