IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2006-KA-1996-COA

ELNORSH DUCKWORTH — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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. Elnorsh Duckworth

THIS 26th day of April 2007.

George T. Holmes

GEORGE T. HOLMES
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STATEMENT OF THE CASE

This appeal proceeds from a judgment of conviction for the crime of sale of controlled substance against Elnorsh Duckworth and a resulting twenty-five (25) year habitual sentence out of the Circuit Court of the First Judicial District of Harrison County, Mississippi, following a trial held September 13-14, 2006, Honorable Roger T. Clark, Circuit Judge, presiding. Duckworth is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Jay Green with the Stone County Sheriff's office was working as an undercover agent assigned to the Coastal Narcotics Enforcement Team in Gulfport MS on November 11, 2004. [T. 52-64]. Green and several others agents were on Polk street behind Lowe's on U. S. Highway 49 in Gulfport MS making street level drug purchases and routing out

prostitutes. *Id.* Green testified that he was in an unmarked car, equipped with a microphone transmitting to a receiver which allowed his actions to be monitored by the other officers and recorded for future use. *Id.*

It was about 8:42 p. m. when Green approached a woman on Polk Street, later identified as Gail Cawthon, and asked for twenty Dollars ($20.00) worth of cocaine. There was a male with Cawthon who asked Green to repeat how much cocaine he wanted. *Id.* Green said twenty dollars worth and gave a twenty-dollar bill to the female who in turn gave it to the male companion, later identified as Duckworth, the appellant here. Duckworth allegedly handed Cawthon a piece of crack cocaine weighing approximately 0.1 gram which Cawthon tendered to Agent Green. [Ex. 3]. As Green drove off, he transmitted a signal phrase to the other officers to arrest the two, giving their description. [T. 52-64].

Officer Wendell Johnson with the Gulfport Police Department was waiting out of sight in another vehicle on Texas Street, monitoring Green's transmissions. [T. 78-87]. Johnson responded to Green's call. When Johnson turned the corner from Texas Street to Polk Street, he saw two subjects fitting the descriptions called out by Green. *Id.* Cawthon reportedly ran, but was apprehended and arrested by other agents. She later reportedly said that the drugs sold were hers and not Duckworth's. [T. 106].

Duckworth turned away from the oncoming officers and dropped something on the ground. [T. 81-82] This was retrieved and found to be the same twenty dollar bill of "buy

money" that Green gave to Cawthon earlier and which had been previously recorded for identification purposes. [T. 99-101, 104].

Duckworth went to trial alone. The jury convicted him of sale of controlled substance; and, he was sentenced as an habitual offender to 25 years imprisonment. [T. 171-72, 176; R. 54].

SUMMARY OF THE ARGUMENT

The trial court erred by not striking police officer Raymond Brooks for cause, and by allowing improper opinion evidence and for refusing a requested lesser included offense instruction for simple possession.

ARGUMENT

ISSUE NO. 1 WHETHER THE TRIAL COURT SHOULD HAVE STRICKEN POLICE OFFICER RAYMOND BROOKS FROM THE VENIRE FOR CAUSE?

During voir dire, after the state disclosed the names of its expected witnesses, venireperson Raymond Brooks advised the court that he knew most, if not all, of the state's witnesses because he was a police officer on the Gulfport Police Department. [T. 10-11]. The trial court asked Officer Brooks which witness he knew, and Brooks replied, "Just about all of them." *Id.* Brooks said that, because he knew all of the witnesses and because his job was to "investigate crimes and arrest alleged criminals", he could be a

"fair and impartial juror". *Id.*

In other words, Brooks saw sitting on a jury as an extension and part and parcel of his chosen law enforcement profession. He did not say that he would be fair and impartial because it was the right thing to do.

Duckworth's trial counsel sought to have Officer Brooks stricken for cause, but the trial court refused. [T. 34-35] The defense used its last peremptory strike on Officer Brooks. [T. 38].

A defendant is entitled to a fair and impartial jury pursuant to the 6th and 14th amendments to the U. S. Constitution and Art. 3 §26 of the Mississippi Constitution. *Irwin v. Dowd*, 366 U. S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), *Mhoon v State*, 464 So. 2d 77, 79 (MS 1985). The trial court has considerable discretion in determining which prospective jurors to strike when challenged for cause. *Scott v. Ball*, 595 So.2d 848, 849 (Miss.1992); *Burt v. State*, 493 So.2d 1325, 1327 (Miss.1986).

