

IN THE COURT OF APPEALS 03/26/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00203 COA

ANTONIO MAURICE PORTIS

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. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID M. RADCLIFF

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: JEANNENE T. PACIFIC

NATURE OF THE CASE: CRIMINAL: SALE OF COCAINE

TRIAL COURT DISPOSITION: GUILTY: SENTENCED TO A TERM OF 30 YEARS WITH 10
YEARS SUSPENDED AND A \$10,000 FINE.

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

FRAISER, C.J., FOR THE COURT:

Antonio Maurice Portis was convicted of the sale of crack cocaine by a Jones County jury. He appeals and raises numerous issues but argues only two: (1) the trial court erred in failing to grant a mistrial when a State's witness mentioned photographs previously undisclosed to the defense and (2) the trial court erred in not granting the defense a continuance or mistrial when the State failed to disclose its confidential informant's identity and location to the defense in compliance with Mississippi Uniform Criminal Rule of Circuit Court Practice 4.06. Because the contended errors are without merit, we affirm.

FACTS

On March 24, 1994, James Kitchens, an undercover agent with the Leaf River Narcotics Task Force, was conducting a sting operation in locations in Laurel suspected of drug trafficking. Kitchens was fitted with a body microphone and transmitter for surveillance, which was monitored by other members of the task force. He was accompanied by confidential informant "LR 613," Randall Sanders, to the "drug buy."

About 8:50 P.M., Kitchens drove his red pickup truck to Kay Street in Laurel with Sanders in the passenger seat. When he arrived the sun had set but Kay Street was illuminated by streetlights and his truck headlights. Kitchens stopped his truck around the eight hundred block of Kay Street where several individuals were loitering. Portis approached the driver's side window of the truck, and asked Kitchens if he wanted to buy anything. About the same time Sanders exited the truck to speak with another individual. Kitchens replied that he "needed \$50.00 worth." Portis gave Kitchens three rocks of crack cocaine, and Kitchens gave Portis two twenty dollar bills and a ten dollar bill. All three bills were official state funds. Kitchens began to drive away but was stopped by an unidentified individual, so Sanders could re-enter the vehicle.

Sanders was outside the truck talking to others during the transaction between Kitchens and Portis. Initially, Kitchens testified that Sanders was outside the truck. Later, he gave Sanders' specific location as being near a house about ten feet from his truck.

After Sanders re-entered his vehicle, Kitchens met with the surveillance officers and delivered the three rocks of cocaine to his superior. Portis was not arrested at that time in order that Kitchens could continue making undercover drug buys in the area.

Portis was indicted on September 12, 1994, for the sale of cocaine pursuant to the Mississippi Code, section 41-29-139(a)(1). A jury found him guilty as charged.

Throughout the trial court proceedings, Portis maintained that he did not sell cocaine to anyone. He insists this is a case of mistaken identity.

DISCUSSION

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN A STATE'S WITNESS MENTIONED PHOTOGRAPHS PREVIOUSLY UNDISCLOSED TO THE DEFENSE?

Portis contends that the trial court erred in failing to declare a mistrial when the State's witness mentioned photographs that had not been disclosed to Portis pursuant to Rule 4.06 of the Mississippi Uniform Criminal Rules of Circuit Court Practice. At trial during examination of Officer Kitchens, the following testimony was elicited by the State, with objection and mistrial motion by defense counsels:

Q Let me ask you this, Mr. Kitchens, did you have an occasion, any time after the 24th of March of 1994, to identify the defendant, Mr.

Antonio Portis?

A Yes, ma'am.

Q Would you tell the jury what the circumstances of that was?

A Usually, we go back to the--

MR. CLARK: I'm going to object to this, "Usually."

Q For this specific incident.

A We went back to the office, and they have a lot of pictures on the table. I couldn't find him in them pictures.

Q What are the pictures of, or who are they of?

MR. CLARK: Judge, we are going to object. We can't furnish him with pictures and all that. This is the first time I've heard of this. We object to this testimony.

THE COURT: Sustained.

Q Mr. Kitchens, did you make any attempt to identify him any other way?

MR. RATCLIFF: The same objection, if we are going the same way.

Q Without talking about the pictures?

MR. RATCLIFF: Judge, I move for a mistrial. I've had it with this.

THE COURT: The motion is to be sustained-- The motion for mistrial be overruled one more time.

Q I'm going to show you a photograph -- just a moment.

MS. PACIFIC: That is all we have.

THE COURT: Cross examine.

