

2007-KA-01527-COA

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI Reply

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DOUGLAS DUVALL HILL

APPELLANT

vs.

STATE OF MISSISSIPPI

APPELLEE

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REPLY BRIEF OF THE APPELLANT

COMES NOW, the Appellant herein, Douglas Duvall Hill, by and through counsels of record, and files this Reply Brief in response to the Appellee's Brief heretofore filed in this honorable Court by the State of Mississippi, and, without waiving any issue contained in the Brief of the Appellant in this matter, would respectfully state and bring to this Court's attention the following facts, statutory interpretation, and case law in support of the Appellant's assertions of error in his conviction and sentence in the lower court:

The Appellant would respectfully submit that the argument in the section of the Appellee's Brief numbered "I," beginning on page 4, alleging that the trial court "acted within its discretion in denying the defendant's pre-trial motion to sever his trial from the trial of the co-defendant," fails because of the misapprehension by the State of the elements in the cited case law for consideration in the severance of the trials of co-defendants as applied to the facts of this case. The Appellee attempts to dismiss the argument of the Appellant by averring the issue as procedurally barred under authority cited by the State in *Beckum v. State*, 917 So. 2d 808 (Miss. Ct. App. 2005) and *Alonso v. State*, 838 So. 2d 309

(Miss. Ct App. 2002). An examination of these cases reveal that neither case is directly on point to refute the claim of error in the denial of a pre-trial motion to sever co-defendants under the facts of this case. *Beckum* speaks to the procedural bar raised in failing to specifically set out factual issues in support of a JNOV motion dealing with the sufficiency of the evidence, while *Alonso* deals with a total failure by the defense to raise claims of error by pre-trial motion, contemporaneous objection, or post-trial motion. The error alleged in the case at bar was sufficiently preserved procedurally by the filing of the pre-trial motion to sever, which was supported by uncontradicted facts before trial, and was not affirmatively or impliedly waived during trial.

Citing to the cases of *Sanders v. State*, 942 So. 2d 156 (Miss. 2006), and *Payton v. State*, 785 So. 2d 267 (Miss. 1999), on page 4 of their brief, the Appellee sets out the standard of review for an abuse of discretion in the severance of co-defendants, but the Appellant contends that the State of Mississippi is mistaken in the application of the rule in the facts of this case. The standard of review as established by the Mississippi Supreme Court in *Sanders* reads:

There are two *Duckworth* factors to be considered by a trial court when determining whether or not to sever a trial: (1) whether the testimony of one co-defendant tends exculpate that defendant at the expense of the other, and (2) whether the balance of the evidence tends to go more to the guilt of one defendant than the other. The overarching consideration when evaluating these factors is whether the defendants would be prejudiced by a joint trial.

Sanders, 942 So. 2d at ¶15 (citing *Duckworth v. State*, 477 So. 2d 935 (Miss. 1985)) (internal citations omitted).

These “two *Duckworth* factors” are clearly separate alternatives to be considered

along with proof of prejudice in the decision by the trial court to sever the trials of co-defendants.

The *Payton* decision is also cited by the Appellee as supportive of their contention that the severance issue is either procedurally barred or not entitled to reversal on this ground. In reversing that case, the Court in *Payton* held:

Payton was prejudiced by Marshall's testimony and defense strategy in general. This strategy was an attempt by co-defendant Marshall through his testimony and that of his witness to mitigate his potential dual life sentences by shifting as much blame as possible to Payton, whose defense was a general denial of the allegations. While it is true that Marshall did not attempt to fully exculpate himself, the blame-shifting is apparent. As the Court of Appeals dissent pointed out, Marshall's defense was successful to Payton's detriment as evidenced by the disparity in sentencing verdicts.

Payton, 785 So. 2d at ¶15 (emphasis added).

While the State of Mississippi attempts to dismiss the severance claim of error using *Sanders* and *Payton*, the second of the two *Duckworth* factors was clearly met before the pre-trial hearing and the first during trial. Further, the requirement of a showing of prejudice was also conclusively established by (1) the possibility the wrongful conviction of the Appellant in this case based on the imputation to the Appellant of the pre-trial confession to police damaging to co-defendant Damita Hill and (2) the “blame-shifting” defense presented by Damita Hill during and after this trial. Even though she did not directly testify that Mr. Hill was the person who injured the child, the general tenor of her anticipated defense at trial endeavored to place the blame squarely on the Appellant herein, thereby also satisfying the first *Duckworth* factor.

