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The Sentinel

THE OFFICIAL NEWSLETTER OF THE GREATER BIRMINGHAM CRIMINAL DEFENSE LAWYERS' ASSOCIATION

NEWS FROM THE COURTHOUSE

A number of issues have been discussed in various judges' meetings when our organization was represented. Among the most spoken of issues are as follows;

1. The judges have decided to implement a flat $350.00 fee for all deferred prosecutions handled by Judge Dan Reynolds. This is regardless of the amount of time expended by the attorney. However, if an attorney can show a hardship or necessary additional hours, this amount will be raised after being individually considered by Judge Reynolds. In addition, this figure should be raised since it was decided before the new fee legislation was passed.

2. The judges in our circuit have acknowledged that we can still file a May motion, along with our new fee declarations.

3. The judges are trying to implement a procedure in which Rule 32 Hearings are held by video conference with the Defendant not brought up from the penitentiary. This is in preliminary stages, but our organization may want to respond to this.

4. At the last judges' meeting on July 27, 1999, Judge Hughes wanted David Barber to clarify whether there was "open discovery" in the District Court. Mr. Barber verified that was the new policy. All the judges were present then. If you have a problem with compliance of discovery in this regard, you may see Laura Petro or approach the judge handling your case, or call one of the GBCDLA Board Members..

5. Our organization has vehemently objected to any lawyer, particularly lawyers representing indigent clients, from having to pay in advance, or at any time, for discovery. Judge Nail has clearly stated his position - if the District Attorney does not supply discovery to the defense, it will not be used. Other judges are considering issuing a standard Order in which it still requires lawyers to pre-pay for discovery, but reimbursement will occur by virtue of the Order when the fee declaration is paid. Our organization has objected, and will continue to object, to us having to pay for anything we are entitled to anyway under the Rules. This is something our organization needs to discuss.

6. There is a vacancy among civil judges. The next civil judge to be filled for that vacancy will be required to assist criminal judges in disposing of cases. This is by order of Judge Thorn and by agreement with the criminal judges.

PRESIDENT'S COLUMN

Richard S. Jaffe

This is the last President's column that I will write for The Sentinel. It has been an honor to have served as your President this year, which has been replete with changes throughout our criminal justice system. We have new judges, new laws, a new pay scale for

indigent Defendants - and - make no mistake about it - **our organization has made huge progress as a component to be considered in the politics and process of the criminal justice system.** I will not reiterate, as I have in previous articles, all of the inroads we have made and specific projects in which we have been involved, but there are a few I would like to mention before discussing the "Kalmanoff" Report to the Criminal Justice Advisory Committee of Jefferson County.

Our members should note that we are now invited to practically every judges' meeting, and our input is sought before, during, and after the meetings. When there is something that affects the criminal justice system, our views, opinions and input are sought by the Jefferson County Commission, our judges, TASC, and the media, and when someone takes a shot at us, such as our District Attorney did in the Birmingham News, we fired back a letter voicing our strenuous objections and took additional action as well.

Not only has our organization grown in numbers and status this year, but we have also increased our capacity and responsiveness to individual members who have had problems in dealing with various components of the criminal justice system. For example, when Board member Virginia Meigs had a serious problem dealing with a particular District Attorney, we met with Chief Deputy District Attorney Roger Brown and Deputy District Attorney Laura Petro, and accomplished our objective. When lawyers Scott Boudreaux and Mark Polson called regarding the City Court's preclusion of our ability to access records, we acted immediately and successfully. When the District Court of Jefferson County and the Birmingham Bar Association took plans to implement a lawyer trainee program, member Don Colee immediately volunteered to represent our organization helping to coordinate those efforts, and before Legislation even comes out of committee, our organization, through Board member and Vice-Present Richard Izzi, has hooked into the pipeline and is on top of each and every proposal. Our organization has been vocal, both publicly and privately, in steadfastly objecting to any efforts to build a new jail far away from the courthouse which would stress our ability to have easy access to our clients who are in jail facing charges.