In *Mhoon v. State*, the court said generally "there is no reason why an officer or an officer's relative should not serve on a jury if otherwise qualified to follow the law and the evidence." 464 So.2d at 81-82. However, the *Mhoon* court reversed the conviction based on a disproportionate number of law enforcement connected members of the jury. There were five jurors connected to law enforcement, and the jury foreman was an active uniformed police officer. *Id.* There were in fact, twelve members of the initial venire who were connected to law enforcement and all of them said, as in the present case, that

they would be fair and impartial. The *Mhoon* court found that the statistical anomaly created too great a risk for undue influence which "worked a great hardship on Mhoon." *Id.*

In the drug case *Taylor v. State*, 656 So. 2d 104 (Miss. 1995), a brother of one of the assistant district attorneys in Hinds County was on the venire. The *Taylor* court noted that the defendant used all six of his peremptory strikes before the assistant DA's brother could be stricken and he ultimately ended up on the jury. The *Taylor* court said in reversing the conviction:

> Our criminal justice system is geared toward providing a defendant a fair trial. Among the constitutional guarantees aimed at securing a fair trial is the requirement of Article 3, Section 26, Mississippi Constitution, that a defendant is entitled to a "trial by an impartial jury." *Nixon v. State*, 533 So.2d 1078, 1084 (Miss.1987).

The *Taylor* court looked to *People v. Macrander*, 828 P.2d 234, 241 (Colo.1992), for guidance. In *Macrander,* the Colorado Supreme Court held that members of a district attorney staff's family should be stricken for cause:

> to eliminate jurors who have expressed or implied prejudices, or who may be put in an embarrassing position despite protestations to the contrary. Certainly, a juror who is the brother of an assistant district attorney is in such a position. That he is close to his sister and is her neighbor makes the problem more acute. While we cannot guarantee a defendant a perfect trial, we must endeavor to ensure that every defendant receives a fair trial free of implied bias that arises from the presence of a juror who is related to an attorney employed by the district attorney's office that is prosecuting the defendant.

The language and rationale of the Colorado Court, adopted by the Mississippi

Supreme Court in *Taylor, supra*, stresses that juror prejudice can be express or *implied*. The same logic would apply in the present case to co-workers of testifying officers. A police officer who knows and works with all of the state witnesses is impliedly prejudiced, especially one who sees sitting on a jury as an opportunity to practice his "calling". As in *Taylor* and *Mhoon, supra*, a prospective juror simply saying that they could be fair and impartial is not the deciding factor, as both courts recognized the risk of implied prejudice.

As stated by the *Taylor* court, echoing the *Mhoon* court's guidance:

> One of the purposes of challenges, for cause and peremptory, is to eliminate jurors who have express or **implied prejudices**, or who may be put in an embarrassing position despite protestations to the contrary. [emphasis added] 656 So. 2d at p. 111

The court has recognized not only an implied prejudice, but there is a presumption of impaired impartiality when there is a close relationship between jurors and parties or witnesses. In the case of *Scott v. Ball*, 595 So. 2d 848, 850 (MS 1992), the Court stated:

> to the extent that any juror, because of his relationship to one of the parties, his occupation, his past experience or whatever, would normally lean in favor of one of the parties, or be biased against the other, or one's claim or the others defense in the lawsuit, to this extent, of course, his ability to be fair and impartial is impaired.

In *Scott v. Ball,* the Supreme Court said that challenges based on close relationships between one of the parties who was a doctor and jurors who were challenged for cause, was proper because of this presumption. *Id.* It follows, that, where

a juror because of any reason would lean in favor of the prosecution, that juror should be excused, even if the juror says he or she could be fair. See also *Wainwright v. Witt*, 469 U. S. 412, 424 (1985), *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985), and *Fugitt v. State*, 82 Miss. 198, 33 So. 942, 944 (1903)

Therefore, it was error for the trial court here to refuse the challenge for cause on Officer Brooks. Accordingly, Duckworth respectfully requests a new trial.

ISSUE NO. 2 WHETHER THE TRIAL COURT ERRED IN ALLOWING IMPROPER OPINION EVIDENCE?

During the testimony of Gulfport Police Officer Windell Johnson's testimony, he was asked by the state, "Would it be typical for there to be two parties conducting a drug deal?" [T. 84] Defense counsel's objection was overruled. *Id.* Johnson responded with his opinion about "typical" two party drug sales, describing how drug dealers get addicts to be intermediaries selling drugs to supply their habits. *Id.*

Interestingly, later during the redirect testimony of state witness Detective Scott McElhenney, the prosecutor asked whether it was "unusual" that Gail Cawthon "took responsibility" for the drug sale. [T. 116-18]. There was an objection which was, initially, overruled. *Id.* Officer Johnson responded with a full answer espousing what "normally" happens which just happened to fit the exact factual scenario offered by the state witnesses. *Id.*

