

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-KA-00014 COA**

**FERDERICK LEE**

**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

DATE OF JUDGMENT:	09/29/94
TRIAL JUDGE:	HON. JOHN LESLIE HATCHER
COURT FROM WHICH APPEALED:	QUITMAN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GAIL P. THOMPSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR.
DISTRICT ATTORNEY:	MELLEN, LAWRENCE Y.,
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT'S 1 THRU 4 SALE, TRANSFER OR DELIVERY OF A CONTROLLED SUBSTANCE, TO-WIT COCAINE; CT'S 1 THRU 4 10 YRS ON EACH CT; CT'S 1 THRU 3 CONSECUTIVE TO EACH OTHER & ANY PREVIOUS; CT 4 CONCURRENT CT'S1 THRU 3; EACH CT PAY \$125.00 LAB FEE (SEE OTHER
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	1/2/98
CERTIORARI FILED:	3/20/98
MANDATE ISSUED:	

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

BRIDGES, C.J., FOR THE COURT:

Frederick Lee was indicted, tried, and convicted of four counts of sale of crack cocaine in the Quitman County Circuit Court. He was sentenced to serve a total of thirty years in the custody of the

Mississippi Department of corrections. One year after his conviction and incarceration, Lee filed a motion for an out-of-time appeal. The motion was granted and we now consider Lee's issues on appeal:

**I. WHETHER LEE'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED?**

**II. WHETHER THE TRIAL COURT ERRED IN ALLOWING A MATERIAL WITNESS FOR THE STATE TO ENTER THE JURY ROOM AFTER DELIBERATIONS BEGAN TO OPERATE A VCR, AND WHETHER THIS ACTION DEPRIVED LEE OF A FAIR AND IMPARTIAL TRIAL?**

**III. WHETHER THE COURT ERRED IN ALLOWING THE PROSECUTION TO REJOIN VOIR DIRE?**

**IV. THE CUMULATIVE EFFECT OF THE AFORESAID ERRORS DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.**

Finding no error, we affirm.

**FACTS**

On February 2, February 17, and twice on April 21, 1994, a confidential informant working for the Mississippi Bureau of Narcotics bought several amounts of crack cocaine from Frederick Lee. The first three buys were recorded on audio cassette, and the last buy was recorded on video tape. The Mississippi Bureau of Narcotics officers involved in the buys testified at trial as to the procedures involved in apprehending Lee. The officers clearly identified Lee as the seller in the transactions. The confidential informant identified Lee as the man who sold him crack cocaine on four instances. The State presented overwhelming evidence showing that Lee was guilty of selling crack cocaine on four separate occasions.

At the conclusion of the State's case, Lee asked for a directed verdict, which was denied. Lee rested his case without presenting any evidence. He then asked for a peremptory instruction, which was also denied. The jury then retired to consider the evidence and returned a unanimous guilty verdict. Lee was sentenced to serve a ten year term for each offense, with the first three terms running consecutively and the last ten year term running concurrently. Lee's attorney met with the family shortly after the sentencing and discussed with them the bleak outlook for a successful appeal. A year after Lee had been at Parchman, the other inmates convinced him that he had received too much time for his crimes and that he needed to appeal. Lee petitioned the court for an out-of-time appeal. It was Lee's position that his attorney was at fault for failing to file an appeal. At the hearing on his request for an out-of-time appeal, Lee's trial attorney testified that there was no agreement between him and Lee to continue Lee's case through an appeal. Lee's attorney stated that he discussed the slim chance of successful appeal with Lee and his family, and, to his knowledge, they decided not to appeal. Lee and his sister both testified that they knew the attorney was not going to appeal Lee's case for them. The judge was somewhat concerned that the attorney did not get a signed waiver from Lee as suggested by the supreme court in *Harris v. State*, 578 So. 2d 617, 620 (Miss. 1991). But the circuit judge noted that the supreme court in *Harris* stated that a written waiver was merely a

recommendation, and that the circuit courts were free to make their own decision about a proper record. *Id.* The circuit judge granted Lee's out-of-time appeal but refused to grant any sanctions against Lee's attorney and dismissed any action against him with prejudice. We now consider Lee's issues raised in his out-of-time appeal.

