IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00951 COA

LOUIS DAVIS, JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES G. TUCKER, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFERY A. KLINGFUSSDISTRICT ATTORNEY: CHARLES E. WOOD

NATURE OF THE CASE: CRIMINAL - SALE OF A CONTROLLED SUBSTANCE, ROCK COCAINE; INDICTED AS A HABITUAL OFFENDER

TRIAL COURT DISPOSITION: GUILTY - SENTENCED TO A TERM OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT THE POSSIBILITY OF PAROLE OR PROBATION

MANDATE ISSUED: 9/26/97

EN BANC

COLEMAN, J., FOR THE COURT:

A jury in the Circuit Court of Hancock County, found Louis Davis, Jr. guilty of the crime of the sale of cocaine, a Schedule II controlled substance, in violation of Section 41-29-139(a)(1) of the Mississippi Code of 1972 (Rev. 1993). The trial court then sentenced Davis to serve thirty years in the custody of the Mississippi Department of Corrections as a habitual offender in accordance with Section 99-19-81 of the Mississippi Code of 1972 (Rev. 1994). Davis has appealed from the trial court's final judgment of guilt to argue that he was denied effective assistance of counsel and that the trial judge erred when it attempted to define "reasonable doubt" during his voir dire of the venirepersons from whom the jury was to be selected to decide his guilt or innocence of the crime for which he had been indicted. Nevertheless, we affirm.

I. FACTS

On November 11, 1993, Davis sold Shane Corr, a detective with the Bay St. Louis Police Department, one rock of crack cocaine for the sum of $20.00. Also present at the sale was Bay St. Louis Police Department Detective Kurt Raymond, who was seated in the passenger's side of a pick-up from which the illicit transaction was consummated between Davis and Detective Corr, the driver of the pick-up. When Corr handed Davis the twenty-dollar bill, which the Bay St. Louis Police Department had provided for the purpose of buying controlled substances, Davis reached inside his mouth and withdrew the rock of crack cocaine, dampened by his saliva. For disguises, Corr wore a wig of long hair and a cap, and Detective Raymond wore sunglasses and a cap. According to the testimony of Detective Corr, Davis' sale of crack cocaine was but one of five such transactions consummated by Detective Raymond and him that evening in Bay St. Louis.

Investigators Corr and Raymond and two other officers involved in this covert operation observed the standard protocols associated with such operations, *i. e.*, searches of the participating officers and the pick-up truck before and after the sale, use of a microphone and concealed "wire" for the officers

who were involved in the surveillance of the operation, and delivery of the substance believed to be cocaine to a crime laboratory for analysis to ascertain its identity. Because Davis was not arrested until eleven days after he sold the rock of crack to Investigator Corr, the twenty-dollar bill with which Corr paid Davis for the rock of crack was not recovered. The nature of Davis' two issues requires no further elaboration on the facts in this case, and they preclude the necessity of narrating the events of his trial other than his conviction and sentence.

II. REVIEW AND RESOLUTION OF THE ISSUES

We quote verbatim from Davis' brief his two issues:

I. He was denied the effective assistance of counsel.

II. The trial judge erred in trying to define the meaning of the "beyond a reasonable doubt" standard of proof.

Issue one: Was Davis denied effective assistance of counsel?

Perhaps material to the issue of ineffective assistance of counsel is an order entered by the trial court after Davis' trial by which it denied Davis' motion for JNOV or new trial, authorized Davis "to proceed in forma pauperis to the Mississippi Supreme Court," and appointed the attorney in the public defender's office who "was in charge of appeals to the Supreme Court" to "proceed with said appeal as prescribed by law." Davis argues that he was denied effective assistance of counsel "when defense counsel failed to take an active part in the trial process, including failing to give an opening statement or file or take an active part in the jury instruction process."

A. Standard of review

In *Handley v. State*, 574 So. 2d 671, 683 (Miss. 1990), the Mississippi Supreme Court reiterated that "[w]hen faced with a claim of ineffective assistance of counsel at trial or sentencing, this Court follows the test set down in *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]." (citations omitted). Earlier, in *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988), the supreme court had explicated the test which the Supreme Court had established in *Strickland*:

In *Strickland v. Washington*, 466 U.S. 668, . . . (1984), the United States Supreme Court established a two-prong test, required to prove the ineffective assistance of counsel: the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. . . . The burden of proof then rests with the [appellant].

Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional. assistance." In short, defense counsel is presumed competent.

Under the second prong, even if counsel's conduct is "professionally unreasonable," the judgment

stands "if the error had no effect on the judgment." Consequently, the movant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." There is no constitutional right to errorless counsel.

