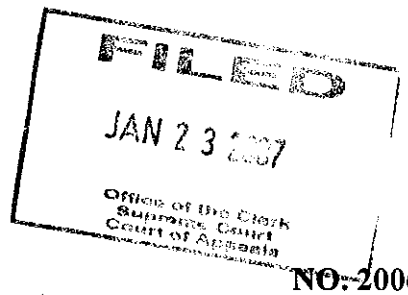
COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI



LAEFAEBEI EUYLESSITY STINGLEY — APPELLANT

V. — NO. 2006-KA-0555-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

COUNSEL FOR APPELLANT

BRENDA JACKSON PATTERSON
MISSISSIPPI BAR NO. [redacted]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 NORTH LAMAR STREET, SUITE 210
JACKSON, MISSISSIPPI 39201
TELEPHONE: 601-576-4200

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAEFAEBEI EUYLESSITY STINGLEY **APPELLANT**

V. **NO. 2006-KA-0555-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Laefaebei Euylessity Stingley

This the 23nd day of January, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson

BRENDA JACKSON PATTERSON
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAEFAEBEI EUYLESSITY STINGLEY **APPELLANT**

V. **NO. 2006-KA-0555-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF OF THE APPELLANT

STATEMENT OF THE CASE

On August 22, 2005, Laefaeabei Euylessity Stingley along with co-defendant Perry Broadway were indicted by a Tunica County grand jury for individually or while aiding and abetting and /or acting in concert with each other, unlawfully, wilfully, and feloniously, knowingly or intentionally without authority of law, have in their possession with intent to sell, marijuana in an amount more than five kilos. During a joint jury trial, co-defendant Perry Broadway's case was dismissed pursuant to a motion for a directed verdict at the close of the state's case, presented by Mr. Broadway's attorney and granted by Circuit Judge Albert B. Smith III. Laefaeabei Stingley was convicted and sentenced to serve ten (10) years in prison.

STATEMENT OF THE FACTS

On April 21, 2005, Laefaeabei Stingley borrowed his cousin Kenneth Burton's 1991 Chevrolet Caprice to go to Memphis, Tennessee to see his probation officer for misdemeanor D.U..I. T. 171. Perry Broadway was at Kenneth Burton's shop when Mr. Stingley went to borrow the car and asked to ride to Memphis to pick up some tires for his truck. En route to Memphis, Mr. Stingley alleges that Mr. Broadway saw a turtle in the road and asked that he stop. Once Mr. Stingley stopped, Mr. Broadway got the turtle and placed it in the trunk of the car after getting the keys from Mr. Stingley. While in Memphis, Mr. Stingley took Mr. Broadway to a tire shop and then went to see his probation officer. During his visit to the probation officer, Mr. Stingley left the car at a parking garage.

Once Mr. Stingley finished with his probation officer he picked up Mr. Broadway and they headed back home on 61 south. While en route on 61 south Chief Willie Dunn and Officer Paul Biggins noticed the 1991 Chevrolet Caprice with four tires on the back seat stacked in twos. They stated that due to a rash of crime in the area they pulled the vehicle over to check to see if the tires were stolen. Chief Dunn asked the driver, Mr. Stingley, to see his driver's license and the driver's license was suspended. Chief Dunn arrested Mr. Stingley and asked him if he could search the car. Mr. Stingley gave him permission to search the car. T. 182. While searching the trunk, they found a duffle bag with garbage bags in it with twelve bricks of marijuana and twelve loose bags of marijuana. Estimated street value forty to fifty thousand dollars. Both Mr. Stingley and Mr. Broadway were charged with possession of marijuana with intent to distribute.

SUMMARY OF THE ARGUMENT

I.

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT MR. STINGLEY'S MOTION FOR DIRECTED VERDICT FINDING THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THAT HE EXERCISED DOMINION AND CONTROL OVER THE MARIJUANA AS TO CONSTITUTE CONSTRUCTIVE POSSESSION OF THE CONTRABAND.

II.

WHETHER THE TRIAL COURT ERRED BY INFORMING THE JURY THAT HE DISMISSED THE CHARGES AGAINST THE CO-DEFENDANT AND THEY WOULD ONLY BE DECIDING THE CASE AGAINST MR. STINGLEY.

ARGUMENT

I.

