

**IN THE COURT OF APPEALS 08/06/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-KA-00028 COA**

**MADISON HANDFORD, 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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: SCOTT COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JERRY L. BUSTIN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN

DISTRICT ATTORNEY: J. KENNEDY TURNER

NATURE OF THE CASE: CRIMINAL - DELIVERY OF COCAINE

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO 13 YEARS IN THE  
CUSTODY OF THE MDOC WITH 3 YEARS SUSPENDED UPON SERVING 10 YEARS AND  
PAYMENT OF \$5,000 FINE.

BEFORE THOMAS, P.J., BARBER, KING, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

Madison Handford, Jr. was indicted and convicted of delivery of cocaine in violation of section 41-29-139(a)(1) of the Mississippi Code. He was sentenced to thirteen years in prison with three years suspended upon serving ten years and payment of a \$5,000.00 fine. On appeal, Handford raises the following issues:

I. WHETHER THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE A SELF-INCRIMINATING STATEMENT MADE BY THE DEFENDANT

II. WHETHER THE TRIAL COURT ERRED IN DENYING A CONTINUANCE WHEN A DEFENSE WITNESS WHO HAD NOT BEEN SUBPOENAED FAILED TO APPEAR

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPEACH THE TESTIMONY OF THE WIFE OF THE ACCUSED

Finding no error in the proceedings below, we affirm the decision of the trial court.

#### FACTS

Handford was convicted of selling cocaine to an undercover agent. In addition to the testimony of the agent, who was wearing a body wire, the State presented testimony from other law enforcement officials who were listening to the transaction from a nearby car. The State also presented a statement made by Handford to the arresting officer that he was selling drugs because he could not get on welfare and that he had to make a living.

#### ANALYSIS

I. WHETHER THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE A SELF-INCRIMINATING STATEMENT MADE BY THE DEFENDANT

While Handford was being processed after his arrest and after his *Miranda* warnings had been given, the arresting officer asked Handford "What is a person your age doing selling dope?" According to the officer, Handford replied by stating that because he had property, he could not receive welfare benefits, and he had to make a living. Handford now assigns the admission of this statement as a two-fold error. First, he claims it was error to admit the statement because it was made during the taking of "personal history"; hence it should not be used against him. Second, Handford claims that the officer was allowed to interpret the meaning of his statement as a confession without being qualified as an expert witness to do so.

Handford cites no authority in support of the proposition that a statement freely given subsequent to valid *Miranda* warnings should be suppressed because the statement was given while the officer was taking the personal history. In such an instance, suppression would not be compelled by *Miranda*.

Handford does not claim that the statement was made under duress or that his admissions were obtained by threats or promises were given. If an arrestee is informed of his rights, and if upon review of the totality of the circumstances it is determined that these rights were scrupulously observed, and the statement was not obtained as a result of force, threats, coercion or promises, then the threshold requirements of a voluntary confession is satisfied. *Lanier v. State*, 450 So. 2d 69, 74 (Miss. 1984) (citing *Brown v. Illinois*, 422 U.S. 590 (1975)). Even though eventually an objection was made on the ground that the confession was involuntary, Handford did not testify that the statement was involuntary. Rather, he testified that the statement was never made. This creates a question of credibility, not admissibility. Once a determination of voluntariness is made by the trial court, the question of whether the statement was in fact made is a question for the jury. *Redmond v. State*, 457 So. 2d 1344 (Miss. 1984). A conflict between the testimony of a defendant and an officer as to whether the defendant did in fact make a statement attributed to him creates a fact issue for the jury. *Weathers v. State*, 237 So. 2d 441 (Miss. 1970). This aspect of Handford's argument is without merit.

Handford also claims that the officer improperly "interpreted" his statement as a confession. As authority he cites *Frierson v. State*, 606 So. 2d 604 (Miss. 1992), which we find is inapplicable here. In *Frierson*, a police officer interpreted the wording, "package we talked about," in a note written to the defendant to be a reference to marijuana. There was no other evidence presented that the note referred to marijuana. The court in that case determined that the officer was not qualified as an expert to make that interpretation.

The officer in this case did not make such an interpretation. He asked Handford why a person his age was selling dope, and Handford told him that it was because he could not get on welfare and had to make a living. This statement is clear and needs no interpretation. The witness merely repeated to the jury what the Defendant had said. The above assignment of error is without merit.

## II. WHETHER THE TRIAL COURT ERRED IN DENYING A CONTINUANCE WHEN A DEFENSE WITNESS WHO HAD NOT BEEN SUBPOENAED FAILED TO APPEAR

Handford assigns as error the trial court's denial of a motion for continuance filed after the defense realized on the morning of trial that two witnesses were not present. The case law submitted by Handford does not support this contention. Handford cites *Ross v. State*, 603 So. 2d 857 (Miss. 1992) as authority for his position. This case, however, involves the procedure that should be followed by the trial court when the defense is surprised by undisclosed evidence. There was no discovery violation in this case. Instead, the "surprise" complained of was occasioned by the non-appearance of two witnesses for the defense.

The trial judge made his decision not to grant the continuance because 1) the motion for continuance was not in the right form and 2) the missing witnesses were never subpoenaed. We have no way of

determining whether or not the trial court was correct in finding that the continuance was not in proper form because Handford failed to ensure that it was included in the record. In *Smith v. State*, 572 So. 2d 847, 849 (Miss. 1990) the court stated:

As we have said above, it was [the] appellant's duty to support his assignments of error with a proper record. This is no mere formality; the trial court's rulings are presumed to be correct in this court, appellant having the burden to show error in them of reversible proportion. Without a showing of what the trial court considered and the reasons for its ruling, it is simply impossible to gauge whether its ruling was correct or not. The result of appellant's failure to present a full record here is that the presumption of correctness stands un rebutted--appellant fails to carry his burden of proof.