## I. WHETHER LEE'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED?

There is a presumption in Mississippi that trial counsel is competent. *Edwards v. State*, 615 So. 2d 590, 596 (Miss. 1993). In order to overcome that presumption and prove that his counsel was ineffective, Lee must meet the two-pronged test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The Mississippi Supreme Court has adopted the Strickland two-pronged test which requires that Lee prove "that his lawyer's performance was deficient, and that the deficient performance prejudiced the defense." *Edwards*, 615 So. 2d at 596. Lee has to prove both prongs of the Strickland test. *Rankin v. State*, 636 So. 2d 652, 656 (Miss. 1994). "The defendant must show that but for his attorney's errors, there is a reasonable probability that he would have received a different result in the trial court." *Id.* Under this standard and looking at the totality of the circumstances, we must determine if Lee's attorney's actions were deficient as well as prejudicial. *Id.* There is no constitutional right to errorless counsel. *Foster v. State*, 687 So. 2d 1124, 1130 (Miss. 1996). The Mississippi Supreme Court has stated as follows:

Judicial scrutiny of counsel's performance must be highly deferential. (citation omitted) . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

*Id.* (citing *Stringer v. State*, 454 So. 2d 468, 377 (Miss. 1984)).

Lee claims that his attorney made several errors which could have affected the outcome of his trial. He claims that his attorney did not make any post-trial motions. His attorney did not object when the prosecutor voir dired the jury about misstatements of the law made by Lee's attorney. Lee also claims that he is mentally deficient and his attorney failed to file a pre-trial motion for a psychiatric evaluation.

Lee's attorney made a motion for a directed verdict as well as a request for peremptory instruction. Both were denied in light of the overwhelming evidence of Lee's guilt. Lee has failed to show how his attorney's failure to file any post-trial motions was prejudicial in light of the overwhelming evidence of his guilt. Lee's attorney did not object to the prosecutor rejoining voir dire because it was in response to incorrect statements of law that he had made earlier. When the State requested additional voir dire, the prosecutor, Lee's attorney, and the judge held a bench conference that unexplainedly

was not recorded. We do not know what was said during this off the record conference but are left with the judge's decision to let the State do additional voir dire limited to the two subjects about which Lee's attorney misinformed the venire. We do not find Lee's attorney deficient in this instance, nor do we find any prejudice resulting therefrom.

Additionally, Lee claims that he is mentally deficient and that a pre-trial psychiatric evaluation should have been ordered. Lee has shown no proof that the failure of his attorney to order such an evaluation effected the outcome of his trial. Lee does not claim that it would have been a viable defense. The evidence showed that Lee was able to communicate with another well enough to sell drugs, give directions, and count money. Lee has failed to show that had his attorney done any of these things that his trial would have ended differently. Lee cannot prevail on his ineffective assistance of counsel claim.

## II. WHETHER THE TRIAL COURT ERRED IN ALLOWING A MATERIAL WITNESS FOR THE STATE TO ENTER THE JURY ROOM AFTER DELIBERATIONS BEGAN TO OPERATE A VCR, AND WHETHER THIS ACTION DEPRIVED LEE OF A FAIR AND IMPARTIAL TRIAL?

