

**IN THE COURT OF APPEALS 09/03/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 92-KA-01255 COA**

**WILLIAM BERNARD JACKSON AND DANIEL OUTLAW**

**APPELLANTS**

**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. GRAY EVANS

COURT FROM WHICH APPEALED: HOLMES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

JAMES H. POWELL, III

STEVEN E. FARESE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS, SPECIAL ASSISTANT ATTORNEY GENERAL

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: CRIMINAL-FELONY

TRIAL COURT DISPOSITION: DEFENDANT JACKSON--AS TO COUNT I, CONSPIRACY,  
20 YEARS IN MDOC; AS TO COUNT II, SALE OF COCAINE, 30 YRS CONSECUTIVE.  
WITH COUNT I AND \$25,000 FINE AND HALF COURT COSTS; DEFENDANT OUTLAW--

COUNT I, CONSPIRACY; AS TO COUNT II, SALE OF COCAINE-10 YEARS IN CUSTODY OF MDOC AS A HABITUAL OFFENDER WITHOUT PAROLE

BEFORE BRIDGES, P.J., KING, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This case is before this Court on the separate appeals of William B. Jackson and Daniel Outlaw from their convictions in the Circuit Court of Holmes County. These defendants were indicted and tried jointly on two counts of drug-related crimes. One count alleged their joint participation in the sale of a quantity of crack cocaine to an undercover drug agent, and the other count alleged that these two defendants entered into a conspiracy to sell cocaine.

Each defendant raises separate issues in his appeal. We have considered the issues and the arguments presented in support of them and have determined that there is no basis to disturb the convictions. We, therefore, affirm as to the convictions on all four counts. Each of the issues raised on appeal will be separately discussed. There is, additionally, a jurisdictional issue in the matter of Jackson's appeal that we will dispose of preliminarily.

I.

Jurisdiction to Consider Jackson's Appeal on the Merits

Jackson was sentenced on October 12, 1992, and filed a new trial motion on November 3, 1992. His first notice of appeal was filed on November 17, 1992, prior to the resolution of the new trial motion. The applicable procedural rules are quite clear that a "notice of appeal filed before the disposition of [a new trial motion] shall have no effect." Miss. Sup. Ct. R. 4(e). The trial court conducted a hearing on the new trial motion on December 14, 1992. The record indicates that the motion was denied in an oral pronouncement from the bench on that date; however, no written order denying the motion was ever entered. There is no question that our procedural rules contemplate the entry of a written order disposing of such post-trial motions. Rule 4(e) states that "[a] new notice of appeal must be filed within the prescribed time *measured from the entry of the order disposing of the motion . . .*" Miss. Sup. Ct. R. 4(e) (emphasis supplied).

On January 29, 1993, Jackson's trial counsel filed a motion for leave to withdraw as counsel of record and sought court authority to "allow defendant thirty days from the date of his withdrawal to employ new counsel to perfect his appeal." The trial court, in an order dated January 28, 1993, and entered on February 3, 1993, granted Jackson thirty days from "the date of this order to perfect his appeal." On February 3, 1993, Jackson's trial counsel filed a second notice of appeal. Finally, a third notice of appeal was filed by Jackson's appeal counsel on March 1, 1993.

The trial court does not have unlimited discretion to extend the time for perfection of an appeal. That authority is limited to that given by Rule 4(g), which permits an extension in two situations. *See* Miss. Sup. Ct. R. 4(g). In the first instance, a party may, prior to the expiration of the original thirty-day

period, obtain an ex parte extension "for good cause." Miss Sup.Ct. R. 4(g). Alternatively, a party may, in the thirty days following the expiration of the original thirty-day appeal period, obtain an extension, but only upon notice to other parties. This second form of extension "shall be granted only upon a showing of excusable neglect." Miss. Sup. Ct. R. 4(g). The trial court is limited as to the additional time that may be allowed for perfecting the appeal in either instance. "No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later." Miss. Sup. Ct. R. 4(g).

