

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 1999-KA-00476-COA**

ALLEN CLAY

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 02/01/1999
TRIAL JUDGE: HON. GEORGE B. READY
COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: WILLIAM F. TRAVIS
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: W. GLENN WATTS
DISTRICT ATTORNEY: ROBERT L. WILLIAMS
NATURE OF THE CASE: CRIMINAL - FELONY
TRIAL COURT DISPOSITION: 02/01/1999: OBTAINING A CONTROLLED SUBSTANCE
BY FRAUD: SENTENCED TO SERVE A TERM OF (5)
YEARS IN THE MDOC & PAY ALL COSTS OF COURT.
DISPOSITION: AFFIRMED - 10/31/2000
MOTION FOR REHEARING FILED: 11/14/2000; denied 1/16/2001
CERTIORARI FILED:
MANDATE ISSUED: 2/6/2001

EN BANC.

MYERS, J., FOR THE COURT:

¶1. Allen Clay was convicted in the Circuit Court of DeSoto County of obtaining a controlled substance by fraud and sentenced to serve five years in the custody of the Mississippi Department of Corrections. He appeals and raises the following issue:

**I. THE CIRCUIT COURT ERRED IN ALLOWING A WITNESS TO TESTIFY TO
MATTERS BEYOND THE WITNESS'S PERSONAL KNOWLEDGE AND WHERE
ANY KNOWLEDGE WAS BASED UPON HEARSAY STATEMENTS OF OTHERS.**

¶2. We find no reversible error and affirm the judgment of the circuit court.

FACTS

¶3. On July 15, 1999, James Randall, a pharmacist at Fred's Pharmacy in Southaven, was given a prescription from the University of Arkansas Medical Center in Little Rock, Arkansas, for Percocet, a

controlled narcotic . When he was unable to verify the information on the prescription, Randall refused to fill it. Randall then contacted Detective Mike Malone of the Southaven Police Department and gave him a description of the person who presented the prescription.

¶4. Detective Malone immediately went to the K & B Pharmacy across the street from Fred's. Upon entering the store, Malone saw a man fitting the description Randall had given him "[p]retty much to a T." Malone spoke with John Garner, the pharmacist at K & B, and requested that Garner verify the prescriptions given him by Allen Clay. Garner contacted the hospital in Arkansas and was told that the doctor who supposedly wrote the prescription was not on staff at the hospital and unknown to them. The prescription was filled, and Clay was followed outside and arrested.

¶5. According to Detective Malone, when Clay was being arrested, he told Malone "to be careful of his arms; that he was a junky." An additional prescription was found on Clay at the time of his arrest and in his car was a prescription pad from the Regional Medical Center in West Helena, Arkansas. One of the prescriptions was supposedly written by "Dr. Patterson" from the West Helena medical facility. "Dr. Patterson" was also the name on the prescription from Little Rock.

¶6. Detective Malone testified that Clay told him that the names on the prescriptions, both the doctors and the person for whom the prescriptions were to be filled, were "all just fictitious names that he made up."

¶7. Clay's appeal concerns the testimony of John Garner, the K & B pharmacist. Garner was asked whether the prescriptions presented by Clay were forged. This testimony was objected to initially on the grounds that "they haven't set the predicate for it" and on the grounds that Garner did not have "personal knowledge" about the forgery. Clay's attorney stated to the court that he would like to know how Garner knew the prescription was a forgery. The court then told the State to ask Garner how he knew it was a forgery.

¶8. Garner was then asked to explain how he verified that the prescription was a forgery. Garner testified that the doctor who supposedly wrote the prescription was not on the staff of the Arkansas medical center and that he did not write the prescription. After Clay made additional objections to hearsay testimony, the prosecution stated that it did not introduce hearsay until instructed to do so by the trial court. On cross-examination, Garner was questioned extensively about his lack of personal knowledge about either the patient or the doctor whose names appeared on the prescription.

¶9. The defense rested without presenting any witnesses.

ARGUMENT

¶10. John Garner testified that a prescription from a hospital in Arkansas was a forgery. Garner lacked personal knowledge on which to base this conclusion. He relied upon a telephone conversation that he had with a doctor at the Arkansas hospital. Garner testified that the doctor told him that the name on the prescription did not match the name of any doctor working at the hospital. Mississippi Rules of Evidence 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he had personal knowledge of the matter." The testimony was based entirely upon hearsay, and is therefore inadmissible.

¶11. The State argues that Clay provoked the statements in question by requesting that the State "set the predicate," and thus the statements were admissible. *Fairley v. State*, 349 So. 2d 1050, 1052 (Miss.

1977). However, Clay did not provoke the conclusion made by Garner that the prescription was a forgery. Rather, that statement was brought about by the State's examination of Garner. Clay simply asked for the conclusion to be substantiated. The rule in *Fairley* does not apply to these circumstances. *Id.*

¶12. The State also cites established law that cross-examining a witness about the substance of objectionable hearsay waives objection to the admission of such evidence on appeal. *Sumner v. State*, 316 So. 2d 926, 927 (Miss. 1975). This law has no bearing on the facts of the case now before us. Clay cross-examined Garner, but such examination did not reach the substance of the hearsay. Rather, Clay was simply attempting to show that the statement did not reflect Garner's personal knowledge and was therefore inadmissible hearsay.

¶13. Garner's testimony regarding the forgery was inadmissible, and admitting it into evidence constituted error. However, this error does not warrant reversal of the conviction, because there was other evidence sufficient for the jury to find that the prescription was a forgery. Particularly damaging to Clay is Detective Malone's testimony that Clay confessed that the prescriptions were forgeries. We also have testimony that Clay had in his possession a blank prescription pad from a hospital some distance from Little Rock. This evidence together with the testimony by both Garner and Randall that Clay presented the prescriptions for filling was sufficient to support a conviction.

