IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONNIE SANDERS — APPELLANT

V. — NO. 2009-KA-0588-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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RONNIE SANDERS **APPELLANT**

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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. Ronnie Sanders, Appellant
3. Honorable Ben Creekmore, District Attorney
4. Honorable Andrew K. Howorth, Circuit Court Judge

This the 21 day of September, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUE

ISSUE NO. 1

THE TRIAL COURT ERRED IN DENYING SANDERS' MOTIONS FOR CONTINUANCE AND MISTRIAL AFTER THE STATE FAILED TO COMPLY WITH DISCOVERY RULES BY FAILING TO DISCLOSE A WITNESS UNTIL MINUTES BEFORE HE TOOK THE STAND TO TESTIFY.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Marshall County, Mississippi, and a judgment of conviction of Burglary of Commercial Building. The conviction resulted in a term of seven (7) years. Ronnie Sanders was also ordered to pay a fine in the amount of two thousand dollars ($2000.00). A jury trial was held February 18-19, 2009, Honorable Andrew K. Howorth, Circuit Judge, presiding. Ronnie Sanders is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On November 12, 2007, the Marshall County Sheriff's Department received a call from an alarm company concerning the M&W Quik Stop. Tr. 102. The Sheriff's Office dispatched an officer to the Quick Stop to determine if there was a possible break-in. *Id.* Officer Michael Garner went to the quik stop. *Id.* Officer Garner patrolled around the store twice looking for any evidence of a break-in and got out and checked the side door and the front door and windows and did not see any signs of a break-in. Tr.102-03.

Officer Garner determined that there was nothing out of the ordinary happening at or inside the store, so he left. Tr. 105. However, as he was leaving the scene, he noticed a gray Chevy van with a Tennessee license plate down the road about two or three hundred feet from the store. *Id.*

Gus Amro also received a call from the alarm company that the alarm at his store had been activated. Tr. 79. He then went down to the store. *Id.* Amro arrives after Officer Garner had already left. As Amro drove around the store he did not see anything out of the ordinary. Tr. 82. However, as he looked inside the store, he could cigarettes and other items laying on the floor. *Id.* He then called 911 and told them that someone had broken into the store. *Id.* Amro then notices something behind him and sees a dark figure running from the store. *Id.*

About thirty minutes after leaving the M&W Quik Stop, Officer Garner hears from dispatch that the store owner observed someone running from the store. Tr.106. Officer Garner than began to head toward the quik stop. *Id.* Officer Garner thought it was a good idea to look for the gray Chevy van that he had observed near the quik stop. Tr. 107. As Officer Garner was headed westbound toward the quik stop, he observed the van headed eastbound driving away from the quik stop. *Id.*

Officer Garner decided to make a traffic stop on the van and see if they had anything to do with the quik stop break-in. *Id.* Officer Garner initiated a felony stop on the gray Chevy van. Tr. 107-08. Items from the quik stop were found inside and outside of the van. With the help of other officers, Officer Garner arrested Ronnie Sanders and Kevin Luster in connection to the burglary of the M&W Quik Stop. Tr. 118.

According to the testimony of Kevin Luster (Luster) on the evening of November 11, 2007, Ronnie Sanders (Sanders) and Gregory Michaels (Greg) came by his house in Memphis, Tennessee, in a grey Chevy van. Tr. 219. Sanders wanted to go riding around and Luster left with Sanders and Greg. Tr. 220. The three men rode to Oxford, Mississippi, to meet some girls. *Id.* They met the girls and drank and had a good time. *Id.*

Luster testified that the guys left the girls and headed back to Memphis. Tr. 221. On the way back, Luster stated that Sanders stopped the van on the side of the road. *Id.* Luster who was laying on the mattress in the back of the van, claimed that Sanders and Greg got out of the van and said they would be back. Tr. 222. Luster did not see either of the men take anything with them when they left. *Id.* Luster who admittedly was tired and drunk laying in the back of the van, claimed that Sanders and Greg were gone over an hour. *Id.*

Luster who eventually passed out from being drunk, stated that when Sanders and Greg came back to the van, they had some bags. Tr. 223. However, Luster did not see any items that were taken from the store and did not see Sanders with any bags. Tr. 223, 231. Sanders and Greg got back into the van with Sanders driving and they drove off back towards Memphis. Tr. 223. Within a few miles, they encountered blue lights. Tr. 224.

With the van pulled over by Officer Garner, Greg got out of the van and ran. Tr. 225. Sanders jumped over to the passenger seat. *Id.* Sanders got out of the van on the passenger seat and Luster then climbed up to the front of the van and got out of the van on the drivers side. *Id.* Luster continued to state that he told the police about a third person, to which the police do not have any recollection of that conversation. Tr. 231-32.

