

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES EWING

APPELLANT

V.

NO. 2010-KA-0251-SCT

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.

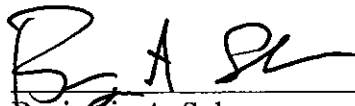
1. State of Mississippi
2. James Ewing, Appellant
3. Honorable Ben Creekmore, District Attorney
4. Honorable Robert William Elliott, Circuit Court Judge

This the 10 day of May, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



Benjamin A. Suber

COUNSEL FOR APPELLANT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES EWING

APPELLANT

V.

NO. 2010-KA-00251-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUE

ISSUE

**THE VERDICT WAS AGAINST THE OVERWHELMING
WEIGHT OF THE EVIDENCE**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Calhoun County, Mississippi, and a judgment of conviction for the crime of Sale of a Controlled Substance (Hydrocodone). James Ewing, hereinafter Ewing, was sentenced to fifteen (15) years with ten (10) years to serve with the Mississippi Department of Corrections and five (5) years post release supervision. Ewing is currently in the custody of the Department of Corrections

following a jury trial on January 21-22, 2010, Honorable Robert William Elliott, presiding.

FACTS

According the trial testimony, on August 30, 2007, Calhoun County Sheriff Department Deputy Sheriffs Dean Poyner and Wayne Plunk, searched both the person and the vehicle of the confidential informant by the name of Tina West (Tina). Tr. 98. The officers then placed audio and video equipment on her and sent her off with twenty dollars (\$20.00) to attempt to make controlled buy of pills in Calhoun County. *Id.*

Tina working as a confidential informant, bought six (6) hydrocodone for twenty dollars (\$20). Ewing testified that his brother Joe, and girlfriend Debra Cutchfield (Debra) were at Debra's house attempting to sell some pills to Tina. Tr. 104. According to Ewing, Joe and Debra were locked out of the house and needed Ewing to come unlock the door so that they could sell the pills to Tina. Tr. 105.

Ewing testified that the only reason he was there was to unlock the door for Debra and Joe. Tr. 106. Ewing continued to state that the pills inside the house were Joe's and Ewing went inside instead of Joe because Joe has no legs. Tr. 105-06. Joe told Ewing to give Tina six (6) pills. Tr. 106. Ewing never received any money from Tina. *Id.* Ewing also stated that Tina asked whether she got six (6) pills for Twenty (\$20), Joe answered yes. Tr. 108.

Tina was working as a confidential informant because she had gotten into some trouble and was trying to help herself get out of trouble. Tr. 76. Tina testified that she

was suppose to buy the pills from Debra, but she got them from Ewing. Tr. 77. Tina claimed that she gave the twenty dollars (\$20) to buy the pills to Ewing. Tr. 80.

Tina upset during direct examination and cross-examination stated on cross that this whole thing was upsetting to her. Tr. 92. She continued to state that she would have to live with this the rest of her life. *Id.* She clarified that her conscious was bothering her for everything that she had done. *Id.* Tina then stated that she did not know if she gave the money to Debra, Joe or to Ewing. *Id.*

SUMMARY OF THE ARGUMENT

The verdict in this case was against the overwhelming weight of the evidence. The evidence presented failed to establish beyond a reasonable doubt the charge of Sale of a Controlled Substance (Hydrocodone), as the video admitted into evidence did not show any exchange of money for drugs. Even if drugs were purchased from this location, other people are present and seen in the video. Anyone present could have taken the money. The pills sold could have been anyone's pills. Ewing was only there to unlock the door. Furthermore, the informant's credibility was highly suspect, has she had a criminal record and was very eager to get her own charges dropped. Allowing the verdict to stand on this evidence would manifest an injustice.

ARGUMENT

ISSUE

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

In trial counsel's Motion for New Trial or in the Alternative JNOV, trial counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 89, R.E. 16. The trial judge denied this motion. C.P. 99, R.E. 19. The trial judge erred in refusing to grant this motion.

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Id.* See also *Benson v. State*, 551 So.2d 188, 193 (Miss.1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

In the case at bar, the informant's testimony was highly suspect. The video did not show any drugs being transferred to Tina or any money being transferred to Ewing from Tina. Ewing's hands are also not seen in the video. Ex. 2. All the video appears to depict is Ewing going into the house. Accordingly, the informant's trustworthiness was absolutely essential to the case, as her testimony is the only evidence a drug sale occurred. As the record reflects, Tina was had a criminal record and she admitted she was only working with the police to get the charged dropped against her. Tr. 76. Tina's testimony was simply not credible. No reasonable jury could put any faith into Tina's testimony. Tina did not even know who took the money, if any money was exchanged. To illustrate

just how unbelievable Tina's testimony was, it is necessary to review a significant portion of his cross-examination.

Q. Why are you so emotional today, Tina?

A. Wouldn't you be?

Q. Well, I don't know. I might or might not. I'm just asking you know.

Mr. Stallings didn't say anything to upset you, did he, when he questioned you?

A. No. This whole thing is upsetting to me. I have to live with it the rest of my life (Witness Crying).

Q. What are you having to live about to live with the rest of your life?

A. My conscious (witness crying)

Q. Is your conscious bothering you because you're trying to send an innocent man to the pen?

A. My conscious is bothering me for everything I've done. (Witness crying).

Q. Tina, didn't you give that money that you were flashing around there on the camera to Debra and to Joe out there in the car before you ever went into the house?

A. I don't think I did. I don't know (Witness Crying).

Q. You don't know?

A. I really don't know (Witness crying).

Tr. 91-92.

Normally, the jury weighs the credibility of each witness. *Wetz v. State*, 503 So.2d 803, 812 (Miss. 1987). However, this can be set aside by this Court when the verdict is contrary to the overwhelming weight of the evidence.

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." *McQueen v. State*, 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005).

To affirm this case, and sentence this to ten years based solely on the testimony of an incredible informant trying to get her own charges dropped, would certainly sanction an unconscionable injustice. See *White v. State*, 761 So.2d 221 ¶40-43 (Miss. App. 2000). Ewing would respectfully submit that the evidence in this case did not warrant the verdict of guilty by the jury. James Ewing should be entitled to a new trial.

CONCLUSION

James Ewing respectfully requests that his conviction for Sale of a Controlled Substance (hydrocodone) be reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For James Ewing, Appellant

BY:



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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for James Ewing, 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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Honorable Jim Hood
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This the 10 day of May, 2010.


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