The United States Attorney's Office has taken the final step toward finalizing a liaison committee between itself and criminal lawyers practicing within the Northern District of Alabama. Several representatives from our organization, as well as the State criminal lawyers' organization, will comprise the private lawyer component of this committee. It will be set up to deal with significant issues, or potential issues, facing both lawyers and prosecutors in the Federal arena. The exact perimeters of the committee are yet to be worked out.

Finally, what concerns me most as your outgoing President, concerns the potentially divisive issue of the implementation of a public defender system or some type of contract system to represent indigent Defendants. Many of our members render quality assistance to indigent Defendants and have been doing so for years. The bottom line is that the information I have gained is that it is going to be purely a question of economics and the economics in this case will even override the politics. Arguments can be made on both sides of the issue but in the end it is highly questionable whether the Jefferson County Commission will vote to outlay millions of dollars each year to finance a quality system.

In my view, it is most important that our organization understand that there will not be a unanimous agreement on this issue, one way or the other, and that no one issue should divide and conquer our organization. Each member should be free to express his or her opinion and be respected for it. The point is that we should not let this one, while an extremely significant issue, serve to splinter our organization into ineffectiveness.

We have accomplished so much and come too far to allow any single issue to destroy our organization which has served its members and the public so well. I am proud that the organization began in my office on 14th Avenue South in 1991 with a small group of dedicated criminal defense lawyers, and I am just as proud to have served as your President this year. Thank you for the opportunity.

RESPONSE TO D.A.'S COMMENT IN PRESS

July 6, 1999

PERSONAL, PRIVATE, AND CONFIDENTIAL

District Attorney David Barber
Jefferson County District Attorney's Office
Criminal Justice Center
801 North 21st Street
Birmingham, AL 35263

RE: Greater Birmingham Criminal Defense Lawyers Association

Dear David:

I am sure you are aware by now that a number of criminal defense lawyers in our organization, especially those doing appointed work, have experienced various degrees of outrage at your statement to the press that "...court-appointed defense lawyers have little incentive to settle low-level criminal cases early..."

David, this letter is not to get into an argument with you, or some type of personal contest, regarding your right to express anything you want to the press. Certainly regarding individual cases, lawyers on both sides have taken shots at each other during the course of litigation.

However, as President of our organization, I wanted to express the views of many members who have contacted me, both personally and, in fact, many in writing. My response to you is as follows: The amount of money paid to lawyers to wait the additional four to six months to resolve a case is minuscule at best. More significantly and noteworthy - lawyers would much rather have the little bit of money that they get paid on these cases as early as possible. If you accept the hypothesis that they are doing it for cash flow purposes, it is far more meaningful to realize less on the short end, rather than having to wait the additional four or five months and then the several months after that just to get the papers processed, only to get a little more. It defies logic and it is not accurate.

There are always those exceptions that abuse the system. Those lawyers exist in every facet in both the civil and criminal justice system. Your comments were directed toward all criminal defense lawyers taking appointed cases, even if there is a hint of accuracy to them - which is doubtful.

I am also writing you this letter to let you know that I believe that there is a significant amount of unnecessary fighting among criminal defense lawyers and prosecutors regarding pre-trial issues. Certainly we all must fight to zealously represent our respective sides, but I believe that when anyone allows the conflict to become personal, the entire criminal justice system is compromised, not to mention the individual parties in the specific litigation involved.

I have spoken about this last issue with Roger Brown personally. In a meeting with Roger and Laura Petro (on a similar matter), I found them to be very supportive to the concept that we should all strive to show the respect for each other as much as possible, and keep personality conflicts to a minimum. I feel you also support these goals. I have, in fact, suggested that we explore this subject further, with perhaps some view toward establishing some type of liaison group to defuse disputes between members of our organization and your office if, and when, they turn unnecessarily personal. I am hoping to discuss this in more detail with your office in the future. I have also acknowledged to Roger that there have been instances on our side as well, where lawyers have unnecessarily personally attacked prosecutors in court, in the press, and in public, and these have also occurred against criminal defense lawyers.

I hope that we can work toward a more cooperative relationship, and reserve our fighting on the issues at hand and, as much as possible, to the courtroom.

