

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01153 COA

**LINDSEY WELLS A/K/A LINDSEY D. WELLS A/K/A DONNIE WELLS A/K/A DONNIE
CAROTHERS**

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. HENRY LACKEY

COURT FROM WHICH APPEALED: LAFAYETTE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID O. BELL

ATTORNEY FOR APPELLEE:

ATTORNEY GENERAL MIKE MOORE,

BY: CHARLES W. MARIS

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF SALE OF COCAINE AND SENTENCED TO
SERVE THIRTY YEARS IN MDOC AND ORDERED TO PAY COURT COSTS AND
STATUTORY FEES INCURRED.

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

THOMAS, P.J., FOR THE COURT:

Lindsey Wells was convicted of sale of cocaine and sentenced to serve thirty years in the custody of the Mississippi Department of Corrections. After his post trial motions were denied, Wells perfected his appeal to this Court alleging only one error. Wells alleges that the trial court erred in not granting a mistrial when the state's witness testified that he could identify Wells' voice as being the one who sold the C.I. drugs because of previous dealings he had with Wells. Finding that the circuit court did not commit error in refusing to grant a mistrial, we affirm.

DISCUSSION

We need not address all of the facts, characters, or places of this case. In short, Jason Springer, a confidential informant, testified that Wells sold him cocaine. Agent Scott Mills, who monitored the transaction through a transmitter, testified: "I recognized his voice immediately as being the defendant, Mr. Wells, because I have had many dealings with him in the past." Wells moved for a mistrial arguing that the state was told in a *motion in limine* that it could not bring into evidence testimony concerning other similar crimes committed by Wells, and that Agent Mills' testimony went against that order. The trial court overruled the motion.

We note at the outset that the comments made by Agent Mills, that he has had prior dealings with Wells, does not constitute testimony of "other crimes" which was prohibited by the trial court. As the state points out, the dealings that the two had together could have been completely innocent. For that reason, Wells arguments must fail.

Furthermore, Wells did not ask that the jury be instructed to disregard the comments, but instead, chose to elicit testimony that Wells had plead guilty to possession of cocaine. In addition, when Wells was on the stand he testified to his previous criminal conviction and of his drug problems. "[Wells] elicited the testimony on cross-examination of [Agent Mills] and cannot now be heard to complain that it was error." *Lewis v. State*, 445 So. 2d 1387, 1389 (Miss. 1984).

Even if we were to hold that the comments made by Agent Mills were comments of past criminal acts committed by Wells, we still would not reverse. Our supreme court has stated:

The trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case. Miss. Unif. Crim. R. Cir. Ct. Prac. 5.15. The trial judge is permitted considerable discretion in determining whether a mistrial is warranted since the judge is best positioned for measuring the prejudicial effect. *Roundtree v. State*, 568 So. 2d 1173, 1178 (Miss. 1990).

Gossett v. State, 660 So. 2d 1285, 1290-91 (Miss. 1995).

No possible prejudice could result from such an innocent comment. The real prejudice occurred when Wells testified to his drug use and past criminal record. For this he cannot complain.

THE LAFAYETTE COUNTY CIRCUIT COURT CONVICTION OF SALE OF COCAINE

AND SENTENCE TO THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. COSTS ARE TAXED TO LAFAYETTE COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.