(citations omitted). The task of this Court is to analyze and resolve Davis' assertions that his trial counsel's performance was so deficient that it denied him effective assistance of counsel in compliance with the two-prong test which *Strickland* established. We begin with his assertion that his trial counsel was ineffective because he made no opening statement to the jury on behalf of Davis.

B. Failure to make an opening statement

The Uniform Criminal Rules of Circuit Court Practice were in effect when this case was tried on July 6 and 7, 1994. Rule 5.11 of those rules provided that "[t]he defense may make an opening statement to the jury." UCRCCP 5.11.[(1)] Davis cites no authority which would require defense counsel to make an opening statement. *Gilliard v. State*, 462 So. 2d 710 (Miss. 1985), involved an appeal of a conviction of the crime of capital murder. Gilliard complained that he had been denied the effective assistance of counsel because his attorney did not make an opening statement. The supreme court stated that "[t]he decision whether to make an opening statement was a strategic one. . . . Petitioner's attorney may have felt that he had nothing to gain by making a statement." *Id.* at 716. *See Moody v. State*, 644 So. 2d 451, 458 (Miss. 1994) (McRae, dissenting) (opining that "[m]any times opening statements are not made, especially in situations where . . . there exists an eyewitness who identifies one of the defendants as one of the perpetrators . . . ."). Of course, in the case *sub judice*, there were two eyewitnesses who testified about Davis' sale of the rock of crack cocaine, Investigator Corr, who made the buy, and Investigator Raymond, who witnessed Davis extract the rock from within his oral cavity and exchange it for a twenty-dollar bill, which Corr handed him.

Late in the afternoon of the first day of the trial, after the State and Davis' trial counsel had selected the jury and after the court had recessed in anticipation of beginning the trial the next morning, Davis' trial counsel told the trial judge that "I'm probably going to reserve the opening [statement]." The next morning, after the State had concluded its opening statement, the trial judge again advised Davis' trial counsel that "you can make an opening at this time, or you may elect to make an opening at a later stage." Then, the trial judge inquired of Davis' counsel, "What's your announcement?," to which Davis' counsel replied, "Your honor, we'll reserve the right to make an opening statement."

The record further reflects that during a recess before the State rested, the trial judge cautioned Davis that he had the right to testify if he wished, but that he did not have to testify. Davis responded to the trial judge's instructions indecisively because he wanted to confer with this attorney after the State rested. After the State rested, the trial judge again inquired of Davis whether he wished to testify, and this time Davis advised him that he had decided not to testify. Davis called no other witnesses and rested immediately. However, the record contains the closing argument which Davis' counsel made, and from our review of his closing argument, we conclude that Davis' counsel accomplished all that he could on behalf of his client in his confrontation of two eyewitnesses, both police officers, who testified for the State.

This Court concludes from its review of the record that Davis' counsel well understood the function

of and time for an opening statement, that he was considering whether and when to make an opening statement, and that, therefore, his decision to reserve this opening statement was a "strategic" one. Davis' informed decision not to testify and his failure to call other witnesses, all after the State rested, rendered moot his counsel's making an opening statement. We further note that Davis does not complain as a part of this issue that there were other witnesses whom his counsel might have called in his defense.

This Court concludes that because Davis' counsel's decision not to make an opening statement after the State had made its opening statement was a "strategic" decision, the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," which is the first prong of the *Strickland* test, prevails. *Strickland*, 466 U.S. at 669. Thus, we need not consider the second prong of the *Strickland* test on this aspect of Davis' first issue. However, were we otherwise persuaded that Davis had somehow overcome this presumption that his counsel's conduct fell within the wide range of reasonable professional assistance, Davis has failed to demonstrate that there is a reasonable probability that, but for his counsel's decision not to make an opening statement, the result of the proceedings would have been different, *i. e.*, the jury would not have convicted him.

This Court therefore declines to put the trial judge in error on this part of Davis' allegation of ineffective assistance of counsel, and we resolve it against Davis.

C. Defense counsel's failure to submit jury instructions on behalf of Davis

This Court thinks it noteworthy that Davis has made no issue of the Court's failure to instruct adequately the jury or of any error in the one instruction which the State requested and the trial judge granted to define the crime of sale of a controlled substance, for which Davis was tried. We have reviewed the Court's instructions about the presumption of innocence of the defendant, the State's burden of proving Davis' guilt beyond a reasonable doubt, the unanimity of the jury's verdict, and all the other aspects of procedure in a criminal trial. Moreover, the record reflects that during the conference among the trial judge, the prosecutor, and Davis' trial counsel about granting or refusing the jury instructions, Davis' counsel told the trial court:

I got [the assistant district attorney's] one instruction, which is his standard instruction in this these cases, and I assume the Court's instructions are the standard instructions, too, so there's no argument as to the instructions. I'm going to use the Court's.

