

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERMAINE BROWNLEE

APPELLANT

V.

NO. 2009-KA-0372-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

On Appeal from the Circuit Court of DeSoto County, Mississippi

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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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 this court may evaluate possible disqualifications or recusal.


1. State of Mississippi
2. Jermaine Brownlee, Appellant
3. Honorable John W. Champion, District Attorney
4. Honorable Robert P. Chamberlin, Jr., Circuit Court Judge

This the 23rd day of December, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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STATEMENT OF THE ISSUE

THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the DeSoto County Circuit Court where Jermaine Brownlee was convicted on two counts of sale of a controlled substance. [RE 17] Count One of the indictment charged Brownlee with the sale of cocaine and Count Two charged Brownlee with the sale of hydrocodone. [RE 5] The Honorable Robert P. Chamberlin presided over the trial.

Brownlee was indicted as a habitual offender under Mississippi Code Annotated Section 99-19-81 (Rev. 2007). Following the jury verdict, the court sentenced Brownlee to thirty (30) years in the Mississippi Department of Corrections on Count I and twenty (20) years on Count II, with the sentence in Count II to run concurrently to Count I. [RE 17]

Aggrieved, Brownlee filed his motion for j.n.o.v. or, alternatively, motion for a new trial. [RE 15] The Court denied this motion and Brownlee timely noticed this appeal. [RE 19-20]

STATEMENT OF THE FACTS

On December 29 2006, the Olive Branch Police Department organized a control buy of narcotics in the parking lot of a local coffee shop. [Tr. 134] Just prior to six o'clock that evening, Olive Branch Narcotics Agent, Ben Moore, drove confidential informant, Sarah McLaughlin to the parking lot of a Starbucks Coffee Shop. [Tr. 134-35] McLaughlin was a paid informant, who occasionally worked with the police as a means of avoiding punishment or for extra money. [Tr. 172] On this day, McLaughlin assisted police for the needed extra cash. [Tr. 177]

Prior to the operation, Agent Moore searched McLaughlin for possession of any contraband. [Tr. 132-33] The search consisted of McLaughlin pulling out her pants and shirt pockets. The police did not find any contraband on McLaughlin, however, the police did not conduct a shakedown search because the Unit had no female Agents. [Tr. 148-49] The police did not frisk McLaughlin to any extent beyond a normal pat-down search.

Agent Moore and McLaughlin arrived at the Starbucks's parking lot in Agent Moore's undercover pickup truck. [Tr. 134-35] As the pair waited on the buyer, Lieutenant Danny Vasser operated a surveillance camera across the street from the parking lot. [Tr. 158] Neither Agent Moore nor McLaughlin was equipped with a body camera. [Tr. 135]

Several minutes after Agent Moore and McLaughlin arrived in the parking lot, two men arrived in a gold car and pulled into the parking lot next to Agent Moore's truck. [Tr. 144-45] Agent Moore had backed his truck into the parking lot space so the driver's side doors of both the truck and the gold car were side by side. [Tr. 136-37] Although McLaughlin identified Brownlee as the driver of the gold car, Agent Moore was not previously familiar with either of the men in the car. [Tr. 135,

145] McLaughlin was also unfamiliar with the male in the passenger seat of the car. [Tr. 179]

Agent Moore remained in his truck as McLaughlin exited the vehicle and entered the gold car's rear passenger door. [Tr. 174-177] McLaughlin testified that, after she entered the car, she handed Brownlee two hundred dollars (\$200) in exchange for cocaine and Lortab (Hydrocodone and Acetaminophine mixture). Following the exchange, McLaughlin re-entered Agent Moore's truck and handed him the substances. The police did not arrest the men in the gold car, rather the police allowed the gold car to drive away. [Tr. 145]

The Mississippi Crime Lab conducted tests of the substances and the results were positive for cocaine and Lortab. [Tr. 167] Brownlee was later arrested. The police did not recover the marked \$200 McLaughlin transferred during the drug sale. [Tr. 161]

SUMMARY OF THE ARGUMENT

Brownlee's conviction was based on the sole testimonies of a paid confidential informant who was not thoroughly searched for drugs prior to the alleged drug buy and on the statements of an undercover cop whose testimony is questionable, at best. Furthermore, the police did not make any arrest at the scene of the drug sale, nor did the police ever recover the money it supplied to the confidential informant in order to purchase the drugs. Based on this weak and tenuous evidence, the Court should find, sitting as the thirteenth juror, that allowing this guilty verdict to stand would sanction an unconscionable injustice.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

i. Standard of Review

The Mississippi Supreme Court has compared the standard of review of motions for new trials as being similar in nature to the Court sitting as a thirteenth juror. *Ross v. State*, 954 So. 2d 968, 1016 (¶127) (Miss. 2007). "A finding that the verdict was against the overwhelming weight of the evidence indicates that the Court disagrees with the jury's resolution of conflicting evidence and requires a new trial." *Id.*

The Court will order a new trial and allow the evidence to be placed before a second jury if the first jury's guilty verdict was based on "extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict." *Id.* (citing *Lambert v. State*, 462 So. 2d 308, 322 (Miss. 1984) (Lee, J., *dissenting*). The Court will only disturb the jury's verdict when the verdict is so contrary to the overwhelming weight of the evidence that it would cause an unconscionable injustice if the verdict were allowed to stand. *Bush v. State*, 895 So. 2d 836, 844 (¶18) (Miss. 2005).

ii. The jury's verdict was based on weak and tenuous evidence

The jury convicted Brownlee based on the testimony of a paid confidential informant and the questionable undercover sting operation by the police. Without more substantial evidence, Brownlee's conviction should be reversed and remanded for a new trial.