The lack of an order denying relief on Jackson's post-trial motion is troubling. Procedural rules, though they may at times seem formalistic and arbitrary, serve a valuable purpose of providing for the orderly administration of our justice system. When they are disregarded, unnecessary difficulties inevitably arise. In these circumstances, we have, out of necessity, elected to regard December 14, 1992, as the date for computation of the thirty-day appeal time. Thus, considering the original notice to be of no effect, we see that the thirty-day appeal period expired on January 13, 1993. No notice was filed during that period, and there was no motion filed seeking to extend the time "for good cause" as contemplated by Rule 4(g). Thereafter, the rules provided Jackson an additional thirty days to file a motion to extend the time "only upon a showing of excusable neglect." Miss. Sup. Ct. R. 4(g). Jackson's motion, though filed within this thirty-day window, did not allege such neglect, and neither did the trial court's order find any such neglect. Also, Rule 4(g) prohibits the grant of extension of time beyond "30 days past [the original appeal time] or 10 days from the date of entry of the order granting the motion, whichever occurs later." *See* Miss. Sup. Ct. R. 4(g). Thirty days past the original appeal time would have expired on February 14. Ten days from the date of entry of the extension order coincidentally expired the same date. The trial court's order purported to extend the appeal period until February 28, which was beyond the authority of the court under the rules. It is true that Jackson's second notice was filed prior to February 14, the outer limit of the trial court's authority to extend the appeal time. This raises the question of whether an order extending the time for an act to be done to a point beyond that authorized by law is a nullity or will be interpreted to have extended the period to the maximum extent permitted by law.

It is evident that there are substantial procedural problems in regard to this Court's jurisdiction to consider the merits of Jackson's appeal. The State, for reasons which do not appear in the record, has not raised these issues. Nevertheless, it is basic law that the parties may not confer jurisdiction by agreement or waiver. *Mississippi State Highway Comm'n v. First Methodist Church*, 323 So. 2d 92, 95 (Miss. 1975) (citations omitted); *Brown v. Thomas*, 230 Miss. 308, 310, 92 So. 2d 878, 879 (1957). We conclude that Jackson's January 29 motion did not comply with the provisions of Rule 4(g), and that it was error for the trial court to grant any extension of time absent an allegation and showing of excusable neglect in failing to refile a notice of appeal within thirty days from the December 14 denial of the new trial motion. Thus, on the face of the record, this Court is without jurisdiction to consider Jackson's appeal.

However, upon review of the comments to Rule 2, we have concluded that it is within the authority of this Court to suspend the rules "to prevent manifest injustice." Miss. Sup. Ct. R. 2 cmt. We have, upon due consideration, decided that the interests of justice would be best served by suspending the strict application of Rule 4 and considering the February 3, 1993, notice, though not technically timely, as vesting jurisdiction in this Court to consider Jackson's appeals on the merits. We do so only reluctantly and in the face of the contrary admonishment of the comment to Rule 2 that

"compliance with even the most technical requirements of the rules is encouraged." Miss. Sup. Ct. R. 2 cmt.

## II.

### The Facts

A group of three individuals, including the police chief of the Town of Cruger, operating undercover, set about on the evening of December 19, 1991, to attempt to purchase illegal drugs. The three were in an unmarked brown van with Chief Wesley Wright concealed in the back. On the parking lot of a local store they were approached on foot by an individual subsequently identified to be the defendant Outlaw. One of the undercover agents indicated to Outlaw a desire to purchase drugs. Outlaw suggested that they wait for a while and that a friend would arrive who could help them out.

Some time later, an automobile arrived, and Outlaw approached the car. The driver handed Outlaw a matchbox which he, in turn, brought over to the van and gave to the undercover agent. The box contained a crystallized substance later chemically identified as crack cocaine. The agent gave Outlaw fifty dollars to complete the purchase, and Outlaw delivered the money to the driver of the vehicle.

Chief Wright, while not revealing his presence, was able to obtain a view of both Outlaw and the driver of the vehicle. He positively identified Outlaw and also was able to identify the driver of the vehicle as the defendant Jackson. The two undercover agents did not know either of the defendants by name at the time of the purchase. The defendants were not arrested at the scene, but were arrested the next day.

## III.

### Jackson's Appeal

Jackson raises four issues on appeal, which we will consider in the same order as presented

in Jackson's brief.

### A.

#### The Jury Instruction Regarding the Sale of Cocaine

Jackson claims reversible error in the granting of an instruction setting out the elements of the crime of sale of cocaine. The basis of the attack is that the instruction "was not supported by competent evidence and was contrary to the overwhelming weight and sufficiency of the evidence." This argument appears nothing more than a back-door attempt to raise the issues of the weight and sufficiency of the evidence supporting the verdict on this count in view of the fact that Jackson did

not test the sufficiency of the evidence by requesting a directed verdict or a JNOV at the trial level, nor did he test the weight of the evidence in his new trial motion. The challenged instruction accurately stated the essential elements of the crime, and there was competent evidence offered by the prosecution as to the commission of each such element by Jackson. It was not error to grant this instruction.

