

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFERY MARCEL ROBINSON

APPELLANT

VS.

NO. 2009-KA-1154

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

THE APPELLANT FAILED TO ESTABLISH THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF THE FACTS

On the evening of March 18, 2008, Officer Michael Hardin and Officer Freddie Payne of the Batesville Police Department were patrolling when they pulled in behind a red Chevrolet truck. (Transcript p. 28 - 29). Loud music was blaring from the truck in violation of a city ordinance. (Transcript p. 29). The officers attempted to make a traffic stop but the driver of the truck refused to pull over. (Transcript p. 31). As they followed the truck they could see the driver looking at them in the rear view mirror and saw him reaching into the center of the vehicle. (Transcript p. 42). Eventually the truck stopped. (Transcript p. 31). The driver of the vehicle, later determined to be the Appellant, Jeffery Marcel Robinson, told the officers that he left his license at home and gave them an incorrect name and date of birth. (Transcript p. 32). Because of this incorrect information and because the Appellant seemed nervous, officers asked him to step outside the vehicle.

(Transcript p. 33). The officers conducted a routine pat down for weapons and found none. (Transcript p. 33). The officers then asked for consent to search his pockets and he gave consent. (Transcript p. 33). They found a rolled up one dollar bill with a rubber band around it in his right front pocket. (Transcript p. 34 and 44). The officers also asked for consent to search his vehicle and consent was given. (Transcript p. 34). The officers found a torn piece of plastic from a sandwich bag with a white powdery residue in the center of the vehicle. (Transcript p. 34 and 46).

After these findings, the officers, knowing that many times people hide drugs in their mouth, asked the Appellant to open his mouth and move his tongue around. (Transcript p. 34 - 35 and 46). He opened his mouth slightly but would not lift his tongue. (Transcript p. 35 and 46). Nonetheless Officer Payne noticed something in the Appellant's mouth and told him to spit it out. (Transcript p. 35). The Appellant then attempted to swallow what was in his mouth. (Transcript p. 35). To keep him from swallowing the substance, Officer Payne put his hand under the Appellant's Adam's apple, but the Appellant still refused to spit it out. (Transcript p. 35 and 47). Officer Payne took the Appellant to the ground and eventually the Appellant spit out the substance in his mouth. (Transcript p. 35 and 47). He was near a muddy area when he spit it out and pushed the substance down into the mud with his hands and knees trying to destroy it. (Transcript p. 35 and 47). The officers were able to locate the substance. (Transcript p. 48). The substance field tested positive for cocaine. (Transcript p. 81). The substance was sent to the Mississippi Crime Lab where it was determined to be .3 grams of cocaine. (Transcript p. 81).

The Appellant was arrested, tried, and convicted of possession of cocaine. He was sentenced as a habitual offender pursuant to Miss. Code Ann. §99-19-81 and as a repeat drug offender pursuant to Miss. Code Ann. §41-29-147 to serve twelve years in the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The Appellant is not entitled to a new trial as he did not and cannot establish from the record that he was denied effective assistance of counsel. Not only did he fail to prove that his counsel's representation was deficient but he also failed to prove that the alleged deficiency prejudiced his case. Accordingly, this Honorable Court should affirm his conviction and sentence.

ARGUMENT

THE APPELLANT FAILED TO ESTABLISH THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The Appellant argues on appeal that "his Sixth Amendment right to effective assistance of counsel was violated because his attorney failed to ask for a directed verdict at the end of the State's case or ask for a peremptory jury instruction at the close of the evidence." (Appellant's Brief p. 4). While a defendant may raise the issue of ineffective assistance of counsel on direct appeal, "this Court may determine the merits of the claim only when '(a) ... the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by the trial judge able to consider the demeanor of witnesses, etc. are not needed.'" *Clayton v. State*, 946 So.2d 796, 803 (Miss. Ct. App. 2006). **"A conclusion that the record affirmatively shows ineffectiveness of constitutional dimensions is equivalent to a finding that the trial court should have declared a mistrial or ordered a new trial sua sponte."** *Id.* (citing *Colenburg v. State*, 735 So.2d 1099, 1102 (Miss. Ct. App.1999) (*Emphasis added*)). The record in this case does not demonstrate that the trial court should have declared a mistrial or ordered a new trial *sua sponte* because of the quality of defense counsel's representation of the Appellant and, therefore, does not support a claim of ineffective assistance of counsel.

