

**IN THE COURT OF APPEALS 05/07/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00165 COA**

**CHARLES GILBERT**

**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. GARY EVANS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LEFLORE COUNTY

ATTORNEY FOR APPELLANT:

DAVID M. HOLLY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: CHARLES SWAYZE, LEFLORE COUNTY PROSECUTING  
ATTORNEY

NATURE OF THE CASE: CRIMINAL:SALE OF COCAINE

TRIAL COURT DISPOSITION: CONVICTED OF THE SALE OF COCAINE AND  
SENTENCED TO TWENTY-FIVE YEARS IN THE MISSISSIPPI DEPARTMENT OF  
CORRECTIONS

BEFORE THOMAS, P.J., KING, AND PAYNE, JJ.

PAYNE, J. FOR THE COURT:

Charles Gilbert sold a twenty-dollar rock of cocaine to Officer Michael Stamps, of the Greenwood Police Department on the night of March 9, 1993. Officer Terry Stanford took control of the drugs purchased by Officer Stamps, sealed the evidence in bags, and took the bags to the crime lab. The name of the suspect was listed on the evidence submission form as "FNU Grant." Officer Stanford testified that the evidence bag labeled as "FNU Grant" identified the cocaine purchased from Charles Gilbert. Officer Stamps also testified at trial and made an in-court identification of Gilbert. Officer Stamps testified that the origin of "FNU Grant" as the identification of Gilbert came from a confidential informant, Jerome Jones. Jerome Jones testified that he accompanied Officer Stamps to buy drugs. Jones testified that Gilbert was the first of the sellers, explaining that he was unsure of Gilbert's name at the time and he believed that others had been calling Gilbert by the name of "Grant." Jerome Jones also made a positive in-court identification of Gilbert.

Gilbert called Jessie Leflore as his first witness. Leflore was then also under an indictment for the sale of cocaine to Officer Stamps on the night in question. While on the stand, Leflore identified himself and his address and then after an objection by Leflore's attorney, Leflore invoked his Fifth Amendment right against self-incrimination. The trial court allowed Leflore to be excused. Counsel for Gilbert argued at trial that he should be allowed to ask questions of Leflore, thereby requiring Leflore to invoke his Fifth Amendment right to each question. The trial court again confirmed with Leflore's counsel that Leflore would invoke his right against self-incrimination and not testify beyond his name and address, and the trial court stated on the record that such a procedure would be useless and a waste of time.

## DISCUSSION

Gilbert appeals arguing:

THE TRIAL COURT ERRED IN ALLOWING WITNESSES FOR THE STATE TO TESTIFY THAT ONE OF THREE SUSPECTS IDENTIFIED THE DEFENDANT, THEN ALLOWING THE WITNESS (SUSPECT) TO INVOKE HIS FIFTH AMENDMENT PRIVILEGE, AS TO ALL FUTURE QUESTIONS, PRIOR TO THE QUESTIONS BEING ASKED, EFFECTIVELY DENIED THE DEFENDANT THE RIGHT TO CONFRONT A WITNESS PRESENTED AGAINST HIM.

Gilbert argues that he was denied the right to confront a witness presented and used against him. Gilbert argues that the State was allowed to use Jessie Leflore's identification of Gilbert as part of its case against Gilbert. This was accomplished through the testimony of Officer Terry Sanford and Officer Michael Stamps who both testified that the way in which they learned Gilbert's real name was through Jessie Leflore. Gilbert argues that the State was allowed, through Officer Stamps and Officer Sanford, to present testimony of a witness who was adverse to Gilbert.

"The right of a criminal defendant to confront and cross-examine the witnesses presented against him is secured under both the United States and Mississippi Constitutions." *Williamson v. State*, 512 So. 2d 868, 873 (Miss 1987) (citing U.S. Const. amend. VI; Miss. Cons. art. III, § 26 ).

The Mississippi Supreme Court has held that "it was reversible error to refuse to permit the defendant to call a witness to the stand and question him in the presence of the jury even though it had been demonstrated that the witness would refuse to answer most of the questions on grounds of self-incrimination." *Hall v. State*, 490 So. 2d 858, 859 (Miss. 1986) (citation omitted); *see also Coleman v. State*, 388 So. 2d 157, 159 (Miss. 1980) (citing *Stewart v. State*, 355 So. 2d 94, 96 (Miss. 1978)). "The State should also be afforded the same right." *Williamson*, 512 So. 2d at 872. "However, as we recognized in *Hall*, the right to call a witness does not diminish that witness' right to invoke his privilege against self-incrimination. The witness may choose to answer only relevant questions or remain silent if his testimony would subject him to potential prosecution." *Id.* (citing *Hall*, 490 So. 2d at 859; *Mississippi State Bar v. Attorney L*, 511 So. 2d 119, 123 (Miss. 1987)).

In *Williamson v. State*, the Mississippi Supreme Court ruled that the admission of testimony regarding a confession of the declarant/co-defendant which implicated the defendant (*Williamson*) when the declarant/co-defendant had invoked his right against self-incrimination denied the defendant her constitutional right to confront and cross-examine witnesses presented against her. *Williamson*, 512 So. 2d at 873. In reversing, the court in *Williamson* noted "the evidence offered by the State was almost purely circumstantial. This testimony became an essential part of the State's case in chief and [the defendant's] ability to cross-examine the declarant (*Harden*) became of even greater significance." *Id.* at 874.

In the present case, Gilbert was allowed to call Leflore to the stand and question him in front of the jury. After testifying to his name and address, Leflore invoked his Fifth Amendment right against self-incrimination *in front of the jury*. The trial court inquired as to Leflore's intent to answer any questions and was informed by Leflore's counsel that beyond his name and address, Leflore would not testify. To require the trial court to allow defense counsel to ask each and every question, only to have the witness invoke his right against self-incrimination as to each question, would have clearly been a waste of the court's time and would have served no purpose. The trial court twice inquired as to Leflore's intent not to answer any questions beyond his name and address. Leflore was represented by counsel who was present at the time of his testimony and who confirmed Leflore's intent to not testify further. We find no error in the trial court excusing this witness.

Additionally, if the identification of Gilbert as "FNU Grant" was solely based upon Officer Stamps and Officer Stanford's testimony regarding Leflore's statement that the other person was, in fact, Gilbert, then we would be required to reverse under *Williamson*. However, the present cause presents a very different situation. The appearance of the individual who sold cocaine to Officer Stamps was observed by both Officer Stamps and Jones. However, the name of that individual was not known. Both Stamps and Jones made in-court identifications of Gilbert as the individual who sold the drugs to Officer Stamps on the night in question. Any testimony regarding how the mix-up of the name was cleared up was necessary only to explain the discrepancy between the evidence bag labeled as "FNU Grant" and its introduction into evidence in the case against Gilbert. *See Hansen v. State*, 592 So. 2d 114, 135 (Miss. 1991) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). We find no reversible error and accordingly, affirm.

**THE JUDGMENT OF THE CIRCUIT COURT OF LEFLORE COUNTY OF CONVICTION OF THE SALE OF COCAINE AND SENTENCE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS FOR TWENTY-FIVE YEARS IS AFFIRMED. ALL**

**COSTS OF THIS APPEAL ARE TAXED TO LEFLORE COUNTY.**

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