Sanders and Luster were arrested and taken to jail. The police found a backpack with items from the quik stop, cash, and a gun around the vicinity of the van. Tr. 113-15. The gun that was found was ultimately determined to the be the gun of the quik stop owner, Armo.

Luster pled guilty during the middle of the trial and testified against Sanders. Sanders was convicted of burglary of commercial building. Sanders is currently incarcerated with the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The trial court should have granted Sanders a continuance of the trial. Sanders was caught by surprise when Luster decided to change his plea from not guilty to guilty and to testify for the State. The State violated the discovery rules by not disclosing Luster as a witness prior to trial. The Court should have granted Sanders a continuance . The Court did not allow Sanders time to prepare and adjust to the new witness by the State.. This was a reversible error he court in denying Sanders his right to a fair trial. This Court should reverse the trial court and remand the case for a new trial.

ARGUMENT

ISSUE NO. 1

THE TRIAL COURT ERRED IN DENYING SANDERS' MOTIONS FOR CONTINUANCE AND MISTRIAL AFTER THE STATE FAILED TO COMPLY WITH DISCOVERY RULES BY FAILING TO DISCLOSE A WITNESS UNTIL MINUTES BEFORE HE TOOK THE STAND TO TESTIFY.

The trial judge prevented Sanders from having a fair trial. Sanders' co-defendant Kevin Luster changed his guilty plea from not guilty to guilty in the middle of the trial. Tr. Tr. 192. Luster pled guilty to accessory after the fact during the middle of the trial and then immediately testified against Sanders. Tr. 197, 218.

Counsel for Sanders immediately asked for a motion for continuance. Tr. 197. Sanders' asked for a motion for continuance claiming that the State had secured an additional witness that had not been discovered. *Id.* Counsel for Sanders and Sanders had not had time to speak about witness and counsel did not have time to check the background of the witness. *Id.* Counsel for Sanders also did not have time to prepare for the new witness that had swapped from the defense to the State. *Id.* The Court denied the motion stating that this was the "classic trial development that you don't necessarily prepare yourself for, but it doesn't constitute grounds for continuance." *Id.*

Defense counsel for Sanders then made an additional motion for a mistrial because Luster as a co-defendant had been sitting with the defense during the whole trial and been working together as a team. Tr. 198. Sanders' claims that he was severely prejudice and did not receive a fair trial as a result. *Id.*

The State violated the discovery requirements by failing to disclose the additional witness prior to the trial. ***Box v. State***, 437 So.2d 19 (Miss. 1983) first set forth the procedure that trial courts should follow in settling discovery violations, however that procedure is now set forth in **Rule**

9.04 of the Uniform Circuit and County Court Rules. ***McCullough v. State***, 750 So.2d 1212, 1217 (Miss. 1999), ***Duplantis v. State***, 644 So.2d 1235 (Miss. 1994).

The Mississippi Supreme Court has held that "the essential purpose of Rule 9.04 is the elimination of trial by ambush and surprise." ***Robinson v. State***, 508 So.2d 1067, 1070 (Miss. 1987). See also **Rule 9.04** of the Uniform Circuit and County Court Rules. **Rule 9.04** states the following:

> [T]he prosecution must disclose to each defendant or to defendant's attorney, and permit the defendant or defendant's attorney to inspect, copy, test, and photograph upon written request and without the necessity of court order the following which is in the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecution:
> 1. Names address of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statements written, recorded or otherwise preserved of each such witness and the substance of any oral statements made by any such witness;

U.R.C.C.C. § 9.04 (1997).

"Disclosure is the hallmark of fairness and the quest for justice that should be the goal of the criminal justice system." ***Wooten v. State***, 811 So.2d 355, 365 (Miss. Ct. App. 2001); ***Robinson***, 508 So.2d at 1070. When the state violates the rules of discovery, the trial court should abide by the rules set out in ***Box***, which is now reflected in **Rule 9.04.** ***McCullough***, 750 So.2d at 1217; ***Box***, 437 So.2d at 23-24; ***Powell v. State***, 925 So.2d 878, 881 (Miss. Ct. App. 2005). **See also U.R.C.C.P. § 9.04 (1997)**. The following procedure is set out in **Rule 9.04**:

> If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:
> 1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and
> 2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a

> period or time reasonable necessary for the defense to meet the non-disclosed evidence or grant a mistrial.
> 3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

U.R.C.C.C. 9.04 I. The Mississippi Supreme Court held in ***McCullough***, that failure to follow the ***Box*** guidelines[1] is prejudicial error, requiring reversal and remand. ***McCullough***, 750 So.2d at 1217; ***Snelson v. State***, 704 So.2d 452, 458 (Miss. 1997); ***Duplantis***, 644 So.2d at 1250; ***Darghty v. State***, 530 So.2d 27, 33 (Miss. 1998).