Portis cites no authority for reversal on the basis of the court's refusal to grant him a mistrial. Time and time again the Mississippi Supreme Court has articulated to bench and bar that absent appropriate authority undergirding a claim of reversible error, there is no obligation to consider it. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993); *Brown v. State*, 534 So.2d 1019, 1023 (Miss. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Stringer v. State*, 454 So. 2d 468, 480 (Miss. 1984); *cert. denied*, 469 U.S. 1230 (1985); *Wood v. Gulf States Capital Corp.*, 217 So. 2d 257, 273 (Miss. 1968) . Moreover, the record shows clearly that upon objection by defense counsel to the testimony pertaining to the pictures or photographs, the State promptly withdrew any efforts to obtain evidence from Kitchens concerning identification by him of Portis subsequent to the alleged crime.

Rule 4.06(i)(3) of the Mississippi Uniform Criminal Rules of Circuit Court Practice provides that "[t]he court shall not be required to grant either a continuance or mistrial . . . if the prosecution withdraws its efforts to introduce such evidence." Unif. Crim. R. Cir. Ct. Prac. 4.06(i)(3).

The trial judge did not abuse his discretion by denying Portis's motion for a mistrial.

II. WHETHER PORTIS WAS ENTITLED TO A CONTINUANCE OR MISTRIAL
BECAUSE THE STATE FAILED TO DISCLOSE ITS CONFIDENTIAL

INFORMANT'S IDENTITY AND LOCATION TO THE DEFENSE IN COMPLIANCE WITH MISSISSIPPI RULE OF CRIMINAL PROCEDURE 4.06?

Portis contends that "[t]he [trial] court erred in not granting the motion of the defendant to continue the case or dismiss same when the [trial] court determined as a matter of fact that the confidential informant had been an eyewitness to the alleged transaction and the State had not provided his identity in violation of Rule 4.06 [of the Mississippi Uniform Criminal Rules Circuit Court Practice]." Portis claims he learned for the first time from a tape of the transaction produced by the State the day before trial that Sanders accompanied Kitchens during the drug sale. Because Sanders' voice was recorded prior to and following the transaction, Portis' counsel requested that the defense be given the name of the confidential informant and a continuance or mistrial.

Officer Kitchens was questioned by both parties outside the presence of the jury to determine whether Sanders (referred to as "LR-613") was an eyewitness to the transaction. He testified to the general facts of the transaction. He also gave the following specific testimony:

Q Officer Kitchens, at the time that the money passed and the drugs were exchanged, was LR-613 in the car or out of the car?

A He was out of the car.

Q How do you know he was out of the car?

A Because somebody had called him and he got to talking. He went on out as soon as this guy come up.

Q So y'all talked before the purchase was made?

A Yes, sir.

Q And during that time LR-613 was not there?

A Yes, sir, he wasn't. He had got out.

After hearing Kitchens' testimony, the trial court made the following ruling:

THE COURT: This walking around the mulberry bush is long enough.

The Court makes a finding that this man was there at the time based on all the evidence that the Court's heard and the testimony of these two people that he's there. He wasn't only there, he was totally involved in the transaction. He pointed out the man, named his name and they went there to buy drugs. They bought drugs and the man

was there with him the whole time, whoever LR-613-- whoever he is.

Under this rule here says just as plain as it says, "... or unless the informant was an eyewitness to the event constituting the charge against the defendant." I didn't write the rule. I didn't make the rule. That's what it says. It's the Rules of Discovery, Rule 406--4.06 of The Criminal Rules of Circuit Court.

Despite ruling Sanders was an eyewitness and disclosing his identity to the defense, the court ruled that the State had made a good faith effort to find Sanders who was out of the State of Mississippi and there was no way the prosecution could find him, so Portis was not entitled to a mistrial or continuance for the State's failure to produce him.

Rule 4.06(b)(2) of the Mississippi Uniform Criminal Rules of Circuit Court Practice provides:

Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose his or her identity will infringe the constitutional rights of the accused or unless the informant was an eyewitness to the event or events constituting the charge against the defendant.

Unif. Crim. R. Cir. Ct. Prac. 4.06(b)(2). In *Fleming v. State*, the concurring opinion of Justice Banks states: "[w]e have interpreted this provision to exclude, as a subject of disclosure, those informants who witness less than every element of the crime charged. For example, the confidential informant who sets up the drug buy, but is not around for the exchange, is not required to be disclosed despite the fact that the informant was present just before and just after the transaction and obviously has material information." *Fleming v. State*, 604 So. 2d 280, 304 (Miss. 1992) (Banks, J., concurring); see *Bradley v. State*, 562 So. 2d 1276, 1279 (Miss. 1990).

In *Bradley v. State*, Bradley was convicted of selling cocaine to an undercover agent [agent]. *Bradley*, 562 So. 2d at 1277. The confidential informant [CI] took the agent to Bradley's abode. The CI secured passage into Bradley's house and introduced the agent to Bradley. Bradley then took the CI and agent into a private room. *Id.* at 1278. In his hand Bradley had a white paper towel. The CI excused himself to go to the bathroom. Bradley removed the paper towel to reveal a plastic bag

containing white powder, later proven to be cocaine. The agent paid for the cocaine. She was rejoined by the CI, and they left to meet with other law enforcement officials.

