

IN THE COURT OF APPEALS 09/19/95

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-00757 COA

SHAWN D. CALLAHAN

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. JERRY O. TERRY

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES G. TUCKER, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: CHARLES E. WOOD

NATURE OF THE CASE: CRIMINAL/ TRANSFER OF A CONTROLLED SUBSTANCE
(COCAINE)

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO FIFTEEN (15) YEARS
IN CUSTODY OF MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE BRIDGES, P.J., BARBER AND PAYNE, JJ.

BARBER, J., FOR THE COURT:

Shawn Callahan was indicted and convicted for transfer of a controlled substance to an undercover narcotics agent. He was sentenced to fifteen years in prison. On appeal, Callahan raises the following issues:

I. WHETHER THE TRIAL COURT ERRED IN NOT PROVIDING THE DEFENDANT WITH A TRANSCRIPT FROM THE PREVIOUS MISTRIAL?

II. WHETHER THE COURT ERRED IN NOT REQUIRING THE STATE'S WITNESS TO STATE HIS CURRENT ADDRESS, THEREBY LIMITING CROSS EXAMINATION?

III. WHETHER THE COURT ERRED IN REFUSING DEFENDANT'S ALIBI INSTRUCTION?

IV. WHETHER THE COURT ERRED IN FORBIDDING DEFENSE COUNSEL FROM REFERRING TO THE STATE'S WITNESSES AS LIARS?

We find the issues raised by the appellant in this case do not warrant reversal of the decision below.

FACTS

In September, 1991, Gordon Parker was working as an undercover agent with local law enforcement in Hancock County. At the time, he was also stationed at Keesler Air Force Base. On September 16, 1991, a Hancock County law enforcement agent fitted Parker with a speaker wire and instructed him to attempt to purchase drugs from various individuals.

According to Parker, he initially approached the appellant's brother, Ronnie Callahan, for the purpose of purchasing cocaine. Ronnie referred Parker to Shawn Callahan who lived in the same apartment complex as Ronnie. As Parker waited in the parking lot of the apartments, Ronnie went to get Shawn. They both returned after a short while and Shawn retrieved several "rocks" of "crack" cocaine from his automobile. Parker selected one of the "rocks" and gave Shawn twenty dollars in exchange for the substance. Since Parker knew Shawn Callahan only as "Splash" he noted the make, model, and license tag number of the automobile from which Shawn had retrieved the cocaine for purposes of identification. The next morning, Parker selected Shawn Callahan from a photographic lineup as the person who had sold the cocaine to him.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN NOT PROVIDING THE

DEFENDANT WITH A TRANSCRIPT FROM THE PREVIOUS MISTRIAL?

Callahan's first trial ended in a mistrial because the jury was unable to return a verdict. Appellant's first argument asserts a Constitutional violation based on the fact that he was not given a transcript of the mistrial. In support of his argument, appellant cites *Britt v. North Carolina*, 404 U.S. 226 (1971). In *Britt*, the Court held that:

[T]he State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.

Britt, 404 U.S. at 227.

The issue in *Britt* was whether the defendant actually needed the transcript of his prior mistrial for an effective defense. The Court established a two-prong analysis for determining this issue. First, the transcript must be of value to the defendant in connection with the appeal or trial for which it is sought. Second, the court must consider whether there are available any alternative devices that would fulfill the same function as a transcript. *Id.*

The Court determined that the defendant is not required to make a particularized showing of need and stated that it has:

consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of a particular case . . . [and that] even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses.

Britt, at 228.

In analyzing the availability of adequate alternatives, the Court noted that "the second trial was before the same judge, with the same counsel and the same court reporter, and the two trials were only a month apart." *Id.* The trial judge had suggested that under these circumstances, the defendant's memory and that of his counsel would be an adequate substitute for a transcript. *Id.* Additionally, the trial judge pointed out that the defendant "could have called the court reporter to read to the jury the testimony given at the mistrial, in the event that inconsistent testimony was

offered at the second trial." *Id.* at 229. The court declined to accept this reasoning by stating that it "rejected the suggestion that in order to render effective assistance, counsel must have a perfect memory or keep exhaustive notes of the testimony at trial. Moreover, we doubt that it would suffice to provide the defendant with limited access to the court reporter during the course of the second trial." *Id.* The Court did, however, find that an adequate alternative did exist because counsel for the petitioner conceded the point during oral argument when he admitted that he could have received far more assistance from the court reporter than was available to the ordinary defendant. The court reporter was a friend of defendant's counsel and "would at any time have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request." *Id.* As a final point of clarification, the Court stated that "[a] defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight. Stated another way, the State bears the burden of proving that adequate alternatives exist for the defendant." *Britt*, at 230.