Since the Appellee argued only a procedural bar and the considerations of the first factor under *Duckworth* in their brief, the Appellant contends that the trial judge was fairly presented by the defense of conclusive proof of the presence of the second factor: “whether the balance of the evidence tends to go more to the guilt of one defendant than the other.” *Sanders*, 942 So. 2d at ¶15. “From the presence of one or both of these factors, the defendant must convince the trial court that he will be unduly prejudiced in his ability to receive a fair trial. *Id.*” *Swanagan v. State*, 759 So. 2d 442 (¶8) (Miss. Ct App. 2000) (citing *Stevens v. State*, 717 So. 2d 311 (¶5) (Miss. 1998)) (emphasis added). The Appellant asserts that during the pre-trial hearing, the trial court had uncontradicted proof of the presence and the prejudicial effect of the second *Duckworth* factor, and the failure of the trial judge to sever these co-defendants predictably lead to an unfair trial. The prejudice that existed in the case before this honorable Court today is further evidenced by the inconsistent, disconnected result reached by the jury’s verdicts against both co-defendants: either they were convinced both parents jointly abused their child, which is in no way supported by the evidence, or the jury found both co-defendants guilty in a “shotgun” fashion to insure that the truly guilty party of the two was punished. Since no else had access to or responsibility for the child during the day of the presentment of the child with trauma at the emergency room, Damita Hill’s testimony served to only to aid the State in the prosecution’s case against the Appellant at his expense, thereby depriving him of a fundamentally fair trial. There is no other reasonable explanation for Mr. Hill’s conviction at trial other than Damita’s Hill’s attempt to “mitigate” her criminal responsibility by connotatively shifting the blame to the Appellant

through her “the baby was OK when I left” testimony in support of her defense, which like in *Payton*, “Marshall did not attempt to fully exculpate himself, [but] the blame-shifting is apparent.” *Payton*, 785 So. 2d at ¶15.

The Mississippi Supreme Court, in affirming the in *Sanders* case, held that:

The State argues that the defendants did not actually offer any exculpatory evidence. In fact, “both women virtually confessed to the crime during their testimonies, thus inculcating themselves.” Both testified to their own guilt, as well as to the guilt of the other. Each consented to and performed acts that were part of the crime, making them principals acting in concert. Because they aided and abetted each other, neither defendant exculpated herself or inculpated the other.

Sanders, supra, at ¶ 18.

Such was not the facts in the case at bar; the Appellant, who consistently denied abusing his child and “whose defense was a general denial of the allegations” (*Payton*, supra, at ¶15), was faced with an implicit accusation of guilt at trial by Damita Hill who sought to incriminate Mr. Hill by her “I don’t know who did it, but it wasn’t me” defense. Clearly, the result in *Sanders* is not controlling here, as neither co-defendant “testified to their own guilt, as well as to the guilt of the other.” *Id.* As a result of the trial judge’s refusal to sever the trial of the co-defendant in the face of overwhelming evidence Damita Hill’s guilt before trial and her implicit “blame-shifting” defense during trial, the Appellant herein submits that refusal violated the Appellant’s fundamental right to a fair trial under the Mississippi and United States Constitutions and amounted to an abuse of discretion, requiring reversal of this matter and a remand to the lower court for a new trial.

The Appellant contends that Issue One is dispositive of this matter and stands on the

Brief of the Appellant as to the remaining two claims of error at trial.

WHEREFORE, PREMISES CONSIDERED, The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits, with proper instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out heretofore.

Respectfully submitted,

Douglas Duvall Hill, Appellant

by


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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Reply Brief of Appellant to the following interested persons:

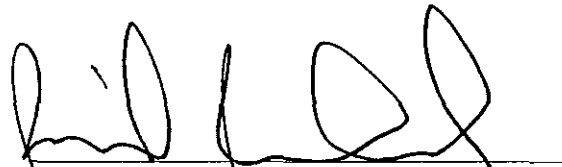
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Gulfport, Mississippi

8th August, 2008
This the ~~2nd~~ day of ~~April~~, 2008.


Phillip W. Broadhead, MSB
Certifying Attorney