The trial judge held that *Bradley* was distinguishable from the case at bar because Sanders did not completely extricate himself from the scene of the transaction. We disagree. The uncontroverted evidence before the court established that Sanders exited the truck before the rocks of crack cocaine or the fifty dollars were exchanged. Sanders was engaged in conversation outside the truck which was not audible on the tape inside the truck. Finally, the transaction took place at night on the opposite side of the truck from Sanders. The bottom line is Sanders was not present when the sale occurred.

The trial judge erred in holding that Sanders was an eyewitness to the event or events constituting the charge against Portis under Rule 4.06(b)(2) of the Mississippi Uniform Criminal Rules of Circuit Court Practice. The trial judge asked the following question of the State: "Well, he [the chief investigator for the Leaf River Task Force] said he didn't know [whether Sanders was in the truck when the transaction took place], but he also said that he was in the car when he went. He was in the car when he left. And when he got back, he said he heard his voice during the buy. Now what else does he need to say?" What the witness "needed" to say was that Sanders witnessed the exchange of crack cocaine for currency.

In order to discover a confidential informant's identity, the evidence must show the confidential informant witnessed the transaction. In the case at bar there was no evidence that Sanders saw the transaction or was in a position from which it could be inferred that Sanders saw it. *Bradley* tells us that a CI's presence in the agent's vehicle immediately before and after the transaction is not sufficient to subject the CI's identity to disclosure. *Bradley*, 562 So. 2d at 1279-80. The trial court erred in ruling that Sanders was an eyewitness to the cocaine sale. Even so, the trial court found that Sanders' was "out of the jurisdiction of the court," that the State had made a good faith effort to find him, that neither the State nor anyone else had any idea where he could be located, and Portis, under the circumstances, was not entitled to a mistrial or continuance for the State's failure to produce him. An examination of the record shows the trial court's action in this regard is supported by substantial evidence. In fact, Portis offered no evidence to rebut the presumption that the State acted in good faith. In *Stromas v. State*, the Mississippi Supreme Court addressed the issue of error resulting from the State's failure to produce a confidential informant who actively participated in all the events involved during sale of a controlled substance. In refuting the appellate contention that reversible error occurred when the State failed to produce the CI, the Mississippi Supreme Court stated:

As a matter of proof, this Court presumes that the State is in good faith and then imposes a duty on the defendant to show that the State acted in bad faith:

In the present case there is no intimation of bad faith on the state's part. The appellant did not seek to show that the state had deliberately withheld information or acted in bad faith in its compliance with the court order to furnish any available information. Absent such a showing we cannot say that the appellant's rights were violated.

Applying *Copeland* to the case sub judice, the State had a duty to disclose in good faith any information it had as to Gendron's whereabouts. The State's offer of information is presumed to be in good faith, and it is incumbent on Stomas to show it is otherwise.

....

Stomas does not allege any bad faith by the State, but simply argues that because the State could not locate Gendron, his defense was fatally impaired. The State provided evidence as to its good faith attempt to locate Gendron and the trial court did not abuse [its] discretion in finding that Stomas's right to confrontation had been satisfied.

Stomas v. State, 618 So. 2d 116, 121-22 (Miss. 1993) (citing *Copeland v. State*, 423 So. 2d 1333, 1336 (Miss. 1982)).

While the trial court acted well within its ambit of authority in denying Portis' motion for continuance and mistrial, it erred under the uncontroverted facts in requiring the State to disclose the CI's identity. On appeal, we affirm the trial court's decision where the right result is reached even though we may disagree with the reason for that result. *Puckett v. Stuckey*, 633 So. 2d 978, 980 (Miss. 1993); *Kirksey v. Dye*, 564 So. 2d 1333, 1336 (Miss. 1990). Under Rule 4.06(b)(2) of the Mississippi Uniform Criminal Rules of Circuit Court Practice, there is no merit in the appellate assertion that the State's failure to disclose the CI's identify entitled Portis to a continuance or mistrial.

For the foregoing reasons the judgment of the Jones County Circuit Court is affirmed.

THE JUDGMENT AND CONVICTION OF THE JONES COUNTY CIRCUIT COURT FINDING APPELLANT GUILTY OF THE SALE OF COCAINE AND SENTENCE OF THIRTY (30) YEARS WITH TEN (10) YEARS SUSPENDED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS; PAYMENT OF \$10,000 FINE AND COURT COSTS IS AFFIRMED. COSTS OF APPEAL ARE TAXED TO JONES COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.