Very truly yours,

/S/

Richard S. Jaffe

RSJ/mg

cc: All GBCDLA Board Members

NEW RATES ON INDIGENT DEFENSE

Virginia P. Meigs, Esq. 94
870-5704

Effective June 10, 1999, new rates are in effect on indigent defense work according to Brenda Layton at the Comptrollers office in Montgomery. New Attorney Fee Declaration forms are available on the first floor of the Criminal Justice Building in the Office of Administration. The following rates are now in effect:

Capital Case (or charge carrying a sentence of life without parole)	No Limit
Class A Felony	$3,500.00
Class B Felony	$2,500.00
Class C Felony	$1,500.00
Other	$1,000.00
Appeal	$2,000.00
Petition for Writ of Certiorari	$2,000.00
Post-Conviction/habeas Corpus	$1,000.00
Hourly Rate: In Court	$50.00
Out of Court	$30.00
Appellate	$50.00

If a case was assigned before June 10, 1999 and settled after June 10, 1999, two fee declarations can be submitted to take advantage of the rate increase; otherwise, the old rate stands. An attorney will not be paid the new rate before June 10, 1999. The State will pay the old rate unless you split the fee declaration after the June 10, 1999 date. The overhead expense remains unchanged at this time.

MIRANDA STANDARD IN FEDERAL COURT

Virginia P. Meigs, Esq.

Don't expect to argue a Motion to Suppress Defendant's Statement in Federal court and use Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) as your authority. In response to the Supreme Court's decision to Miranda, the Congress of the United States enacted 18 U.S.C.A. §3591 (West 1985), with the clear intent of restoring voluntariness as the test for admitting confessions in Federal court. Accordingly, §3501, rather than Miranda, governs the admissibility of confessions in federal court. In U.S. v. Dickerson, 166 F.3d 667, the district court erred in suppressing Dickerson's voluntary confession on the grounds that it was obtained in technical violation of Miranda.

On January 27, 1997, Charles T. Dickerson confessed to robbing a series of banks in Maryland and Virginia. Dickerson was subsequently indicted by a federal grand jury on one count of conspiracy to commit bank robbery in violation of 18 U.S.C.A. §371 (West Supp. 1998), three counts of bank robbery in violation of 18 U.S.C.A. §§2113(a) & (d) (West Supp. 1998), and three counts of using a firearm during and in relation of 18 U.S.C.A. §924(c)(1) (West Supp. 1998). Shortly thereafter, Dickerson moved to suppress his confession. Although the district court specifically found Dickerson's confession was voluntary for purposes of the Fifth Amendment, it was suppressed for purposes of technical violation of Miranda. In reviewing §3501, a confession shall be admissible in evidence if it is "voluntarily given."

On appeal in Dickerson, the Court of Appeals held that:

(1) admissibility of confessions in federal court is governed by statute providing that confession is admissible if voluntarily given, not by rule of Miranda;
(2) government could appeal order denying reconsideration of suppression ruling;
(3) as matter of first impression, District Court's refusal to reopen suppression hearing would be reviewed for abuse of discretion;
(4) government's proffered reasons were insufficient to establish that its failure to

introduce evidence which was to become basic for its motion for reconsideration should be excused;

(5) government's refusal to brief the question whether admissibility of confessions was governed by statute did not prevent Court of Appeals from considering such question;

(6) warrant authorizing search of defendant's apartment was sufficiently particular in describing the items to be seized; and

(7) even if warrant was not sufficiently particular, evidence obtained in search was admissible pursuant to good faith exception to exclusionary rule.

This goes back to the saying what you say can and will be used against a Defendant in the Federal court system.