In *McClendon v. State*, 387 So. 2d 112 (Miss. 1980), the defendant's trial ended in a mistrial and his counsel at that time requested a transcript which the trial judge denied. At the start of the second trial, counsel for the defendant asserted a claim of double jeopardy. After the plea was denied, counsel announced ready for trial. During the course of the second trial, another request for a transcript was made and denied. The court held that "[w]hile the trial judge may have technically erred in the first trial in denying the motion for the transcript, we are of the opinion it did not prejudice the defendant in this trial because his counsel had equal knowledge with the State's attorney of the events of the first trial. Moreover, he announced ready for trial and only renewed his motion for the transcript after the trial was underway." *Id.* at 115. This decision rests not only on a finding of lack of prejudice to the defendant, but also upon the untimely request for the transcript. *Britt* and subsequent Fifth Circuit opinions support an interpretation that we may assume prejudice unless there is an adequate alternative available to the defendant. Therefore, our analysis focuses on whether a transcript must be requested in a timely manner.

The State argues that Callahan was not entitled to a transcript in this case and cites as authority *Fisher v. State*, 532 So. 2d 992 (Miss.1988). In *Fisher*, the defendant requested a transcript from a *related* trial which resulted in an acquittal. The court held that the rule in *Britt* applies only where there is a request for transcripts of prior proceedings in the *same* case. *Id.* at 999. Where there is a request for a transcript from a related case, the defendant must show some particularized need for them other than the possibility of overlapping evidence. Clearly, the decision in *Fisher* is inapplicable to this case because here, we are dealing with a request for a transcript of a prior proceeding in the same case, not a related case. *Fisher v. Hargett*, 997 F.2d 1095, 1097-1100 (5th Cir. 1993).

The State also cites *Lewis v. State*, 580 So. 2d 1279 (Miss. 1991) as authority for the proposition that Callahan was not entitled to a transcript in this case. In this case also, the first trial ended in a mistrial. The second trial was scheduled two weeks after the first trial ended. Although the court offered to continue the case, the defendant wished to have the retrial as soon as possible because he had been incarcerated from the time the crime had occurred. Furthermore, counsel for the defendant did not request a transcript of the previous trial until after the second trial had begun. Therefore, it appears that the defendant in *Lewis* waived his right to a transcript by neither moving for a continuance nor requesting the transcript before the beginning of the second trial.

In the case sub judice, Callahan did request a continuance at the end of the first trial, but did not offer any reason at the time of why he was requesting one. Moreover, immediately prior to the start of the second trial, counsel did again move for a continuance but gave as a reason the fact that he had recently discovered that charges were pending against his client in another county and he needed additional time to negotiate with the State concerning these charges. The State objected to the continuance by asserting that counsel had agreed to try the case on that date. Only then did Callahan's counsel mention the desire for a trial transcript. He did so by stating that this was the reason he requested a continuance after the first trial, although he gave no reason at the time. It is worth noting that this request was made subsequent to counsel's discovery that the defendant was not present at the start of trial.

The Fifth Circuit, in *United States v. Smith*, stated that neither the Supreme Court nor the Fifth Circuit has ever established that "the mere request for a transcript by an indigent imposes a constitutional duty on the trial court to order it prepared. Only 'differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.'" *United States v. Smith*, 605 F.2d 839, 843 (5th Cir. 1979) (citations omitted). We likewise find that a trial court has discretion to deny an indigent defendant's last minute request for a transcript. It is proper that such discretion include consideration of the timing of the defendant's request as well as whether the defense counsel is trying to gain some tactical advantage by requesting the transcript for the purpose of causing delay. Thus, it was not reversible error in this case for the trial court to refuse defendant's last minute request for a transcript.

II. WHETHER THE COURT ERRED IN NOT REQUIRING THE STATE'S WITNESS TO STATE HIS CURRENT ADDRESS, THEREBY LIMITING CROSS EXAMINATION?

Appellant's second argument asserts a violation of the Sixth Amendment because the prosecution's key witness, an undercover agent, was not required to divulge his home address on cross examination. The Fifth Circuit addressed this same issue at length in their decision in *United States v. Alston*, 460 F.2d 48 (5th Cir. 1972). The facts of that case are almost identical to those before us. An undercover agent, who was instrumental in the arrest of the defendant, testified at trial and was subject to cross-examination. "The only information regarding his background that [the agent] refused to divulge on the stand was his home address." *Id.* at 50. Our decision regarding this matter parallels their well-reasoned approach to the issue. In *Alston*, the Fifth Circuit found that:

The question before this court is whether or not [the defendant's] Sixth Amendment right to confront the witness [undercover agent] was abridged in the circumstances of this trial by the trial judge's failure to require the witness to divulge his home address. The strength of [the defendant's] proposition rests entirely on two Supreme Court decisions, *Alford v. United States*, 282 U.S. 687 (1931) and *Smith v. Illinois* 390 U.S. 129 (1968). Finding those decisions inapposite to the circumstances of this case, we conclude that [the agent] was not required to divulge his home address.