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT MR. STINGLEY'S MOTION FOR DIRECTED VERDICT FINDING THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THAT HE EXERCISED DOMINION AND CONTROL OVER THE MARIJUANA AS TO CONSTITUTE CONSTRUCTIVE POSSESSION OF THE CONTRABAND.

At the close of the state's case, counsel for Mr. Stingley argued pursuant to a motion for directed verdict that the trial court should have dismissed the charges against Mr. Stingley because there was insufficient evidence to establish that he exercised dominion and control over the marijuana as to constitute constructive possession of the contraband. T. 163

The state in its case in chief put on three witnesses. Chief Willie Dunn and Captain Paul Biggins of the Tunica County Sheriff's Department, testified that on April 21, 2005, around lunch time they were traveling south bound on 61 when they saw a 1991 four-door, blue Chevrolet Caprice with four tires on the back seat. Laefaeabei Stingley was the driver and Perry Broadway was the

passenger. After a search of the interior which produced no contraband, they searched the trunk of the vehicle and they found twelve bricks of marijuana and twelve loose bags of marijuana. Detective Faye Pettis, the third witness called by the state, testified that the owner of the car was Kenneth Burton. T. 146. She stated that she did not find fingerprints of Laefaeabei Stingley on the trunk of the vehicle nor on any of the bags containing marijuana. T. 144 and 146. She further stated, after repeatedly testifying that Mr. Stingley refused to give a statement, that he did say he was going to have a Cheech and Chong party. T. 148. The testimony of Detective Pettis proceeded as follows:

> Q. All right. Now, did you question Mr. Stingley when you got back to the sheriff's department or that day or the next day?
>
> A. That day.
>
> Q. That day. Did he tell you where he had been in Memphis?
>
> A. When I talked to Mr. Stingley, he said he didn't want to give a statement.
>
> Q. He didn't tell you what he had been doing in Memphis?
>
> A. No, sir, he didn't.
>
> Q. All right. Did he ever tell you where he had been in a parking lot in Memphis?
>
> A. No, sir, he didn't.
>
> Skip to page 149.
>
> Q. And you're sure, Investigator Pettis, that Mr. Stingley did not tell you that he had been seeing his parole officer or probation officer in Memphis and he had parked his car at a parking garage there off of Poplar in Memphis?
>
> A. No, sir. Mr. Stingley didn't give me a statement at all.
>
> Q. Ma'am?
>
> A. No, sir, he didn't.
>
> Q. Did he give you any kind of statement whatsoever?

A. He made a statement.

Q. To who?

A. To myself and some officers that was in the room.

Q. Well, what did he say?

A. We asked him what was he going to do with all that marijuana? He said he was going to have a Cheech and Chong party.

The only witness the defense called was Mr. Stingley. Mr. Stingley testified that he needed to go see his probation officer in Memphis, Tennessee and that his car was not working because the motor blew up in it. He was going to have his mom go with him or take him to Memphis but something went wrong with her. So he asked his cousin to take him, however, his cousin told him to get his car and go ahead to Memphis. He stated that this was the only time he had used his cousin's car. He further testified that while en route to Memphis the passenger in the car, Perry Broadway, saw a turtle in the road and asked him to stop. Once he stopped , Mr. Broadway picked up the turtle and got the keys to the trunk from him and placed the turtle in the trunk. He also testified that when they arrived in Memphis, he left Mr. Broadway at a tire shop while he went to see his probation officer. He further testified that he never went in the trunk of the car and he did not know that the marijuana was in the trunk of the vehicle. He gave Chief Dunn permission to search the vehicle because as Mr. Stingley said, "I didn't have nothing to hide". T. 182. As to Detective Pettis, Mr. Stingley testified that he did not tell her that he was going to have a Cheech and Chong party. He stated that he was not in a playing mood and that it was nothing to joke about because they were charging him with having all that marijuana. T. 184.

In Curry v . State, 249 So.2d 414 (Miss. 1971), the court stated:

> What constitutes a sufficient external relationship between the defendant and the narcotic property to complete the concept of 'possession' is a question which is not susceptible of a specific rule. However, there must be sufficient facts to warrant a finding that defendant was aware of the presence and character of the particular substance and was

> intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the drug involved was subjected to his ***dominion*** or **control**. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances. (249 So.2d at 416).