DISTRICT ATTORNEY'S OFFICE MAKES PERJURY CASE

J. Derek Drennan, Esq. 96

As many of you may be aware, Richard Jaffe, Emory Anthony, and Derek Drennan represented a recent capital murder Defendant whose main accuser had lied under oath literally hundreds of times. While the Defendant was acquitted in less than an hour, it should be pointed out that the State has made no effort to-date to prosecute that witness for perjury, although that witness had violated that statute continually and at least eight times in eight different court hearings and trials over a four-year period of time. Recently the Jefferson County District Attorney's Office has decided to indict a client of Richard Jaffe and Derek Drennan for perjury. The charge of perjury appears to be motivated by the fact that the Defendant gave exculpatory testimony in the trial of her Co-Defendant. The testimony also allegedly exculpated the witness in a charge in which she had pled guilty to violation of the Youthful Offender Act and was granted probation. Apparently, based on the fact that the Witness-Defendant accepted a probationary sentence and treatment as a youthful offender rather than be subject to the in excess of twenty years imprisonment as an adult, and although the Co-Defendant was not convicted of the crime charged, the State has chosen to single out and prosecute a witness merely because that witness' testimony apparently interfered with their ability to gain a conviction on the Co-Defendant. We, as an organization, cannot allow the State to selectively prosecute alleged perjurers simply because that testimony is adverse to their interests. We would ask the members of the organization to identify those cases where State's witnesses had clearly perjured themselves and given inconsistent testimony which would have subjected them to the perjury statute but that the Jefferson County District Attorney's Office chose not to prosecute because that testimony was not adverse to their position in that case, and inform Derek Drennan of any such cases. Affidavits from members of the organization are requested, and we would appreciate any and all of your phone calls or correspondence in our effort to identify those cases in which the Jefferson County District Attorney's Office routinely ignores the dictates of the perjury statute when it suits their own interest.

Selective Prosecution

GBCDLA MEMBERSHIP DUES FOR 1999-2000 ARE DUE. PLEASE FORWARD DUES TO GBCDLA, P.O. BOX 370282, BIRMINGHAM, AL 35203.

DUES:

$25.00	Any attorney admitted from 1996 to date
$50.00	Regular Member
$100.00	Sustaining Member

RECENT DECISIONS

ALABAMA COURT OF CRIMINAL APPEALS

Ballard v. State

Released 3-26-99. Appealed from Jefferson County. Opinion authored by Judge Cobb.

Halycon Ballard was convicted of theft in the second degree after being charged with stealing two blouses and a sweater - a shoplift. Among the numerous issues raised, counsel challenged the qualifications of the document examiner for the Alabama Department of Forensic Sciences. On redirect examination, the prosecutor attempted to elicit the fact that the defense could have called his own expert to examine the documents. The court found no error with the eliciting of this information, in spite of the burden of proof shifting inherent in the question. The court also overruled several objections to the prosecutor's closing argument, in spite of the fact that it brought out facts not in evidence before the jury. In spite of the fact that the court found that "the prosecutor should not have been allowed to expand on the reply in kind argument, and informed the jury that the State had provided Ballard with a copy of the original invoice at the Preliminary Hearing a month before the incident", that argument was considered harmless error.

Finally, the court refused to reverse the case in spite of questioning by the prosecutor of the Defendant which invaded the privileged communications prong of the attorney-client privilege.

Lawhorn v. State

Opinion 3-26-99, appealed from Talladega Circuit Court. Decision by Presiding Judge Long.

Lawhorn appealed the denial of his post-conviction petition filed pursuant to Rule 32. He was sentenced to death after being convicted of murder with aggravation. He claimed his attorney was ineffective. The Court of Criminal Appeals held that trial counsel was not ineffective for failing to interpose a Batson objection. Lawhorn was white and at that time the lawyer claimed that Batson had not been applied to white Defendants. The Alabama Court of Appeals held that the lawyer was not ineffective for failing to forecast changes in the law.

As to the allegation that Lawhorn's attorney was ineffective for failing to investigate his drug use during the time of the murder, thus preventing a jury charge on involuntary intoxication. However, the Alabama Court of Criminal Appeals held that while counsel has a duty to investigate for evidence favorable to the Defendant, "this duty only requires a reasonable investigation". Finally, the Alabama Court of Criminal Appeals procedurally barred a number of claims on Lawhorn's petition because they were not raised on direct appeal.

Howlet v. State

Opinion released 4-21-99. Appealed from Colbert Circuit Court. Authored by Presiding Judge Long.