After Johnson's answer, the court recessed for the evening. [T. 118] On returning the next morning, the trial court reversed its ruling on the objection to McElhenney's opinion evidence, and said:

> Detective McElhenney gave his opinion about what typically happens or what usually happens and why. Such opinions under the law are nothing more than conjecture and speculation, and I should hot have allowed those opinions into evidence. So at this time I'm going to sustain the objection of defense counsel, and I'm instructing you to disregard the testimony, that opinion testimony of Detective McElhenney. [T. 119-21]

Then the trial court went juror by juror asking them if they understood and would for certain disregard the improper opinion evidence of Detective McElhenney. [T. 121–22]. Nothing was said about the similar previous opinion testimony of Officer Johnson.

What resulted here, to the detriment of Duckworth, from the inconsistent, arbitrary and diametrically opposed rulings, was a confused jury and a circumvention of the requirements of Miss. R. Evid. Rule 701, 702 and the *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) decision and its progeny in the jurisprudence of this State.

In *Smith v. State,* 942 So. 2d 308, 316-17 (Miss. App. 2006), applying *Daubert*, the court stated:

> Under Rule 702, expert testimony should be admitted only if it withstands a two-pronged inquiry. [Cite omitted]. First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. *Id.* Second,

the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue.

[Citing M.R.E. 702] Furthermore, 'the party offering the testimony must show that the expert has based her testimony on the 'methods and procedures of science,' not merely [her] subjective beliefs or unsupported speculation.' [Cite omitted]. Then the trial judge must determine whether or not the expert testimony 'rests on a reliable foundation and is relevant in a particular case.' [Cite omitted]. The focus of the trial judge's analysis must be solely on principles and methodology, not on the conclusions they generate. [Cites omitted.].

It is the appellant's position here that the state was permitted to cross the boundaries established by Miss. R. Evid. Rules 701 and 702; and, a witness not qualified as an expert, was allowed to posit an "expert" opinion disguised as a "lay" opinion.[1] This testimony prejudiced Duckworth because it was used to set up a specious standard scenario with the implication to the jury that this case fits that standard when there was no science involved at all.

According to the court in *Whittington v. State*, 523 So. 2d 966, 975 (Miss. 1988),

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RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness,(b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[w]here a "record does not reveal . . . any specific scientific or technical training or experience" on the part of the witness "which qualifie[s] him as an expert, [it is] error for the circuit judge to permit [the witness] to express [an] opinion . . . ."

In *Palmer v. Volkswagen of America, Inc.*, 905 So. 2d 564, 588 (Miss. App. 2003), there was objection to a lay opinion about an air bag equipped automobile; the Court of Appeals said in reversing:

> In *Sample v. State*,[643 So. 2d 524, 530 (Miss. 1994)], our supreme court stated that, while there is a very thin line between lay testimony and expert opinion, there is a bright line rule: "[t]hat is, where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Rule 702 opinion and not a Rule 701 opinion" *Id.* at 529-30. [The witness'] explanation of how tank testing works, ... certainly required experience or expertise beyond that of the average, randomly selected adult..... It was expert testimony. The trial court abused its discretion by allowing [this] testimony to stray into the realm of scientific, technical and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Rule 702.

On *certiorari*, in *Palmer v. Volkswagen of America, Inc.*, 904 So. 2d 1077, 1092 (Miss. 2005), the Supreme Court concurred with the Court of Appeals, finding the plaintiff was prejudiced by improper opinion testimony and stating:

> To be clear, the test for expert testimony is not whether it is fact or opinion. The test is whether it requires "scientific, technical, or other specialized knowledge" beyond that of the "randomly selected adult." If so, the testimony is expert in nature, and must be treated in discovery, and at trial, as such.

The Supreme Court on grant of *certiorari* required that prejudice be shown for reversal, which it was. *Id.* Duckworth's position here is that prejudice resulted, not only

from the jury hearing what amounted to an untested technical behavioral science opinion which was nothing more than conjecture, but prejudice also resulted from the jury being confused by inconsistent rulings from the trial court.

The case of *Goodson v. State*, 566 So. 2d 1142, 1153 (Miss. 1990), is authority for the proposition here that Duckworth was prejudiced by the admission of Johnson's speculation in the disguise of a valid lay "opinion". The defendant in *Goodson* was charged with rape of a female under the age of fourteen and the trial court allowed testimony about "child sexual abuse profiles", an area which had been determined to be not an area of expertise. *Id.* at 1142-46.