In Curry, the defendant owned the car where marijuana was found, he was in the passenger seat while the vehicle was being driven by another and when the officers saw the vehicle they turned around to follow and witnessed Curry say something to the driver, and reach down as if to put something under the seat. Pursuant to a lawful search, the officers found a matchbox containing marijuana under the dashboard and a package of marijuana under the accelerator. The Supreme Court affirmed the conviction finding that all of the above referenced circumstances and criteria were sufficient to warrant the jury in finding that appellant was in possession of the marijuana.

In Fultz v. State, 573 So.2d 689 (Miss. 1990), defendant Fultz was driving a car that belonged to his sister. He was driving erratically and police stopped the car and Fultz failed three sobriety test and was arrested and taken to the police station. The officers did an inventory of the vehicle and found in the trunk a duffle bag with three large, clear plastic bags, eleven in all, with marijuana in them. Fultz was charged and later convicted of possession of marijuana with intent to sell more than one ounce and sentenced to 10 years.

The Supreme Court held that evidence was insufficient to establish that defendant constructively possessed marijuana found in the trunk of the vehicle being driven by the defendant and reversed the conviction.

In Ferrell v. State, 649 So.2d 831 (Miss. 1995), the Supreme Court reversed the conviction where the defendant was not the owner of the vehicle and cocaine was found in a matchbox in between the two front seats. The presence of the cocaine was not positioned in such a way as would be reasonably apparent to a person riding in the car. The Court stated that the State was required to establish additional

incriminating circumstances in order to prove constructive possession.

In Hudson v. State, 362 So.2d 645 (Miss. 1978), the Supreme Court reversed convictions finding evidence was insufficient to sustain finding of constructive possession, where the defendants were not owners of the vehicle in which marijuana was found, marijuana was secreted under the hood outside the passenger compartment, and there was no proof of other incriminating circumstances.

There is no evidence in this case that Mr. Stingley exercised dominion and control over the marijuana. The marijuana was found in the trunk of the car and there is a total absence of "other incriminating evidence" as required by the Curry decision.

Here, as in Curry, Fultz, Ferrell, and Hudson, Mr. Stingley arguably might show temporary dominion and control over the automobile, but not dominion and control over the marijuana. This alone will not suffice to prove dominion and control over the marijuana.

II.

WHETHER THE TRIAL COURT ERRED BY INFORMING THE JURY THAT HE DISMISSED THE CHARGES AGAINST THE CO-DEFENDANT AND THEY WOULD BE DECIDING THE CASE AGAINST MR. STINGLEY.

Mr. Stingley asserts on appeal that the trial court abused his discretion and committed reversible error by informing the jury, after the close of the state's case, that the trial judge dismissed the charges against the co-defendant and that they would be deciding the case against Mr. Stingley. The comments by the Court are as follows:

> BY THE COURT: Good morning, ladies and gentlemen.
>
> (Jury responds.)
>
> BY THE COURT: One note before we start. You will notice that there is only one defendant. The Court dismissed the charges against the co-defendant and you will only be deciding the case against Mr. Stingley. T. 169.

Mr. Stingley argues that the above statement made by the trial judge was tantamount to telling

the jury that the co-defendant was innocent and that he was the one guilty of this crime and completely prejudiced his case in the eyes of the jury. In support of his argument Mr. Stingley cites Weatherly v.Welker, 943 So.2d 665, (Miss.2006), where the trial court's disclosure to jury, prior to voir dire, that patient was in settlement negotiations with surgeon and clinic against whom she had brought medical malpractice action was reversible error . Whether the jury was actually prejudiced or influenced by the statement was not for the court to decide, but rather the mere fact that the statement was made to the jury created a conclusive presumption of such prejudice. Rules Civ. Proc., Rule 408.

Weatherly was a civil case and not involving the loss of liberty as in the present case. How much more serious were the comments made by the judge in the present case. Mr. Stingley asserts that his case is synonymous with Weatherly and that the mere fact that the statement dismissing the charges against the co-defendant was made to the jury created a conclusive presumption of such prejudice.