The appellant, Benjamin Howlet, was convicted of two counts of murder made as capital because the murder was committed by shooting the victim while he was in a vehicle and because Howlet was in a vehicle when he fired the shot.

Howlet was sentenced on May 27, 1998, and filed a motion for a new trial on June 25, 1998, the sixtieth day after pronouncement of sentence, unless the motion was continued as provided in Rule 24.4, Ala.R.Crim.P. The trial court issued an order setting the motion for a hearing on August 7, 1998, a date outside the sixty-day time period. The appellant filed two separate motions to enlarge the time for ruling on the motion for new trial. The court granted both requests. The order relating to the second request stated "[T]he Motion for a New Trial in the above case is continued until a date **14 days after the completion and delivery of the trial transcript** and the time for ruling on the defendants' Motion is enlarged to include the date of the hearing on the motion and 7 days therefrom.

The Court held that the date, "14 days after completion and delivery of the trial transcript" was not a "date certain" because it could not be calculated when the order was issued.

APPEAL DISMISSED.

McMillan, Cobb, Baschab, and Fry, JJ., concur.

Pierce v. State

Opinion released 3-2-99. Appealed from Geneva Circuit Court. Authored by Judge Baschab.

Appellant, Andy Dwight Pierce, was convicted of capital murder for killing Annie Brooks during the course of a robbery.

Appellant made several contentions, including that extraneous influences on the jury during his trial deprived him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under Alabama law. Specifically, he claims that Sheriff Douglas Whittle was a key State witness who had improper close and continual contact with the jury throughout the trial, thus violating Turner v. Louisiana. Another contention was that his trial counsel was ineffective because he did not object to State's witness Douglas Whittle having extensive contact with the jury.

AFFIRMED.

Long, P.J. and McMillan, J. concur; Cobb, J., concurs in part and concurs in result in part; Fry, J., recuses himself.

COBB, J., CONCURRING IN PART; CONCURRING IN RESULT IN PART stated, "[t]he most problematic and disturbing question before this court is whether Sheriff Whittle served as a key witness for the state while maintaining a close and continual association with members of the jury. Cobb felt that the most problematic and disturbing question before the court was whether Sheriff Whittle served as a key witness for the state while maintaining a close and continual association with members of the jury. The Rule 32 petition approached this question in two ways: first, under the theory that Whittle's alleged dual role did not come to light until after the trial and that it was, therefore, newly discovered evidence; and second, under the theory that trial counsel was ineffective for failing to object to Whittle's dual role. The majority rejected both contentions.

Cobb did not believe that Rule 32.1(e)(5) would apply in a jury contamination case because it presents an impossible burden in those situations. However, newly discovered evidence tending to show that improper and prejudicial influence had been injected into the jury's deliberations would never prove a defendant's innocence. Such evidence would prove only that the defendant had been denied a fair trial as contemplated by the United States and Alabama Constitutions.

The majority stated that the trial court's comments about the sheriff's making "arrangements" for the jurors needs "made it apparent that Whittle would be in charge of the sequestration of the jury" and that therefore, defense counsel should have objected at that time to Whittle's having extensive contact with the jury. The majority held that these comments indicated that the sheriff was fulfilling his duties as contemplated by statute. It clearly is within a sheriff's job to make necessary provisions for a sequestered jury. §12-16-10 Ala. Code 1975. However, this statute does not require a sheriff or a deputy who serves as a witness for the State to personally attend the jurors. A sheriff may delegate those duties when necessary. Therefore, Cobb did not believe that the comments in the present case made it apparent to defense counsel that Whittle would maintain a "close and continual" association with the jury outside the courtroom.

Cobb also disagreed with the majority's statement that to be afforded a remedy, Pierce must show that Whittle's conduct resulted in his suffering actual prejudice. However, the holding in Turner v. Louisiana, 379 U.S. 466 (1965) makes it clear that if a key witness is in close and continual contact with the jury there is inherent prejudice.