The thrust of Jackson's argument appears to be that the indictment charges a sale to the named undercover agent, and the proof shows only that Jackson handed the drug to Outlaw without any evidence that Jackson knew Outlaw intended to deliver the drugs to the undercover agent. The record indicates that the entire transaction occurred in the space of just a few minutes during a time that the two vehicles were in plain sight of each other, and that Outlaw delivered the proceeds of the sale to Jackson immediately after the sale was concluded. To say that there is no merit to Jackson's argument is an understatement.

Jackson advances another related argument under this same issue on appeal. He claims that there was a fatal variance between the indictment and the proof. Again, he relies upon the proposition that the proof shows only that Jackson delivered the matchbox containing the drug to Outlaw and not to the undercover agent, but that he was charged with a sale to the agent. It is one of the most fundamental concepts of criminal law that it is not necessary, in all cases, that the accused physically carry out every act constituting the offense in order to be convicted. It is sufficient to convict all participants as principals where a number of persons acting in concert, all evidencing the necessary criminal intent, jointly accomplish all of the elements of the crime. *Callahan v. State*, 419 So. 2d 165, 170 (Miss. 1982).

The evidence in this case was more than sufficient to support an inference that Jackson was an active participant in the sale to the undercover agent, even though the actual delivery was made by his accomplice, Outlaw. This issue is without merit.

B.

#### The Jury Instruction Regarding Conspiracy

Again, Jackson attempts to use the vehicle of attacking an instruction to challenge the weight and sufficiency of the evidence supporting his conviction, since a direct attack has been procedurally foreclosed to him. He does not claim that the instruction incorrectly states the elements necessary to convict him of conspiracy to sell a controlled substance. Rather, he claims only that there was not sufficient, competent evidence to support the issuance of the instruction.

The evidence for the prosecution showed that Outlaw, through his unsolicited inquiry, became aware of the desire of the undercover agent to purchase illicit drugs, and that Outlaw thereupon indicated that, through an associate, he would be able to fulfill that desire in a short while. Jackson's subsequent appearance in accordance with Outlaw's prediction, and the ensuing transaction, would easily support a reasonable inference by the jury that Jackson's appearance was not coincidental, but was a part of a prearranged plan to accomplish a sale. It was not necessary to show that Jackson was aware of the exact identity of potential customers arranged by Outlaw prior to Jackson's arrival on

the scene. It is sufficient to convict for the crime of conspiracy to show "a common design or understood purpose between the parties to commit the crime." *Davis v. State*, 485 So. 2d 1055, 1058 (Miss. 1986).

C.

#### Ineffective Assistance of Counsel

Jackson's new attorneys on appeal assert on his behalf a claim that his representation at trial was so deficient as to violate his Sixth Amendment right to assistance of counsel. Jackson recites in his brief a litany of twelve instances where he would have us now hold that his trial counsel's performance was deficient. In another instance he catalogues thirteen failings by trial counsel.

We review this challenge to the jury verdict under the now well-established guidelines of *Strickland v. Washington*, 466 U.S. 668 (1984). That case established a two-prong test to evaluate a claim of ineffective assistance of counsel. First, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 690. Secondly, the defendant must demonstrate that there is a reasonable probability that, but for counsel's failings, the result of the proceeding would have been different. *Id.* at 694.

We conclude that a substantial number of the alleged failings of trial counsel are simply without merit on their face. More importantly, we observe that Jackson has failed in his brief to advance any argument to support a finding that, had these alleged failings of trial counsel not occurred, there was a reasonable probability that the result would have been different. The *Strickland* case teaches us that, in making such an evaluation, an appellate court must be convinced that "[a] reasonable probability [of a different result] is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Jackson relies on the proposition that the failings were so egregious that there was a presumption of prejudice. We respectfully disagree. In assessing the effect of counsel's performance on the outcome of the trial, we are directed to "consider the totality of the evidence before the judge or jury." *Id.* at 695. The proof of guilt in this case was overwhelming. None of the alleged failings of Jackson's trial counsel, had they not occurred, would have led to the exclusion of any direct evidence of the crime itself. This direct evidence strongly pointed to Jackson's guilt. We conclude that Jackson's ineffective assistance claim fails to meet the second prong of the two-part *Strickland* test. *See, e.g., Wiley v. State*, 517 So. 2d 1373, 1378 (Miss. 1987) (citations omitted).

