

IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00308 COA

JOHNNY JONES A/K/A "D-JOHNNY"

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. JOHN LESLIE HATCHER

COURT FROM WHICH APPEALED: CIRCUIT COURT OF COAHOMA COUNTY

ATTORNEY FOR APPELLANT:

TOM T. ROSS, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: DISTRIBUTING COCAINE

TRIAL COURT DISPOSITION: GUILTY OF SALE OF COCAINE AND SENTENCED TO
SERVE SIXTEEN YEARS IN THE CUSTODY OF THE MDOC WITH EIGHT YEARS
SUSPENDED

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

FRAISER, C.J., FOR THE COURT:

Johnny Jones was convicted of sale of cocaine by a jury in the Coahoma County Circuit Court. He was sentenced to serve sixteen years in the custody of the Mississippi Department of Corrections with eight years suspended pending good behavior. On appeal, Jones asserts that the trial court erred in trying him in his absence. Because Jones's assertion of error is meritorious, we reverse and remand for a new trial.

FACTS

Johnny Jones was indicted prior to the January 1993 court term by the Grand Jury of Coahoma County, Mississippi, for the crime of sale of a controlled substance. Jones was arraigned on December 17, 1992, and entered into a pre-trial appearance bond December 31, 1992, which was approved January 1, 1993. The bond indicated that Jones was to present himself for trial on June 17, 1993; however, at the request of the State, the trial date was advanced to January 22, 1993. Prior to announcing ready for trial, Jones's counsel informed the trial court that Jones was not present. Trial counsel informed the court that Jones had been advised of the trial setting by counsel's associate. Further, Jones's sister testified that she had told Jones trial was to be held on January 22, 1993. Counsel announced that Jones was not present for the trial and moved for a continuance until Jones could be located. The court overruled Jones's motion for continuance, and trial was held, which resulted in Jones' conviction.

DISCUSSION

The right of a defendant to be present at his trial is deeply rooted in both the United States Constitution and statutory law of this State. A person charged with a felony has a fundamental right to be present at every stage of the trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). The right of presence derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam). A defendant's rights under the Constitution may be waived, provided such waiver is voluntary, knowing, and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

In Mississippi, this constitutional right is paralleled by a statutory right, which provides:

"In criminal cases the presence of the prisoner may be waived, and the trial progress, at the discretion of the court, in his absence, *if he be in custody and consenting thereto*. If the defendant, in cases less than felony, be on recognizance or bail or have been arrested and escaped . . . , the trial may progress. . . .

Miss. Code Ann. § 99-17-9 (1972) (emphasis added). While Mississippi's statutory right parallels the

constitutional protections, it has been interpreted to provide even greater protection than the constitutional right of presence at trial. The Mississippi Supreme Court in *Sandoval v. State*, 631 So. 2d 159, 164 (Miss. 1994) interpreted the language as follows:

Only in discussing "cases less than felony" does the statute permit trial *in absentia* of defendant "on recognizance or bail." This statute, unchanged since 1857, expresses the legislative intent to limit waiver of trial presence of accused felons to those instances where the accused is "in custody and consenting thereto."

The decisions of this Court prior to *Samuels* consistently applied the rule that an accused felon present at the commencement of his trial may thereafter waive his appearance by absenting himself from the trial.

Banos v. State, 632 So. 2d 1305, 1309 (Miss. 1994) (citing *Sandoval*, 631 So. 2d at 164). Thus, the statutory interpretation enunciated in *Sandoval* and applied in *Banos* is that a criminal defendant may waive his statutory right to appear at trial in cases where the defendant is physically present and consenting at the time of trial. In *Sandoval*, *Banos*, and the present case, the defendants executed recognizance bonds, which placed them in constructive custody. In *Sandoval*, *Banos*, and the present case, the defendants were not present during any stage of the trial. In *Sandoval* and *Banos* the Mississippi Supreme Court held that the trial court committed reversible error by trying the defendant *in absentia*. Based on clearly established law, we are compelled to reverse Jones's conviction and remand this matter for a new trial.

THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT IS REVERSED AND THIS CAUSE REMANDED FOR A NEW TRIAL. ALL COSTS ARE TAXED TO COAHOMA COUNTY.

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