Since Davis' appellate counsel does not suggest any errors which occurred in the trial judge's instructing the jury, this Court declines to speculate about what other jury instructions Davis' trial counsel ought to have submitted. Thus, Davis has again failed to rebut the first prong of the *Strickland* test, which is the presumption that his counsel's conduct fell within the wide range of reasonable professional assistance. Again, we resolve this aspect of Davis' first issue against him and hold that his counsel participated effectively in the process of selecting jury instructions, even if, as Davis argues, his counsel "failed to provide even one jury instruction."

Issue two: The trial judge erred in trying to define the meaning of the "beyond a reasonable doubt" standard of proof.

During voir dire, the trial judge stated to the venirepersons, "But I do need to caution you and remind you that 'beyond a reasonable doubt' is the highest standard of proof known to our form of government . . . ." Davis protests that this comment impermissibly defined the concept of "reasonable doubt." He cites *Boutwell v. State*, 165 Miss. 16, 143 So. 479, 483 (1932) in which the Mississippi Supreme Court opined that reasonable doubt defined itself without the assistance of the court. The State responds to Davis' allegation by emphasizing that just immediately prior to the statement of the trial judge of which Davis complains, the trial judge also stated to the venirepersons:

I can't give you a definition of "reasonable doubt." The law won't allow it. In my opinion we don't allow it because it's best to leave it upon the wisdom, the composite wisdom of the twelve jurors hearing the case to decide whether there is or is not a reasonable doubt in the case."

The State also argues that the issue is procedurally barred because Davis' trial counsel did not object to the trial judge's comment that "beyond a reasonable doubt is the highest standard of proof known to our form of government . . . ." The State is correct that the issue is procedurally barred. *See Foster v. State*, 639 So. 2d 1263, 1287 (Miss. 1994) (holding that because the appellant declined to object to part of the closing argument which he asserted on appeal constituted reversible error, the point was improperly raised before the supreme court for the first time and was therefore procedurally barred). Regardless of the procedural bar, we would resolve this issue against Davis on the obvious ground that the trial court also told the jury, "I can't give you a definition of 'reasonable doubt.' The law won't allow it." This Court resolves Davis' second issue against him by declining to put the trial judge in error for something he stated but to which Davis' trial counsel made no contemporaneous objection.

III. SUMMARY

Neither Davis' trial counsel's failure to make an opening statement nor his failure "to provide even one jury instruction" constituted ineffective assistance of counsel. In fact, Davis fails to rebut the first prong of the *Strickland* test, which is the presumption that his counsel's conduct fell within the wide range of reasonable professional assistance. Neither will we put the trial judge in error for stating preliminarily to the venirepersons during his voir dire of them that "'beyond a reasonable doubt' is the highest standard of proof known to our form of government . . ." when Davis' trial counsel failed to object contemporaneously to the comment, and the trial judge had also just advised the venirepersons that the law would not permit him to define the concept of "reasonable doubt." This Court therefore affirms the trial court's final judgment of Davis' guilt of the sale of a Schedule II controlled substance, cocaine, and its sentence of Davis to serve thirty years in the custody of the Mississippi Department of Corrections as a habitual offender in accordance with Section 99-19-81 of the Mississippi Code of 1972 (Rev. 1994).

THE HANCOCK COUNTY CIRCUIT COURT'S JUDGMENT OF THE APPELLANT'S GUILT OF THE SALE OF A SCHEDULE II CONTROLLED SUBSTANCE, COCAINE, AND ITS SENTENCE OF THE APPELLANT TO SERVE THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS A HABITUAL OFFENDER IN ACCORDANCE WITH SECTION 99-19-81 OF THE MISSISSIPPI CODE (REV. 1994)

ARE AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO HANCOCK COUNTY.

BRIDGES, C.J., McMILLIN , P.J., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.

1. The Uniform Circuit and County Court Rules superceded the Uniform Criminal Rules of Circuit Court Practice, under which the case *sub judice* was tried, as of May 1, 1995. Rule 10.03 of the Uniform Criminal Rules of Circuit Court Practice provides that "[t]he defense may make an opening statement to the jury at the conclusion of the state's opening statement or prior to the defendant's case in chief." UCCCR 10.03.