From the very beginning, this case was riddled with weak and tenuous evidence. The circumstances surrounding the alleged drug buy were questionable, at best. One only has to begin by looking at the extent of the police's search of the confidential informant at the pre-buy meeting.

Before arriving at the Starbucks that evening, the Agent Moore did not search McLaughlin, the confidential informant, to any extent greater than that of a normal pat-down search. [Tr. 148-49, 178] There was no female Agent employed in the Narcotics Division at the time of this undercover

operation so Agent Moore did not conduct a "shakedown" search of the McLaughlin. [Tr. 148-151]

According to McLaughlin, the police search prior to the operation consisted of her pulling out her pants and shirt pockets. If McLaughlin had intended to hide any drugs or contraband in her underwear prior to meeting the gold car in the Starbucks' parking lot, the police would not have been able to discover this through the use of its very preliminary and basic drug search technique.

Then there was the controlled buy itself. Agent Moore and McLaughlin were not equipped with body videos at the time of the buy. [Tr. 135] The only video available from this operation came from Lt. Vasser's surveillance across the street from the parking lot. [Tr. 158] This surveillance video did not identify the driver of the gold vehicle and it did not show any money/drug transaction. Essentially, there was no significant video surveillance footage that could be used to support this conviction.

Agent Moore admitted that, prior to the drug sting, he was unfamiliar with Brownlee. [Tr. 135] However, Agent Moore testified that "someone named Jermaine" arrived at the Starbucks around 6:00p.m. After the gold car arrived, there were two males in the car. Without any prior knowledge of Brownlee, one can assume Agent Moore's positive identification of Brownlee as the car's driver is based solely on McLaughlin's identification. McLaughlin's identification, however, could have easily been tainted by her paid informant status and by the fact that she had only been face to face with Brownlee about two or three times prior to this occasion. [Tr. 172]

After the gold car parked, McLaughlin exited Agent Moore's undercover vehicle and entered the back passenger door of the car. [Tr. 174-77] This was after nightfall in the parking lot of a coffee shop. Agent Moore did not follow McLaughlin into the car so he could only watch McLaughlin as he sat in the driver's seat of his truck. His vehicle was backed into the parking lot and the gold car faced forward next to his driver's side door. Both the driver's sides of the cars were parked adjacent

to one another.

Agent Moore testified that, in this parking situation, he was able to watch the entire transaction. [Tr. 136-38] He testified that he was able to see McLaughlin exit his truck, walk around the rear of the gold car, enter the car's back passenger door, exchange State-issued money for drugs, leave the gold car, and return back to Agent Moore's truck. Given the dark, nighttime conditions in the parking lot, coupled with the fact that he was looking through another vehicle, it is arguable that Agent Moore had a good enough vantage point to observe the transaction.

It is highly questionable that Agent Moore would be able to view the entire exchange of drugs for money in the exact manner that he purported to observe. What is even more troubling, however, is that the police did not perform a "takedown" immediately following the transaction. [Tr. 145] The police had the ability to arrest Brownlee at the scene of the Starbucks, however, the police decided to "let the money walk." [Tr. 159] This meant that the police did not recover the marked currency it provided McLaughlin with which to purchase the drugs. The police never found the money it issued for the controlled buy, but more importantly, Brownlee was never found in possession of the marked money.

"A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, 'unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.' *Daniels v. State*, 9 So.3d 1194, 1199 (Miss. Ct. App. 2009) (quoting *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982)). Rather, it means that this Court, sitting as the "thirteenth juror," simply disagrees with the jury's resolution of the conflicting testimony." *Id.*

Reviewing the evidence presented at trial, this Court should find that the verdict in this case was based on extremely weak evidence and that justice requires that Brownlee receive a new trial.


CONCLUSION

A jury convicted Brownlee based on weak and tenuous evidence. The police did not have any video surveillance which identified Brownlee as the seller in the controlled buy. The police never recovered the marked drug money used to purchase the contraband during the drug buy. The police didn't conduct a "takedown" of the gold car, following the drug buy. The police did not thoroughly search the confidential informant prior and following the drug buy. With all of this weak evidence, Brownlee requests the Court to find that affirming the trial court's decision will sanction an unconscionable injustice.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Jermaine Brownlee, Appellant

By:


Erin E. Pridgen, Miss. Bar No. [REDACTED]
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CERTIFICATE OF SERVICE

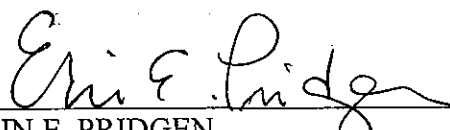
I, Erin E. Pridgen, Counsel for Jermaine Brownlee, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Robert P. Chamberlin, Jr.
Circuit Court Judge
8619 Highway 51 North
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Honorable John W. Champion
District Attorney, District 17
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This the 23rd day of December, 2009.



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