Appellant also argues that trial counsel was ineffective for failing to object to Whittle's having extensive contact with the jury. The majority stated that this issue was precluded from review because it did not involve newly discovered evidence, and that, therefore, it should have been raised at trial and on direct appeal. Again, Cobb did not believe that the trial counsel necessarily had reason to suspect that Whittle was improperly performing the dual roles of key witness for the state while maintaining a close and continual association with the jury. Therefore, counsel could not be ineffective for failing to object.

However, Cobb did not believe relief should be granted under the guise of "newly discovered evidence" because it was not established by a preponderance of the evidence that the sheriff's conduct was not known or could not have been discovered "through the exercise of reasonable diligence."

Greenhill v. State

Opinion released 4-30-99. Appealed from Franklin Circuit Court. Authored by Judge Baschab.

Appellant Jerry Lee Greenhill was convicted of murder and attempted murder. Greenhill argued that the Trial Court erred when it did not grant a witness immunity or admit the transcript of the Grand Jury testimony into evidence after she invoked her Fifth Amendment Right against self-incrimination. The court held that the recognized non-statutory power to grant immunity applies only to State witnesses and, further, non-statutory grants of immunity must be signed by the District Attorney, which did not agree to the proposed grant of immunity in this case. In addition, the court held that even if the State and the Trial Court had agreed to offer the witness immunity in exchange for her testimony, the witness could not have been compelled to accept the offer and to waive her Fifth Amendment Rights. Accordingly, the Appellate Court held that the Trial Court did not err in its refusal to grant the witness immunity and compel her to testify.

The Appellant next argued that the Grand Jury testimony of the witness should have been admitted after the witness became unavailable in refusing to testify. The Trial Court held that the Grand Jury testimony was secret and, therefore, inadmissible.

The Appellant also argued that the Trial Court erred in granting the State's Motion in Limine preventing him from making reference to the allegation that the deceased was HIV positive and, therefore, presented a life-threatening potential injury to the Defendant. The court held that the Appellant in his offer of proof failed to adequately raise grounds for the admission of that evidence.

Smith v. State

Appeal from Mobile Circuit Court. Alabama Court of Criminal Appeals. CR98-0155. Opinion by Judge Baschab.

The appellant was charged by indictment with murder in connection with the death of his wife, was convicted of the crime of reckless manslaughter, and sentenced to twenty years in prison. The appellant raises one assertion of error alleging that the Trial Court erroneously denied his request to charge on the lesser included offense of criminal negligent homicide. The court found that from the testimony and evidence which suggested that the appellant's wife fell off of a porch striking her head against a brick during an argument would allow a reasonable juror to conclude that the appellant did not perceive that his wife might die as a result of his actions, thereby entitling the Defendant to a charge on criminally negligent manslaughter. (The court points out that the difference between reckless manslaughter and criminally negligent manslaughter is that the reckless offender is aware of the risk and consciously disregards it, as opposed to the criminally negligent offender who is not aware of the risk created and, therefore, cannot be guilty of consciously disregarding it.) Because the court erred in denying the Defendant requested charge, the case was reversed and remanded to the Trial Court.

Holliday v. State

Appeal from Randolph Circuit Court. Alabama Court of Criminal Appeals. Opinion by Judge McMillan.

The appellant was found guilty of unlawful sale of marijuana and was sentenced under the habitual offender act to life imprisonment. The appellant raises one assertion of error asserting that the Trial Court erred by granting the State's challenge for cause of a prospective juror without allowing questioning to determine if the potential juror could be fair and impartial. The juror in question was the mother of a Defendant who had pled guilty to a similar charge earlier in that week. The juror's son was represented by the appellant's counsel. Based on those facts alone, the court granted the State's challenge for cause. The court found, however, that while the Trial Court has discretion in deciding who shall be excused for cause, the Trial Court in this case abused that discretion. The court found that not only must the Trial Court determine through questioning that the prospective juror is biased, the court must go further and determine whether or not that bias can be laid aside and whether that juror can follow the court's instructions and render an impartial verdict. The court stated "to disqualify a prospective juror, he must have more than a biased or fixed opinion as to the guilt or innocence of the accused. Such an opinion must be so fixed as that it would bias the verdict a juror would be required to render." The court found that because the Trial Judge did not question the potential juror or allow either party to

question the potential juror as to any prejudice she may have harbored against either side, the Trial Court abused its discretion and the case was due to be reversed and the cause remanded for further proceeding.