One reason the *Goodson* court reversed was that the physician who testified for the state did not have expertise to give an opinion with the reliability required by Rule 702. Similarly, in *Edmonds v. State*, 2004-CT-02081-SCT (decided January 4, 2007), pages 4-7, the court, on grant of *certiorari,* found that a two-shooter theory proffered by a pathologist to be inadmissable saying:

> While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses. There was no showing that Dr. Hayne's testimony was based, not on opinions or speculation, but rather on scientific methods and procedures. [Cite omitted]. The State made no proffer of any scientific testing performed to support Dr. Hayne's two-shooter theory. Therefore, the testimony pertaining to the two-shooter theory should not have been admitted under our standards. *Id.*

The same fatal shortcomings appear in the case at bar. Here there was no showing

that Johnson's testimony was based on science, as it was clearly based on speculation and lay conjecture. This is not mere argument here; because, the trial court in the present case found the exact same type testimony to be inadmissible later in the trial. [T. 119-21].

In *Goodson, supra*, court stated that "[t]here was a substantial probability that the jury would be mislead by [the doctor's] opinion", and letting [the doctor] testify about profiles denied Goodson the right to a fair trial Rule 103(a) MRE. 566 So. 2d at 1148. Here in Duckworth's case, as in *Goodson*, the jury would have been influenced and misled by the allowance of one improper lay opinion with the exclusion of the other.

Therefore, it would follow that Duckworth here, as Goodson and Edmonds, did not receive a fair trial. In kind relief of reversal is respectfully requested.

ISSUE NO. 3 WHETHER THE TRIAL COURT ERRED IN REFUSING A REQUESTED LESSER INCLUDED OFFENSE INSTRUCTION?

There was testimony that Gail Cawthon told the arresting officers that the dope was hers and not Duckworth's. [T. 106; 116] The officers also testified that Duckworth said "he had nothing to do with the drugs." *Id.* It is Duckworth's position that the above, along with other matters in the record, provide an evidentiary foundation for a lesser included offense instruction for simple possession with was requested as D-6 and D-7. [R. 50-51].

In *Perry v. State*, 637 So.2d 871, 877 (Miss. 1994), the defendant was convicted of conspiracy and possession with intent to sell marijuana. In reversing for refusing a lesser included offense instruction for simple possession, the *Perry* court said, "[o]ur law is well-settled that jury instructions are not given unless there is an evidentiary basis in the record for such ... [and], [s]uch instructions 'must be warranted by the evidence.'". [Cites omitted].

In *Harbin v. State*, 478 So.2d 796 (Miss.1985), the court reviewed the test to be used on appeal to decide whether a lesser included offense instruction should have been granted:

> Only if this Court can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, and considering that the jury may not be required to believe any evidence offered by the State, that no hypothetical, reasonable jury could convict ... the defendant of [the lesser-included offense], can it be said that the refusal of the lesser-included offense instruction was proper.

At the trial court level, the test is, as stated in *Brown v. State*, 934 So. 2d 1039, 1042-43 (Miss. App. 2006), that:

> A lesser-included offense instruction should be granted if a reasonable jury could find the defendant not guilty of the principal offense charged in the indictment but could find him guilty of the lesser.

The *Perry* case, *supra,* has several similarities to the case at bar. In *Perry*, as here, the amount of drugs involved was very small and the defendant denied responsibility. The *Perry* court said:

> "[t]he jury was free to disregard Perry's denial of knowledge of the marijuana, as it most certainly did, but it was also free to disregard his alleged accomplice's testimony that the marijuana was for sale. Looking at the evidence in the light most favorable to Perry, the jury could find [Perry guilty of simple possession]. He was entitled to that instruction and the failure to give it compels reversal." 637 So.2d at 877.

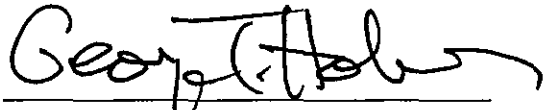
So, applying the above standards to the case at bar, it is readily apparent that the jury here in Duckworth's case, could have found, based on the testimony that Gail Cawthon took express and full responsibility for the crime and that Duckworth denied responsibility, in conjunction with other testimony, that Duckworth merely possessed the cocaine in this case. That being so, he was surely entitled to a lesser included offense instruction of simple possession, and as in *Perry*, a reversal is compelled.

CONCLUSION

Elnorsh Duckworth is entitled to a new trial.

Respectfully submitted,

ELNORSH DUCKWORTH

BY: 

GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 26th day of April, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Roger T. Clark, Circuit Judge, P. O. Box 1461, Gulfport MS 39502, and to Hon. Richard Joel Smith, Jr., Asst. D. A. , P. O. Box 1180, Gulfport MS 39502, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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