In Green v. State, 53 So. 415 (1910), the Court said in commenting upon the influence a trial judge has on the jury during the trial of a case:

> "It is a matter of common knowledge that jurors, as well as officers in attendance upon court, are very susceptible to the influence of the judge. The sheriff and his deputies, as a rule, are anxious to do his bidding; and jurors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury, to avoid prejudice to either party. The court will not stop to inquire whether the jury was actually influenced by the conduct of the judge. All the authorities hold that if they were exposed to improper influences, which might have produced the verdict, the presumption of law is against its purity; and testimony will not be heard to rebut this presumption. It is a conclusive presumption."

The jury in Mr. Stingley's case was exposed to improper influence when the trial judge dismissed the co-defendant's case. The trial judge's conduct created a conclusive presumption.

In Wilson v. State, 451 So.2d 724 (Miss. 1984), the Supreme Court reversed the defendant's conviction because the trial court stated in front of the jury that the confession of the defendant was freely

and voluntarily given, and that "(t)here was no coercion, threats, promises or force used." The Supreme Court found that these remarks by the trial court amounted to a peremptory instruction on the confession and removed from the jury its function of deciding the credibility of the confession and the weight to be given to the testimony of the witnesses surrounding its execution. The Court cited Yelverton v. State, 191 So.2d 393 (Miss. 1966); Roberson v. State, 185 So. 2d 667 (Miss. 1966), "This Court has acknowledged that judges unconsciously exert tremendous influence in the trial of a case, and they should be astutely careful so that unintentionally the jurors are not improperly influenced by their words and actions."

The trial court in Wilson did not give a corrective instruction to inform the jury of it's responsibility to determine the weight and credibility of the confession.

Mr. Stingley argues that even though his attorney failed to object to the judges comments, the comments constituted plain error and that the Mississippi Supreme Court, provides that a reviewing court may address issues as plain error "when the trial court has impacted upon a fundamental right of the defendant." Moore v. State, 755 So.2d 1276 (Miss Ct. App. 2000) (quoting Berry v. State, 728 So.2d 568, 571 (Miss.1999) (quoting Sanders v. State, 678 So.2d 663, 670 (Miss. 1996). This plain error rule "reflects a policy to administer the law fairly and justly" and protects a party "when (1) he has failed to perfect his appeal and (2) when a substantial right is affected." M.R.E. 103(d), cmt. "Requirement for plain error rule that error affect substantial rights requires in most cases that errors have been prejudicial and have affected the out come of district court proceeding." United States v. Olano, 507 U.S. 725, (1993).

He states that the prejudice that he suffered was not cured because the defense failed to request and the trial judge failed to give a limiting instruction as to the comments made by the court. In Moore v. State, 755 So,2d 1276 at1280 (Miss Ct. App. 2000), (quoting Boone v. Wal-Mart Stores, Inc., 680

So.2d 844, 845 (Miss. 1996), the established standard of review provides that jury instructions "are read as a whole to determine if the jury was properly instructed." If the instructions "do not fairly or adequately instruct the jury, [the appellate court] can and will reverse." Id. With no limiting instruction, a principle of law applicable to this case was not explained to the jury, and the jury was improperly allowed to consider the witnesses' prior statements as evidence of Moore's participation in the crimes charged. Consequently, the jury instructions were inadequate to render a fundamentally fair trial. Mr. Stingley argues that because the jury instructions in his case did not include a limiting instruction as to the comments made by the trial court dismissing the co-defendant charges they were inadequate to render a fundamentally fair trial.

CONCLUSION

This Court should therefore reverse the trial court and dismiss Mr. Stingley. Given that Mr. Stingley was not the owner of the vehicle in which the contraband was located, and the state failed to show additional circumstances that are actually incriminating in order to establish constructive possession, there is insufficient evidence to obtain a conviction.

Also, Mr. Stingley argues that the trial court's comments to the jury, though unintentional, improperly influenced them that he was guilty of the crime and therefore impacted Mr. Stingley's fundamental right to a fair trial. Because there is insufficient evidence to obtain a conviction in argument one, the conviction of the trial court should be reversed and this case should be dismissed and not remanded for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

BRENDA JACKSON PATTERSON
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Laefaebei Euylessity Stingley, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Albert B. Smith, III
Circuit Court Judge
Post Office Drawer 478
Cleveland, MS 38732-0478

Honorable Laurence Y. Mellen
District Attorney
115 North First Street, Ste. 200
Clarksdale, MS 38614

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 23nd day of January, 2007.

Brenda Jackson Patterson

BRENDA JACKSON PATTERSON
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200