Boynton v. State

Appeal from Baldwin Circuit Court. Alabama Court of Criminal Appeals. Opinion by Judge Cobb.

Appellant was convicted for possession of marijuana in the second degree. Appellant was sentenced to one year's imprisonment which was split fourteen days - the balance to be served on two years unsupervised probation. The underlying facts were not disputed by the State or the appellant. According to the testimony, the appellant was observed with another individual outside a nightclub smoking what appeared to be, in the officers' opinion, a marijuana cigarette, and sharing that cigarette with the other individual. The officers, in plain clothes and at night, approached the appellate and his companion. The companion fled the scene and was apprehended. The appellant did not move from the spot from where he was observed. The officers stated that the appellant appeared to attempt to put out the marijuana cigarette. However, upon a search of the area, no marijuana was recovered from the scene. These officers testified, however, that they could smell marijuana in the air and that the appellant's fingers smelled of marijuana. The appellant denied that he was smoking marijuana. The appellant alleges that the evidence against him is insufficient to sustain a conviction. The court found that based on the facts presented in the case, that the appellant's conviction was based on mere possibility, suspicion, or guesswork. The majority of the court also questioned whether or not there was even probable cause to arrest the Defendant. Judge Bashab dissented in the case stating that the State presented sufficient circumstantial evidence in the case to establish that the substance that the appellant had possessed and smoked was marijuana. Judge Bashab also concluded that the facts and circumstances of the case created a reasonable inference adverse to the innocence of the accused and, thus, the question of the appellant's innocence was properly before the jury. Based on the majority's view of the case, the cause was reversed and judgment rendered.

Sullivan v. State

Appeal from Walker Circuit Court. Alabama Court of Criminal Appeals. Opinion by Presiding Judge Long.

The appellant was convicted of the unlawful distribution of a controlled substance and sentenced to a total of twenty years. The appellant raises two issues on appeal, one of which the court finds as dispositive to the case and subjects the cause to be reversed and remanded to the Trial Court. The appellant contends that the Trial Court committed reversible error when it permitted the prosecutor to impeach him by cross-examining regarding a prior misdemeanor conviction for second-degree possession of marijuana. The appellant argues that the prior conviction for a misdemeanor marijuana possession was inadmissible under Alabama Rule of Evidence 609 because it was not a felony conviction, and it was not a crime involving dishonesty or false statement. The appellant also argues that the Trial Court's subsequent curative instruction given at the close of all evidence came too late and was insufficient to cure the prejudicial effect of the improperly admitted evidence. The court agrees with the appellant's position and finds that the introduction of the Alabama Rules of Evidence supersedes Alabama Code §12-21-162(b) and the "moral turpitude" standard contained therein, thus whether the crime of unlawful possession of marijuana in the second degree is a crime of moral turpitude is not determinative of the admissibility of the evidence under the present evidentiary rules in the State of Alabama. The only question under Rule 609 is whether the misdemeanor offense is a crime involving dishonesty or false statement. The court finds that the crime of second-degree possession of marijuana does not contain any elements of dishonesty or false statements and does not directly bear on the ability of the appellant to testify on its own behalf truthfully. Subsequent to the Trial Court's allowing the impeachment of the Defendant pursuant to the misdemeanor conviction, the court asks that jury to disregard the evidence that they had heard after the Defendant had rested his case. The Court of Criminal Appeals found that the prior conviction the State used to impeach the Defendant with was of a similar nature to the present offense and that both crimes involved illegal drugs. In conclusion, the court found that given a similar nature of the past offense and the present offense, the error was highly prejudicial to the appellant's case and could not be cured and denied the appellant a fair trial. Therefore, the judgment of

the Trial Court was reversed and the cause remanded for proceedings not inconsistent with the Appellate Court's opinion.