¶14. We therefore find that there is no cause for disturbing the judgment entered by the Circuit Court of DeSoto County.

¶15. THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY OF CONVICTION OF OBTAINING A CONTROLLED SUBSTANCE BY FRAUD AND SENTENCE OF FIVE YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF APPEAL ARE ASSESSED TO DESOTO COUNTY.

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, MOORE, PAYNE, AND THOMAS, JJ., CONCUR. LEE, J., CONCURS IN RESULT ONLY. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY IRVING, J.

KING, P.J., DISSENTING:

¶16. With appropriate respect for the majority opinion, I dissent.

¶17. The majority opinion believes the hearsay violation to be harmless. In my opinion, this proposition is invalid.

¶18. The majority holds the admission of this hearsay to be harmless error "because there was other evidence sufficient for the jury to find that the prescription was a forgery". This other evidence, as relied upon by the majority, consisted of "testimony that Clay had in his possession a blank prescription pad from a hospital some distance from Little Rock⁽¹⁾," and "Detective Malone's testimony that Clay confessed that the prescriptions were forgeries."

¶19. "A blank prescription pad from a hospital some distance from Little Rock" is not evidence that Clay forged a prescription. This is especially true when the prescription alleged to have been forged was written on a prescription pad from the University of Arkansas Medical Center at Little Rock. The other evidence upon which the majority relies, is the testimony of Mike Malone.

¶20. The relevant portion of that testimony is as follows:

Q. Now, once you got him to the police department, was he advised of his rights?

A. Yes, sir. He was.

Q. And did you have occasion to talk to him there at the police station?

A. Yes, sir.

Q. And what did he tell you there at the police station?

A. Basically, he said that he had been doing this all his life, he was a junky, he wasn't going to hide that, and that pretty much the names on the prescription along with the doctors were all just fictitious names he had made up.

¶21. This court has consistently held that "an error is harmless only when it is apparent on the face of the record that a fair minded jury could have arrived at no verdict other than that of guilty." *Givens v. State*, 730 So. 2d 81, (¶33) (Miss. Ct. App. 1998), *Bishop v. State* 761 So. 2d 894, (¶12) (Miss. Ct. App. 2000), *Fortune v. State*, 766 So. 2d. 827 (Miss. Ct. App., Sept 12, 2000).

¶22. If this Court is to hold the admission of this hearsay is harmless error, it must be convinced, that after exclusion of the hearsay evidence, the other evidence of guilt is so great, that the jury's verdict could not possibly have been tainted by the consideration of the hearsay evidence. Such a requirement mandates that this Court look at more than whether there was evidence which a jury might decide to be credible, and therefore might conclude that Clay was guilty. It requires that the evidence be so overwhelming, that the jury could only reach one conclusion.

¶23. A careful reading of the record in this case clearly discloses that it does not meet the standard of harmless error required in *Bishop*. The evidence, excluding inadmissible hearsay, is not so overwhelming that the jury could only have reached one conclusion. The evidence, excluding the inadmissible hearsay, consists solely of the testimony of Mike Malone on February 1, 1999, attempting to recall what was allegedly said to him by the defendant on July 15, 1997, almost two years previous. There was no written, or recorded, documentation of this July 15, 1997 statement. This lack of documentation of the statement alleged to have been made by Clay, suggests that the evidence of guilt is not so overwhelming that the jury could only have returned a verdict of guilty.

¶24. The mere fact that Mike Malone was giving his recollection of what he claims Clay said to him almost two years previous, and which he made no record of, indicates that the jury just as easily could have found Malone to be incredible, and therefore found Clay not guilty. There is no requirement that the jury accept as credible the testimony of Malone, *Collins v. State*, 757 So. 2d 335, 339 (Miss. Ct. App. 2000), nor can this Court presume that the jury would have automatically given credence to Malone's testimony without the hearsay. Because the question before this Court is one of tainted evidence, rather than the sufficiency of the evidence, this Court cannot simply accept as true that evidence which supports the jury verdict. Instead, we are obligated to look at the evidence, and see if the jury might just as easily have viewed this evidence and reached some other conclusion. Because the jury is not mandated to accept as credible the testimony of any witness, the lack of documentation on Clay's alleged statement could have caused this case to go either

way. If there exists two conclusions which might easily be reached from the same evidence, guilty or not guilty, you must assume that the tainted evidence tipped the scales in favor of the guilty verdict. Under these circumstances you cannot reasonably hold this to be harmless error. Clearly there were two conclusions, rather than one, which the jury could have reached from this same evidence.

¶25. As we resolve this case, the question which this Court is required to address, is not whether there was other evidence in the record, but rather, whether that other evidence in the record is so overwhelming that the jury could only have returned a verdict of guilty, thereby rendering harmless any improperly admitted evidence. My reading of the record leads me to conclude that the answer to that question is no.

¶26. The State's total case was dependent upon proof that the prescription was forged. If there was no proof that the prescription was forged, then there was no case against Clay. The testimony of Randall and Garner, offered to prove that the prescription was forged, was essential to that case.

¶27. Under these circumstances it cannot be said that the evidence against Clay was so overwhelming that the jury's verdict was not influenced by the inadmissible hearsay. Because this court cannot with confidence state that the evidence against Clay was so overwhelming that the jury could only have returned a verdict of guilty, I would reverse and remand for a new trial.

IRVING, J., JOINS THIS OPINION.

1. That hospital was Regional Medical Center located in West Helena, Arkansas.