It is true, as [the defendant] urges that both *Alford* and *Smith* reversed criminal convictions because the home address of a witness was not divulged. But it appears to us that the purpose of *Alford/Smith* was to safeguard the opportunity for a meaningful and open cross-examination, not to require that a witness always divulge his or her home address. *Alford* and *Smith* do not erect a per se requirement that a witness' home address be divulged on demand:

"The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgement in determining when the subject is exhausted. . . . There is a duty to protect him [the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him."

Alford v. United States, 282 U.S. at 694, reaff'd *Smith v. Illinois*, 390 U.S. at 133.

The critical question is not simply whether or not the witness has divulged his home address, . . . but whether or not the defendant has been given sufficient "opportunity to place the witness in his proper setting". . . . Thus, while a witness would normally be required to answer all questions regarding his or her background, there are exceptions to that requirement. . . . We think that a reasonable interpretation of this area of exception . . . to the usual requirement that the witness divulge background information would include an instance in which the physical safety of the witness or his family might be endangered by the disclosure.

Alston, 460 F.2d at 51, 52 (citations omitted).

In the instant case, Gordon Parker was identified as an undercover agent. There was considerable testimony as to his work as an undercover agent as well as the fact that he was in the military and was stationed at Keesler Air Force Base. Parker also revealed his address at the time of Callahan's arrest and stated that he now currently resided in Cleveland, Mississippi. He also stated that he was currently involved in another undercover operation and that his address depended on the operation he was currently involved with. Furthermore, Parker testified as to prior undercover operations he was involved in with other law enforcement agencies. We find that, for the purposes of the Sixth Amendment, a witness may be sufficiently "placed" by disclosure of his occupational background and current circumstances. Therefore, we hold that the trial judge did not abuse his discretion in allowing Parker to refuse to divulge his home address.

III. WHETHER THE COURT ERRED IN REFUSING DEFENDANT'S ALIBI INSTRUCTION?

Appellant's third assignment of error is the court's refusal to submit defendant's alibi instruction. The decision in *Sanford v. State*, 372 So. 2d 276 (Miss. 1979) establishes that an alibi instruction, like all other instructions, must be supported by sufficient and credible evidence. A defendant's claim that he was not present at the crime, where not supported by a scintilla of evidence, does not rise to the level sufficient to support an instruction of alibi. In *Sanford*, there was neither evidence nor testimony which corroborated the defendant's claim that he was home during the time the crime was committed. In the case before us, not only is Callahan's claim that he was not present at the crime uncorroborated, it is directly contradicted. We conclude that the trial court did not err in refusing the alibi instruction where it lacked evidentiary support.

IV. WHETHER THE COURT ERRED IN FORBIDDING DEFENSE COUNSEL FROM REFERRING TO THE STATE'S WITNESSES AS LIARS?

Finally, Appellant asserts that the court erred in forbidding defense counsel from referring to the State's witnesses as liars. Callahan relies on *Shell v. State*, 554 So. 2d 887 (Miss. 1989) to support his claim that it was permissible for the defense to refer to the State's witnesses as liars. We disagree because the facts in *Shell* are distinguishable from those in this case. In *Shell*, the defendant had given no less than three different accounts of the crime to the Sheriff's Department. The Court stated that:

Under the circumstances, it is understandable that the prosecutor would feel justified in calling Shell a liar.

Shell himself admitted on the stand that he had lied on more than one occasion about key facts. The prosecutor's comments were in response to evidence and testimony presented in the case, and he was allowed to draw reasonable conclusions from them.

Shell, 554 So.2d at 899-900.

There is no evidence in the record to support the characterization of Gordon Parker, or any other person involved with the case on behalf of the State, as liars other than Parker's admission that he concealed his true identity in his work as an undercover agent. Because of the nature of their work, undercover operatives must be able to assume an alternative identity to gain the confidence of those involved in the illegal drug trade. It is an obvious fact that such a misrepresentation is required if they are to achieve any measure of success in their efforts to stop those engaged in drug activity. No one involved in illegal drug activity would deal with someone known to be an undercover law

enforcement officer. Counsel for the defense was in no way restricted to argue that the State's witness had misrepresented his name, identity and his ultimate purpose for purchasing drugs from Callahan. In view of the trial court did not err in refusing to allow counsel for the defense to characterize the State's witness as a liar.

THE JUDGMENT OF THE HANCOCK COUNTY CIRCUIT COURT OF CONVICTION OF TRANSFER OF A CONTROLLED SUBSTANCE AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST HANCOCK COUNTY.

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