During the trial, an officer of the Mississippi Bureau of Narcotics operated a video cassette recorder to play a tape of Lee selling crack cocaine. During jury deliberations, the jury sent a note to the judge stating that they were unable to operate the VCR. The judge, prosecutor, and Lee's attorney discussed what to do and decided that the only person capable of operating the VCR was the officer who operated it during the trial. All parties agreed to let the officer into the jury room for the limited purpose of getting the VCR operational. The judge instructed the officer that he was not to communicate with the jury, but to operate the VCR only. The bailiff accompanied the officer into the jury room and was instructed by the judge to make sure the officer did not have any communication with the jurors. Lee has failed to show that the officer's presence in the jury room to operate the VCR in any way influenced the jury and affected the outcome of his trial. The Mississippi Supreme Court stated in *Stampley v. State*, 284 So. 2d 305, 308 (Miss. 1973) that "some undue influence was attempted to be exerted on the jurors or that the facts supported a presumption that an undue influence was likely to have occurred. . . ." Lee has failed to show that any undue influence was exerted over the jurors in this case. This issue is meritless.

## III. WHETHER THE COURT ERRED IN ALLOWING THE PROSECUTION TO REJOIN VOIR DIRE?

During voir dire of potential jurors, Lee 's attorney made two misstatements of the law: one, that Lee could go to jail for life and two, that if the video tape was not clear that it was Lee, then the jury had to find him innocent. The State objected, and the judge sustained the objections and told the jury to disregard the statements. After Lee's attorney finished voir dire, the judge and attorneys held a bench conference that was not recorded. The judge allowed the State to do additional voir dire, limited to

the two misstatements made by Lee's attorney. The State then explained that Lee could not go to jail for life for the crimes for which he was charged. Additionally, the prosecutor told the jurors that the videotape was only one element of the proof against Lee and it should be considered along with the other pieces of evidence.

Lee has cited no authority supporting his contention that improper voir dire occurred. Rule 3.05 of the Uniform Circuit and County Court Rules (formerly Rule 5.02 of the Uniform Criminal Rules of Circuit Court) reads as follows:

In the voir dire examination of jurors, the attorney will question the entire venire only on matters not inquired into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court. No hypothetical questions requiring any juror to pledge a particular verdict will be asked. Attorneys will not offer an opinion on the law. The court may set a reasonable time limit for voir dire.

There is no evidence that any improper voir dire by the State took place. Lee fails to prove how this additional voir dire by the State in any way prejudiced him or affected the outcome of his case.

#### IV. THE CUMULATIVE EFFECT OF THE AFORESAID ERRORS DEPRIVED THE APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

Lee claims that the cumulative effect of the above errors denied him the right to a fair trial. We have found that none of the complained of errors were even errors at all. Lee has not shown that he was denied effective assistance of counsel; he has not shown that he was prejudiced by the officer's entry into the jury room; and he has not shown that the judge erred in allowing the State additional voir dire. While it has been held that errors not reversible in and of themselves may be reversible when combined with other errors, we do not find that this is the case here. *See Wilburn v. State*, 608 So. 2d 702, 705 (Miss. 1992). The Mississippi Supreme Court has also stated that "[w]here there is no reversible error in any part, . . . there is no reversible error to the whole." *Id.* (citations omitted.) Lee is not entitled to a new trial on the basis that he was deprived a fair trial. All of Lee's issues are meritless, and we affirm.

**THE JUDGMENT OF THE QUITMAN COUNTY CIRCUIT COURT OF CONVICTION OF FOUR COUNTS OF TRANSFER OR DELIVERY OF A CONTROLLED SUBSTANCE, TO-WIT COCAINE AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVE TO ANY PREVIOUS SENTENCE AND FINE OF \$1000 FOR COUNT I; TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVE TO COUNT I AND FINE OF \$1000 FOR COUNT II; TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVE TO COUNTS I AND II AND PAY FINE OF \$1000 FOR COUNT III; AND TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONCURRENT TO COUNTS I, II, AND III IS AFFIRMED. THE FORFEITURE OF LEE'S DRIVER'S LICENSE FOR SIX MONTHS IS AFFIRMED. COSTS OF THIS APPEAL TAXED TO QUITMAN COUNTY.**

**McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING,**

**PAYNE, AND SOUTHWICK, JJ., CONCUR.**