With regard to ineffective assistance of counsel claims, the Mississippi Supreme Court has held the following:

In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney's overall performance was deficient and (2) that the deficient performance, if any, was so substantial as to prejudice the defendant and deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Furthermore, there is a "strong but rebuttable presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Walters v. State*, 720 So.2d 856, 868 (Miss.1998). To overcome this presumption, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Schmitt v. State*, 560 So.2d 148, 154 (Miss.1990). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Only where it is reasonably probable that, but for the attorney's errors, the outcome of the trial would have been different will this Court find the counsel's performance was deficient." *Id.*

Smiley v. State, 815 So.2d 1140, 1146-47 (Miss.2002) (quoting *Gary v. State*, 760 So.2d 743, 753 (Miss.2000)) (*Emphasis added*). Moreover, this Court held that "[i]n addition to the presumption that counsel's conduct is reasonably professional, there is a presumption that counsel's decision are strategic in nature, rather than negligent." *Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002).

Therefore, in order for a defendant to prevail on a claim of ineffective assistance of counsel raised on direct appeal, he must show "from the record that his counsel's performance was deficient, and that the deficient performance prejudiced him." *Walker v. State*, 823 So.2d 557, 563 (Miss. Ct. App. 2002) (citing *Strickland*, 466 U.S. at 686) (*emphasis added*). This determination is made based on the "totality of the circumstances." *Cole v. State*, 666 So.2d 767, 775 (Miss. 1995) (citing *Frierson v. State*, 606 So.2d 604, 608 (Miss. 1992)). "The target of appellate scrutiny in evaluating the deficiency and prejudice prongs of *Strickland* is counsel's 'over-all' performance." *Id.* Accordingly, the Appellant must, not only show that his counsel was deficient, but he also must

show how these alleged deficiencies prejudiced his case. In order to prove prejudice, the Appellant must show from the record that his counsel's "errors were of such a serious magnitude as to deprive the defendant of a fair trial because of a reasonable probability that, but for counselor's unprofessional errors, the results would have been different." *Cole*, 666 So.2d at 775 (quoting *Martin v. State*, 609 So.2d 435, 438 (Miss. 1992)). The Appellant has failed to meet this burden as he did not meet either prong of the *Strickland* test.

The Appellant did not establish that his counsel representation was deficient. He claims, relying on *Holland v. State*, 656 So.2d 1192 (Miss. 1995), that his counsel was deficient in not moving for directed verdict and not requesting a peremptory instruction. However, the *Holland* case is easily distinguishable from the Appellant's case. Holland's counsel failed to file any post-trial motions. Appellant's counsel did file a motion for new trial alleging that the verdict was "against the overwhelming weight of the evidence" and that "the trial court erred in overruling [his] objection to the City of Batesville, Ms.'s noise statute to be overly broad in violation of the constitutional provisions cited by [him]." (Record p. 21 - 22). See *Simon v. State*, 857 So.2d 668, 690 (Miss. 2003). Admittedly, this post-trial motion did not address the sufficiency of the evidence. See *Parker v. State*, 30 So.3d 1222, 1234 - 1235 (Miss. 2010). However, failure to move for directed verdict or request a peremptory instruction in the case at hand still does not constitute a deficient performance as there were no grounds to do so. As set forth in more detail below, there was more than sufficient evidence to support the verdict.

Additionally, the Appellant did not and cannot establish from the record the second prong of *Strickland*. There is nothing in the record to prove that had Appellant's counsel moved for directed verdict or for a peremptory instruction that it would have been granted thereby changing the outcome of the case. In fact, the record indicates that had his counsel moved for directed verdict or

for a peremptory instruction, they would have been denied as there was more than sufficient evidence that the Appellant possessed cocaine. That evidence includes but is not limited to:

- a. Both officers testified that they saw the Appellant spit the cocaine out of his mouth and attempt to destroy it. (Transcript p. 35 and 47).
- b. The Appellant admitted to possessing the cocaine in a statement to police after his arrest. (Transcript p. 57).
- c. Exhibit 7 is a picture of the Appellant with cocaine residue on his face. (Transcript p. 51 and Exhibit 7)

As such, the second prong of *Strickland* was not met.

Accordingly, the Appellant did not establish that he was denied effective assistance of counsel and is, therefore, not entitled to a new trial.

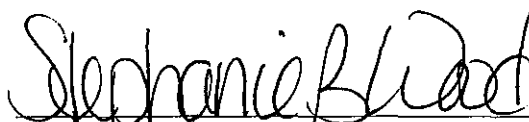
CONCLUSION

For the foregoing reasons the State of Mississippi respectfully requests that this Honorable Court affirm the Appellant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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