Luster pled guilty during the second day of the trial. Sanders was caught by complete surprise. Sanders asked for a continuance to prepare for the newly discovered witness for the state. The Court denied the motion immediately continued with the trial. Furthermore, the defendant Sanders was not even present[2]. **Rule 9.04** states that the defense should have a reasonable time to examine the newly produced documents, but Sanders had absolutely no time to review and prepare for the testimony of Luster. Counsel for Sanders was not allowed any time to adjust and prepare for the testimony of Luster. A motion for continuance would have allowed counsel for Sanders to prepare and adjust his strategy for the newly discovered. The Mississippi Supreme Court stated that there is no hard and fast rule determining how much time is a reasonable time for the defense to review the newly acquired evidence. ***Inman v. State***, 515 So.2d 1150, 1153 (Miss. 1987); ***Wooten***, 811 So.2d at 365. Even though there is no rule determining how much time should be

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[1] ***Box*** guidelines are now reflected in Rule 9.04 of the Uniform Circuit and County Court Rules. ***McCullough v. State***, 750 So.2d 1212, 1217 (Miss. 1999); ***Duplantis v. State***, 644 So.2d 1235 (Miss. 1994).

[2] Counsel for Sanders was informed that Ronnie Sanders had been admitted to the emergency room in Bolivar County Mississippi the morning of the second day of trial. Counsel was told that Sanders left the hospital and was on his way to court, but he never appeared before the court. A fax was received from the hospital that Sanders was admitted.

granted, counsel for Sanders was not granted any additional time to review or prepare for the testimony of Luster.

The facts in the ***McCullough*** case address the issue of newly acquired evidence. In ***McCullough***, the prosecution informed McCullough that it intended to impeach his testimony using newly acquired evidence. The evidence was not provided to McCullough until the morning of trial. McCullough made an objection to the evidence and requested a continuance. The Mississippi Supreme Court held that "[s]ince the defense was not presented with the evidence until the morning of the trial, and McCullough requested a continuance which was denied, this Court finds prejudicial error." ***McCullough***, 750 So.2d at 1217. The Court in ***McCullough*** reversed and remanded the case. These facts are very related to the facts in the case involving Sanders. However, in case at hand, Sanders did not know about the new witness for the State until the middle of the trial, whereas in ***McCullough*** they found out on the morning of trial.

The Mississippi Court of Appeals held in ***Powell*** that a violation of the discovery rules by the prosecution does not always result in a reversal of the conviction. ***Powell***, 925 So.2d at 882. However, that case can be distinguished. In ***Powell***, this court said that it was error for the State to use an impeaching document that was not disclosed to the defendant. ***Id.*** However, this court did not reverse because the defendant failed to bring the matter to the trial court's attention. ***Id.*** Powell filed a motion for a new trial after he was convicted stating that the court erred in allowing the State to impeach him because he was not given a copy of the impeaching document. ***Id.*** This court continued to say that if Powell would have brought this information up to the trial court during the trial, then the trial court would have been compelled to proceed in accordance with **Rule 9.04 I**. ***Id.*** In the case involving Sanders, the trial court was immediately notified that the State had violated

the discovery rules and asked for a continuance, which was subsequently denied by the court. Tr. 197

The Court in ***Inman*** stated that "[w]here that State is tardy in furnishing discovery which it was obligated to disclose and after an initial objection is made by the defense, the defendant is entitled upon a request to a continuance postponement of the proceeds reasonable under the circumstances." *Id.* Sanders did make a timely objection in asking for a continuance and the trial court immediately proceeded with the trial.

The information that might have been discovered in the testimony of Luster, if examined, would have prevented Sanders from a trial by ambush and surprise. ***Wooten v. State***, 811 So.2d at 365; ***Robinson***, 508 So.2d at 1070. Without the opportunity to review and prepare for Luster's testimony, Sanders was denied his right to a fair trial. *See* **U.R.C.C.P. § 9.04 (1997)**. Sanders was entitled to a continuance of the proceedings against him and failure to do so was prejudicial error which entitles a reversal and remand to the trial court. ***McCullough***, 750 So.2d at 1217; ***Snelson v. State***, 704 So.2d at 458; ***Duplantis***, 644 So.2d at 1250; ***Darghty v. State***, 530 So.2d at 33.

CONCLUSION

Ronnie Sanders is entitled to have his conviction for burglary of a commercial building reversed and remanded for a new trial.

Respectfully submitted,

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For Ronnie Sanders, Appellant

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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Ronnie Sanders, 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:

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This the 21 day of September, 2009.

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