D.

#### The Issue of Severance

Jackson claims reversible error in the trial court's failure to grant his motion for severance. The decision to grant severance in a non capital case lies within the sound discretion of the trial court. *Rigby v State*, 485 So. 2d 1060, 1061 (Miss. 1986) (citations omitted). There are two primary areas

where the supreme court has indicated an abuse of discretion in denying a severance motion may occur.

First, where there is a significant imbalance in the evidence pointing toward the guilt of one co-indictee, severance is indicated to prevent a possible injustice to other defendants who might be unduly prejudiced by damaging evidence that does not directly implicate them. *Gossett v. State*, 660 So. 2d 1285, 1289 (Miss. 1995) (citing *Duckworth v. State*, 477 So. 2d 935, 937 (Miss. 1985)). Secondly, when the evidence supporting the innocence of one co-indictee tends to implicate the remaining defendants, severance should normally be granted. *Id.*

In this case, the primary defense of both defendants was simply that the allegations were untrue. Both attempted to prove that they were not at the location where the sale took place at the critical time, but their explanations as to where they were did not conflict with each other nor, in any way, tend to place the other at the scene. The trial court was not manifestly in error in declining to grant severance due to conflicting defenses.

Jackson argues alternatively that the great weight of the State's evidence implicated Outlaw, but not him. The fact that Outlaw negotiated the transaction and carried out most of the physical acts associated with the drug transaction does nothing to diminish the proof implicating Jackson. He was shown to be present at the scene, to have personally given the illicit drugs to Outlaw for delivery to the undercover agent, and to have immediately thereafter received the proceeds from the sale. The weight of the direct evidence implicating Jackson in this transaction was substantial, and not significantly distinguishable from that against Outlaw. There was no abuse of discretion on this theory.

#### IV.

##### Outlaw's Appeal

Outlaw raises three issues, only one of which bears any relation to the issues raised by his co-defendant Jackson. We will address them in the order presented in Outlaw's brief.

#### A.

##### Challenge for Cause of Juror Carnathan

During voir dire, potential juror Carnathan, in response to inquiries concerning relationships with law enforcement, revealed that he was a federal game warden. He further indicated that, in the course of his duties, he had occasion to work with local law enforcement officers, including the county sheriff, and that two Lexington police officers worked for him on a part-time basis.

Outlaw attempted to challenge Carnathan for cause, but the trial court refused to remove Carnathan from the panel. Outlaw and Jackson had exhausted their peremptory challenges before Carnathan was reached, and, as he was not peremptorily challenged by the prosecution, he became a member of the

jury to try the case. The county sheriff testified as a rebuttal witness for the prosecution concerning the results of a search of Jackson's residence after the defendants were arrested and to certain statements made by Jackson concerning items found as a result of the search. Outlaw now claims that the trial court committed reversible error in refusing to excuse Carnathan for cause because of his professional relationship with the sheriff, and "[e]ven without Sheriff March, however, Carnathan's duties in law enforcement alone should have been enough for the Court to grant Outlaw's challenge for cause."

This Court can reverse for the trial court's failure to excuse a prospective juror for cause only upon a finding that the trial court committed an abuse of discretion. *Billiot v. State*, 454 So. 2d 445, 454 (Miss. 1984). The grounds for excusing a potential juror for cause include challenges to the person's competency or impartiality. *Billiot*, 454 So. 2d at 457.

As to the second more general allegation by Outlaw, it is well established that a prospective juror's employment in the law enforcement field, standing alone, is not grounds for a challenge for cause in a criminal prosecution. *Walker v. State*, 671 So. 2d 581, 624 (Miss. 1995) (citations omitted).

As to the first allegation, we note that the voir dire failed to reveal the scope of the professional association between the local sheriff and juror Carnathan. We also note that Sheriff March was not a witness during the prosecution's case in chief and was called only as a rebuttal witness. His testimony did not go to the essential elements of the drug transaction itself. We conclude that there is not sufficient basis for this Court to conclude that juror Carnathan's inability to serve as an impartial juror was so evident on these facts that it was an abuse of discretion for the trial court to disallow Outlaw's challenge for cause. *See, e.g., Coverson v. State*, 617 So. 2d 642, 646 (Miss. 1993).

B.

