

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-00136

**FILED**

**COPY**

CHARLIE SAWYER

**SEP 07 2007**

APPELLANT

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

VERSUS

STATE OF MISSISSIPPI

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE 1<sup>ST</sup> JUDICIAL DISTRICT OF  
HINDS COUNTY, MISSISSIPPI

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BRIEF ON THE MERITS BY APPELLANT

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Appellant Requests Oral Argument

OFFICE OF THE PUBLIC DEFENDER,  
HINDS COUNTY, MISSISSIPPI

William R. LaBarre, MSB No. [REDACTED]

PUBLIC DEFENDER

Frank McWilliams, MSB No. [REDACTED]

Ginger E. Gibson, MSB No. [REDACTED]

Virginia L. Watkins, MSB. [REDACTED]

Assistant Public Defenders

Post Office Box 23029

Jackson, Mississippi 39225

Telephone: 601-948-2683

Facsimile: 601-948-2687

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 the Supreme Court and the judges of the Supreme Court may evaluate possible disqualification or recusal.


William R. LaBarre, Esq.,  
HINDS COUNTY PUBLIC DEFENDER  
Frank L. McWilliams, Esq.  
Ginger E. Gibson, Esq.  
Virginia L. Watkins, Esq.,  
Assistant Public Defenders  
Post Office Box 23029  
Jackson, Mississippi 39225

Honorable Faye Peterson,  
HINDS COUNTY DISTRICT ATTORNEY  
Rebecca Wooten Mansell, Esq.  
Katherine Pugh, Esq.  
Assistant District Attorneys  
Post Office Box 22747  
Jackson, Mississippi 39225

Honorable W. Swan Yerger  
CIRCUIT JUDGE  
Post Office Box 327  
Jackson, Mississippi 39205

Mr. Charlie Sawyer  
MDOC 74364  
WCCF, WCCF Bldg. E  
Post Office Box 1079  
Woodville, Mississippi 39669

So certified, this the 7<sup>th</sup> day of September, 2007.

  
Virginia L. Watkins, MSB No. [REDACTED]  
Certifying Attorney

*Charlie Sawyer v. State of Mississippi*

2007-KA-00136

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### STATEMENT OF THE ISSUES

- I. The trial court abused its discretion when it denied his Motion to sever counts against him or alternatively, to stipulate to two prior convictions for armed robbery, as introduction of evidence of two prior convictions for armed robbery were unduly prejudicial, and
- II. The trial court abused its discretion in accepting as “race neutral” the excuses given by the prosecution in exercise of peremptory challenges, thus denying to Mr. Sawyer equal protection of law in the selection of jurors passing judgment upon him, as the prosecution engaged in purposeful discrimination by use of peremptory challenges.

## STATEMENT OF THE CASE

### A. COURSE OF PROCEEDINGS BELOW

Charlie Sawyer Jr. was arrested on the night of June 11, 2005 in connection with the robbery June 3, 2005 of Alfred Jacobs at Ellis Seafood Restaurant, 211 West Woodrow Wilson in Jackson. CP 3; T. 293. Mr. Sawyer was thereafter indicted by a grand jury of the 1<sup>st</sup> Judicial District, Hinds County, Mississippi, for armed robbery, in violation of MISS. CODE ANN. § 97-3-79 (1972) and for possession of a firearm as a convicted felon, in violation of MISS. CODE ANN. § 97-37-5 (1972), all subject to enhanced penalties under MISS. CODE ANN. § 99-19-83 (1973). CP 3. On September 28, 2006, a jury was impaneled to hear the charges and on September 29, rendered a verdict of guilty on both counts. CP 3; 48-49; RE 10-11. Thereafter, Mr. Sawyer was sentenced to life imprisonment without possibility for parole in the custody of the Mississippi Department of Corrections, pursuant to MISS. CODE ANN. § 99-19-83 (1972). CP 50-54; RE 12-13. Upon timely prosecution of all post-trial motions, all of which were denied, Mr. Sawyer appeals his conviction to this Court. CP 57; 60; RE 14.

### B. STATEMENT OF FACTS

On the night of June 3, 2005, Alfred Jacobs pulled up to the drive-through menu board to place an order at Ellis Seafood Restaurant, 211 West Woodrow Wilson in Jackson, Mississippi. T. 256. As so many of us do, Jacobs initially fumbled about, making sure he had his wallet. T. 257. When he looked up toward the menu board, he found a black male standing at his driver's side window aiming a gun at his head. T. 257. Jacobs testified he then saw a second black male materialize at the passenger side, reaching for his shirt front pocket. T. 259. Meanwhile, the assailant at the driver's side tried to get at Jacob's back pocket, demanding his wallet, which Jacobs initially refused to do, swatting away or "tussling" with the hands coming through his car windows. T. 259. Jacobs testified he surrendered both his wallet and cellular telephone after the