The analysis in this case is the same as that in *Smith*. Because the motion was not included in the record, we are left with only the trial court's finding that the motion was not in the proper form. We must presume this finding to be correct.

It is well settled that we will not hold a trial court in error for denying a continuance for the purpose of obtaining a missing witness where no subpoena was requested to assure the witness' attendance at trial. See *Pinson v. State*, 518 So. 2d 1220 (Miss. 1988); *Worthy v. State*, 308 So. 2d 921 (Miss. 1975); *Lee v. State*, 70 So. 2d 609 (Miss. 1954).

In the case at bar, the trial had been scheduled for several months, yet the defense made no attempt to place the witnesses under subpoena. The trial judge correctly noted this in denying the continuance. On appeal, Handford asserts that the witnesses were in fact subpoenaed. Upon careful review of the clerks papers, however, it appears that the only subpoenas issued were issued in a related case on November 18, 1992 for cause number 4352. This request for subpoenas was made more than one month after the conclusion of the present case which was cause number 4351. This assignment of error is without merit.

### III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPEACH THE TESTIMONY OF THE WIFE OF THE ACCUSED

Handford asserts that it is reversible error to allow the State to impeach the accused's wife by referring to an alleged crime which was the subject of a second indictment against Handford where the alleged wrongful acts referred to occurred five months after the date of the crime on trial. The trial court allowed this line of questioning as rebuttal to Mrs. Handford's testimony on direct examination that to her knowledge, her husband had never dealt in drugs. The trial judge found that the defense had "opened the door" to this line of questioning on direct. Mrs. Handford's testimony on direct was as follows:

Q: Now, they have said that he sold drugs for a living. Do you know anything about him selling drugs?

A: No, I don't.

Q: Has he sold drugs while you have been living with him?

A: Not that I know of. (R. 62)

....

Q: Have you ever at any point in time, seen anyone coming there exchanging money for drugs?

A: No, I have not.

Q: Has your husband mentioned selling crack cocaine, or any illicit drugs?

A: Not to me that I know of.

Q: Have you seen any there that he has exchanged money for?

A: Not that I know of. (R. 63)

Handford's attorney, Mr. Bustin, asked these questions on direct examination and elicited the above answers. Bustin did so knowing that Mrs. Handford was present when narcotics agents and the Scott County Sheriff's Department searched Handford's home on May 29, 1992 and found cocaine, and when her husband was arrested on the subsequent charge.

Handford relies on *Hewlett v. State*, 607 So.2d 1097, 1103 (Miss. 1992), which cites Mississippi Rule of Evidence 404(b): "Evidence of other crimes, wrongs, or acts are not admissible to prove character and that the person acted in conformity with that character, . . . although it is admissible to show . . . plan, knowledge, identity, of absence of mistake or accident." It is true the evidence that cocaine was found in Handford's house five months subsequent to the time of his arrest on this charge would not have been admissible in the State's case in chief under the provisions of Rule 404(b). When, however, evidence of his character, (i.e. that he had never been involved in the sale of cocaine) was introduced by his wife's testimony, the State's rebuttal testimony became admissible.

Evidence of the character of the accused is admissible under Rule 404(a)(1) of the Mississippi Rules of Evidence, when it is "evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same." M.R.E. 404(a)(1). Rule 405(a) states that in situations where character evidence is allowed, proof may be made on cross examination by inquiry into relevant specific instances of conduct. The comment to Rule 405 states that "[t]here are two sound reasons for permitting this type of cross-examination. If the witness on cross-examination professes no knowledge about specific acts, his qualifications to state opinion or reputation are impugned. If the witness admits knowledge of specific bad acts, then he has been impeached." M.R.E. 405 cmt. As the court found in *Rowe v. State*, 562 So. 2d 121, 123 (Miss. 1990):

The defendant in a criminal case may offer his good character to evidence the improbability of his doing the act charged. Miss. R. Evid. 404(a)(1); . . . The prosecution may then offer evidence of a pertinent trait to rebut the same. Miss. R. Evid. 404(a)(1).

The prosecution may not offer evidence of the accused's character unless and until the accused has raised the issue by offering evidence of his good character. If and when the accused has raised the issue of his character, the prosecution may then offer evidence of the accused's bad character.

In applying both the rules of evidence and the logic in *Rowe* to this case, we find that where the Defendant's wife testified that she had no knowledge of his ever being involved in drug sales or of drugs being kept in their home, the prosecution was correctly permitted to rebut those statements by showing that she did have such knowledge and that she was present when drugs were found. The cross-examination was directly related to Mrs. Handford's contradictory testimony that she had never seen drugs at their house and had never known her husband to be involved in drug sales.

There was no error in allowing the State to impeach the witness by showing the contradiction in her testimony.

**THE JUDGMENT OF THE SCOTT COUNTY CIRCUIT COURT OF CONVICTION OF DELIVERY OF COCAINE AND SENTENCE OF THIRTEEN (13) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THREE (3) YEARS SUSPENDED WITH CONDITIONS AND TO PAY A FINE OF \$5,000.00 IS AFFIRMED. COSTS ARE ASSESSED AGAINST SCOTT COUNTY.**

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