#### Sheriff March's Testimony During the State's Rebuttal

Outlaw claims that the trial court committed reversible error when it permitted Sheriff March to testify on rebuttal for the State over Outlaw's objection that March had been in the courtroom during the trial in violation of Mississippi Rule of Evidence 615. This rule provides that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." M.R.E. 615 (emphasis supplied).

The short answer to this issue is that no party "invoked the rule" at the commencement of the trial, and the trial court did not invoke it on its own motion. Outlaw's argument that the rule of sequestration of potential witnesses has universally been observed in criminal trials in Holmes County does nothing to alter the fact that it was not in effect for the trial of this cause.

C.

The Trial Court's Failure to Grant A Mistrial Upon  
Disclosure of Outlaw's Previous Criminal Record

This is the only issue having a common thread with Jackson's issues raised on appeal, since Jackson listed it as one example of his trial counsel's ineptitude. During voir dire, Jackson's counsel made reference to Outlaw's previous criminal record. Outlaw's counsel immediately objected. At a bench conference, he also moved for a mistrial. The trial court denied the mistrial motion, but admonished the panel, stating:

Ladies and gentlemen of the jury, the Court will instruct you at the close of this case that, if the court instructs you to disregard something that was said, that you must disregard that statement entirely. Mr. Osborne [Jackson's counsel] has made a statement which he didn't intend to make and I ask you now to disregard that statement. Can you tell me that you will do so? . . . Forget that. That is not to be considered as a part of the basis on which you render an opinion. Is there anyone who cannot completely ignore that?

The record reflects that there was no affirmative response from the venire panel, and the process of voir dire continued. Outlaw admits the law to be that the trial judge is in the best position to determine whether an objectionable comment requires a mistrial or can be cured by proper admonishment to the jury. *Alexander v. State*, 602 So. 2d 1180, 1182-83 (Miss. 1992); *Johnson v. State*, 477 So. 2d 196, 210 (Miss. 1985), *overruled in part on other grounds by Clemons v. State*, 593 So. 2d 1004, 1006 (Miss. 1992). Outlaw's assertion on appeal is that the admonishment was not sufficient to inform the jury as to "exactly what it was they were to disregard." It is true that the trial court, in its admonishment, does not specifically refer in so many words to the fact that Jackson's counsel had just mentioned Outlaw's criminal record; however, the objection by Outlaw's counsel immediately followed the statement by Jackson's counsel that "Mr. Outlaw is charged, has a previous record." The admonishment immediately followed this objection, and the ensuing bench conference. We conclude beyond doubt that the admonishment was sufficient, in that context, to inform the jury what it was to disregard.

Also, in light of the overwhelming evidence of Outlaw's participation in the events of the charged crime, we cannot conceive that this brief mention of his previous criminal record during voir dire was so prejudicial to his receiving a fair trial that the court committed an abuse of discretion in denying the mistrial motion. *Johnson v. State*, 666 So. 2d 784, 794 (Miss. 1995) (citations omitted).

V.

Conclusion

This Court notes that, as to defendant Outlaw, there is no judgment of sentence on the first count of the indictment, which was the conspiracy charge, although the jury did find him guilty on that count. The issues raised by Outlaw on appeal do not directly affect this aspect of the case, but deal generally with the conduct of the trial. However, our affirmance of Outlaw's conviction pertains solely to his conviction and sentence on Count Two, the Court being of the opinion that we are without jurisdiction to consider the jury verdict returned on Count One. Subject to that consideration, there appears no basis to disturb the convictions obtained in this case. We, therefore, affirm the judgments as entered in the trial court.

**THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT FINDING WILLIAM B. JACKSON GUILTY OF THE CRIMES OF COUNT I, CONSPIRACY TO SELL COCAINE AND COUNT II, SALE OF COCAINE AND RESULTING SENTENCES OF 20 YEARS FOR COUNT I AND 30 YEARS FOR COUNT II TO RUN CONSECUTIVELY WITH COUNT I IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND \$25,000 FINE IS AFFIRMED. THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT FINDING DANIEL OUTLAW GUILTY OF THE CRIME OF SALE OF COCAINE AS CHARGED IN COUNT II AND THE RESULTING SENTENCE OF 10 YEARS IN THE CUSTODY OF THE**

**MISSISSIPPI DEPARTMENT OF CORRECTIONS AS A HABITUAL OFFENDER IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED EQUALLY TO WILLIAM B. JACKSON AND HOLMES COUNTY.**

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