robber on the driver's side hit Jacobs in the mouth with the butt of the pistol he carried. T.261. The two then walked away heading to the back of the restaurant, shooting once in the air and ordering Jacobs to go away and not look back. T.263. Jacobs drove out and around again to the order pick-up window to report the robbery. T.264. Jacobs testified that restaurant employees told him that the police had already been summoned after hearing the "commotion" over the ordering microphone by the menu board. T.263. At the time of the incident and even a week later on June 10, Jacobs was unable to give any description other than race, gender and a possible age range of 20-30 years. T. 243-244; 277; 278. Jacobs repeatedly testified as to the speed with which the incident occurred and confusion as to what had actually happened as the reason for his inability to give police additional details regarding his assailants. T.276-277. Under direct examination regarding his inability to give any physical characteristic descriptions, Jacobs admitted, "I was out of it." T. 265.

On the night of June 11, 2005, police were again summoned to Ellis Seafood Restaurant because employees allegedly noticed a man with a gun hiding in the bushes near the menu order board. T. 234; 235. Several officers drove to a nearby gas station and formed a loose human perimeter in an effort to hem in the suspect. T. 221; 286; 291; 297.

Officer Tuesday Jones approached the bushes and noticed a man she identified as Mr. Sawyer holding a gun "stooped" in the bushes. T.251. Officer Jones said she then ordered Mr. Sawyer to drop his weapon and put his hands up; Jones testified he dropped the gun on the ground and raised his hands only to run when officers attempted to further detain him. T. 236-237; 246; 251. After a foot chase in the vicinity, Officer Joe Nick Brown located Mr. Sawyer squatted down next to a house, breathing heavily. T.239; 287; 298. Brown took Mr. Sawyer into custody with no further trouble. T. 293.

Upon his arrest, Brad Davis, the detective assigned to investigate the robbery of Jacobs, assembled a photographic line-up that included a picture of Mr. Sawyer, as well as five other individuals. T.305. Exh. 5. Davis testified he did so due to the similarity of the June 3 incident. T. 304. Davis telephoned Jacobs that night to come and review the line-up, which Jacobs readily agreed to do. T. 271; 309. Both Jacobs and Davis testified as to Jacobs' identification of Mr. Sawyer as one of his assailants on the night of June 3, despite his near complete inability in the intervening week to provide investigating officers any identifying characteristics beyond race, gender and age. T. 244; 262; 276-277; 314. Mr. Sawyer was thirty-six years old at the time of trial. T. 314.

Two days before trial, Jacobs acknowledged that police showed him a Lorcin .380 handgun recovered at the scene. T. 274; 280; 298. Although Jacobs described the gun in his initial statements to police as "silver" the recovered weapon was essentially black and gray. T. 298; Exh. 1. Although Jacobs testified confidently that the weapon recovered at the scene could "very well be" the weapon used on him, Jacobs also acknowledged difficulty in describing details of the occurrence, including the gun he said his assailant used. T. 258; 275.

Police did not test the recovered Lorcin for possible fingerprint or blood and tissue matches, nor was the car of Mr. Jacobs processed for possible fingerprint matches with Mr. Sawyer or anyone else. T. 244; 290; 300.

No follow-up investigation or arrests was completed regarding the second assailant who allegedly stole from his front pocket the cellular phone of Mr. Jacobs. T. 317.



### SUMMARY OF THE ARGUMENT

The trial court abused its discretion by refusing to permit Mr. Sawyer to either sever trial of the counts against him or, alternatively, to permit him to offer a court-sanctioned stipulation that would have negated the need for mention to the jury that Mr. Sawyer had twice previously been convicted of armed robbery, a crime for which he was then standing trial. Although a limiting instruction was given, Mr. Sawyer contends it was insufficient to remove the risk of a tainted jury verdict.

Furthermore, the trial court erred when it accepted with little or no questioning the reasons even the court admitted were “borderline” and advanced by the prosecution in striking black jurors Corvettia Gray, Estell Kelly, Reshemia Ratcliff, Maxine Johnston and Stacy Wilson. T. 182; 185; 192; 195-196; 197. RE 16-21. The prosecution used nine of eleven strikes against African-Americans. Mr. Sawyer contends that the ostensibly “race-neutral reasons” given by the prosecutor and accepted by the trial court were no more than a pre-text to rid the jury pool of African-Americans, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).



## ARGUMENT

### **I. The trial court abused its discretion when it denied his Motion to sever counts against him or alternatively, to stipulate to two prior convictions for armed robbery, as introduction of evidence of two prior convictions for armed robbery were unduly prejudicial, and**

At common law, the Crown was prohibited from mentioning evidence that the accused had committed a similar crime in the past, or indeed any crimes committed in the past. Those primal legal tribunals sought to ensure an accused was convicted of the charge for which he or she then stood trial, not an act in the past. *Old Chief v. United States*, 519 U.S. 172, 181 (1997) citing *Greer v. United States*, 245 U.S. 559, (1918). This policy colors our criminal justice system and is no where more evident than in the MISSISSIPPI RULES OF EVIDENCE 401; 402; 403 and 404. These rules define relevant evidence, provide for its admission and exclusion and along the way, give benchmarks for the evaluation of evidence.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence.” MISS.R.EVID. 401. While MISS.R.EVID. 402 favors admissibility of all relevant evidence, the rule itself acknowledges the boundaries: the United States Constitution, the Mississippi Constitution and elsewhere in the evidentiary rules. MISS.R.EVID. 403 provides for the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, ...”

In case at bar, the trial court abused its discretion in refusing the motion of Mr. Sawyer to sever trial of the counts against him or, alternatively, to grant a stipulation that he was a convicted felon for the purposes of establishing the necessary element of the crime, felon in possession of a firearm, in violation of MISS. CODE ANN. § 97-37-5 (1972). T. 24; RE 15. In so doing, the trial court failed to properly consider the danger of such information before the jury

and the probability that such evidence might taint the verdict, thus depriving Mr. Sawyer to his fundamental right to a fair and impartial trial.

Mr. Sawyer was arrested June 11, 2005 at Ellis Seafood Restaurant for committing an armed robbery June 3, 2005 at Ellis Seafood Restaurant, ostensibly with a companion who was never found. Mr. Sawyer was charged with the June 3, 2005 crime because he was found crouched in the bushes near the restaurant drive-through area with a gun in his hand. T.234-235. Alfred Jacobs, the victim, was unable to give investigating officers virtually any physical characteristics beyond race (black) gender (male) and possible age (twenty to thirty). T.243-244; 278. Mr. Jacobs identified Mr. Sawyer as one of his June 3 assailants from a photographic line-up prepared after Mr. Sawyer was arrested June 11, 2005. T.271-272. There are no fingerprints or other physical evidence to link him to the crime against Mr. Jacobs, merely the similarity of Mr. Sawyer's actions the night of June 11, as compared to June 3, 2005 and the eyewitness identification of Mr. Jacobs.

Mr. Sawyer was duly charged with armed robbery and due to his two previous convictions for armed robbery, he was also charged as being a convicted felon in possession of a fire-arm with eligibility for enhanced penalties under MISS. CODE ANN. § 99-19-83 (1972). CP 3.

While Mr. Sawyer concedes the prosecutor is correct, she has a certain amount of freedom in proving her case, she is wrong that her freedom is complete to prove her case as she wishes. T.18. MISS.R.EVID. 402 provides some of the initial barriers to the prosecutor's assertions – the United States Constitution, the Mississippi Constitution and the rules themselves. The case of *Old Chief*, from the district of Montana, dealt with the refusal of a prosecutor to agree to a stipulation that Johnny Old Chief, charged with assault resulting in serious bodily injury, had previously been convicted of the same crime. It was his right, the *Old Chief* prosecutor insisted, to prove his case, his way. The *Old Chief* prosecutor insisted on presenting to

jurors the full bill of particulars involving the past sins of Johnny Lynn Old Chief. *Id.*, 177. (Incredibly, the prosecutor in the instant case claimed that *Old Chief* was a Florida case involving application of Florida law and therefore, not controlling under Mississippi law. T. 18).

The United States Supreme Court disagreed and reversed, due to the inherent and unacceptable danger that Mr. Old Chief was convicted not for the current charge but for past acts. The basis was the balancing test of FEDERAL RULE OF EVIDENCE 403, which Miss.R.Evid. 403 mirrors. *Old Chief*, at 184.

This is exactly the situation in the case at bar. Here, an agreed stipulation would have removed the risk of a tainted verdict, yet provided the proof necessary to sustain the prosecutor's burden on the charge of convicted felon possessing a firearm. Even though a limiting instruction was given, Mr. Sawyer contends it was woefully insufficient under the facts of this case. T. 325. For this reason, the cause should be reversed and remanded for re-trial in a manner consistent with the Mississippi Rules of Evidence and sound constitutional practice.

**II. The trial court abused its discretion in accepting as "race neutral" the excuses given by the prosecution in exercise of peremptory challenges, thus denying to Mr. Sawyer equal protection of law in the selection of jurors passing judgment upon him, as the prosecution engaged in purposeful discrimination by use of peremptory challenges.**

Mr. Sawyer contends he was deprived of his right to equal protection and due process of law by the trial court's acceptance of allegedly "race neutral" reasons for using nine of eleven peremptory challenges against African-Americans, under the authority of *Batson v. Kentucky*, 476 So.2d U.S. 79, 106 S.Ct. 1712 (1986).

The prosecutor here is familiar to this Court, as she admitted to striking a male juror due to his gender, acknowledging she did not know if striking a juror on the basis of gender was discriminatory. *McGee v. State*, 953 So.2d 211 (Miss. 2007).

Under *Batson*, the objecting party challenging peremptory strikes must show: (a) that he or she is a member of a cognizable racial group; (b) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; and (c) that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. *Batson*, 476 So.2d U.S. at 96, 106 S.Ct. at 1716. *Flowers v. State*, 947 So.2d 910, 917 (Miss. 2007). "At the final stage of the *Batson* analysis, the trial court determines if the reasons given by the prosecution were pretexts for intentional discrimination." *Berry v. State*, 802 So.2d 1033, 1038 (Miss. 2001). In evaluating whether the prosecutors proffered reasons are race-neutral or merely pretexts for striking the veniremen, five factors are to be considered:

- (1) Disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge;
- (2) The failure to voir dire as to the cited characteristic;
- (3) The characteristic cited is unrelated to the facts of the case;
- (4) The record lacks support for the stated reason and
- (5) Group-based traits. *Flowers*, at 917, citing *Manning v. State*, 765 So.2d 516, 519 (Miss. 2000)

The exclusion of even one prospective juror on the basis of discriminatory peremptory strikes is sufficient to taint the verdict and require reversal. *McGee*, at 215.

Mr. Sawyer submits that he met the initial three-part test: Mr. Sawyer is black; the prosecutor exercised nine of eleven challenges against African-American veniremen, and these facts raised a definite inference that the prosecutor was attempting to systematically exclude these prospective jurors from the panel because of their race. T. 164. The trial panel ultimately

consisted of seven whites and five African-Americans, with one African-American alternate and one white alternate. T. 254.

Specifically, Mr. Sawyer challenges the trial court's acceptance of the employment status of Maxine Johnson, Stacy Wilson, and Corvettia Gray, based solely on responses to the jury questionnaire and without engaging in voir dire on those issues with these prospective jurors. T. 182; 185; 197. RE 16-17; 21. In raising a *Batson* challenge against Mr. Sawyer for exercising peremptory strikes against prospective white jurors, however, this same prosecutor argued against acceptance of the race-neutral reason offered by counsel for Mr. Sawyer on the basis that defense counsel did not further voir dire the veniremen. T. 152; 161.

The prosecutor stated that Ms. Johnson listed "unemployed" on her jury questionnaire, but never questioned her about it, and advanced Ms. Johnson's written response as the reason for exercising the peremptory strike. T. 181. "I am not going to put someone on my jury that's not working. She seems able-bodied. She's 54. She's not too old to be working or not working." T. 181. Counsel for Mr. Sawyer raised the failure of the prosecutor to inquire, and the response was "I don't have to ask. That's on her jury questionnaire." T. 181. Mr. Sawyer submits the prosecutor does indeed need to ask.

Prospective juror Stacy Wilson wrote "not applicable" on her questionnaire regarding employment, again with no further inquiry by the prosecutor, although she engaged in questioning Ms. Wilson during voir dire. T. 76; 92. Even though the questions were on other topics, the prosecutor asked each prospective juror identified as "retired" their prior occupation. (T. 63-64, Mary Louise Jones, retired school teacher; T. 69, 70, Estell Kelly, retired from the Mississippi Department of Human Services). Counsel for Mr. Sawyer rebutted on the prosecutor's failure to probe, but the trial court accepted the reasoning given by the prosecutor. T. 185; RE 17.

Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing BRIEF OF APPELLANT ON THE MERITS to the following:

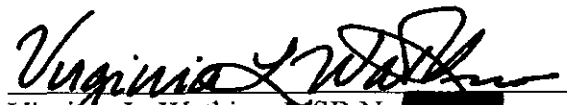
Honorable James Hood III  
ATTORNEY GENERAL  
Charles W. Maris Jr.  
Assistant Attorney General  
Carroll Gartin Justice Building  
Post office Box 220  
Jackson, Mississippi 39205-0220

Honorable Faye Peterson  
DISTRICT ATTORNEY  
Hinds County Courthouse  
Post Office Box 22747  
Jackson, Mississippi 39225

Honorable W. Swan Yerger  
CIRCUIT JUDGE  
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Post Office Box 327  
Jackson, Mississippi

Ms. Charlie Sawyer  
MDOC 74364  
WCCF, WCCF Bldg. E  
Post Office Box 1079  
Woodville, Mississippi 39669

So certified, this the 7<sup>th</sup> day of September, 2007.

  
Virginia L. Watkins, MSB No [REDACTED]  
Certifying Attorney