IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JUSTIN BRENT TURNER — APPELLANT

VS. — NO. 2007-KA-0184

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LEAKE COUNTY

REPLY BRIEF OF APPELLANT JUSTIN BRENT TURNER

ORAL ARGUMENT IS REQUESTED

John M. Colette, MSB [redacted]
401 E. Capital Street
Suite 308
P. O. Box 861
Jackson, MS 39201
(601) 355-6277 Office
(601) 355-6283 Facsimile

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

UNITED STATES SUPREME COURT

FIFTH CIRCUIT

MISSISSIPPI

ARGUMENTS IN REPLY

ARGUMENT I

THE STATE HAS MISINTERPRETED THE LAW REGARDING THE IMPLICATIONS OF A FOURTH AMENDMENT VIOLATION AND HAS FAILED TO ASSERT ANY EXCEPTIONS TO THE EXCLUSIONARY RULE.

In its Brief, the State goes back and forth as to whether the defendant was or was not in custody. The State claims that probable cause existed to warrant placing the Defendant/Appellant in custody when it supports its argument that the subsequent consent, to give a blood sample, by the Defendant/Appellant would be tainted because no illegal seizure/arrest occurred. However, on the same page the State says that the Defendant/Appellant was not in custody "for purposes of search and seizure law." The State claims that the Defendant/Appellant sitting in the back of the patrol car was simply "cooperation with law enforcement." See, State's Brief, page 8.

The trial court below, has already concluded that the Defendant/Appellant WAS in custody when he was placed in the back of the patrol car. Further, the trial court found that the Defendant's/Appellant's Fourth Amendment Constitutional Rights WERE violated as a result of the seizure. (T.R. 1/48).

Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment may not be introduced at trial for the purpose of proving the defendant's guilt. *Mapp v. Ohio* 367 U.S. 643, 654-55 (1961).

When a court improperly admits evidence in violation of the exclusionary rule, reversal is required unless the error was harmless. *Chapman v. California*, 386 U.S. 18, 23-24 (1967).

The State erroneously argued in its Brief that should this Court conclude that the Defendant/Appellant was illegally seized, that any such seizure would be no ground to suppress

the blood test result. See, State's Brief at page 9. In support of its argument, the State relies on *Comby v. State*, 901 So. 2d 1282 (Miss. App. 2005). While *Comby* is indeed good law, and in fact has been cited and relied on in at least four subsequent cases, the law that *Comby* stands for is different than what the State would have this Court believe. The State erroneously says that *Comby* held that blood test results are "NEVER" suppressible even in circumstances where there is a clear violation of an unlawful arrest, search or interrogation. The implications of this misrepresentation are clear. If the law was as the State represents it to be, then the result would be that law abiding citizens everywhere would be subjected to daily random blood tests with no underlying reason or cause, and in the event that law enforcement find incriminating evidence of alcohol or drug use, the blood test could be used against the defendant regardless of the extent of the constitutional rights violation or the flagrancy of the official misconduct that occurred in order for the blood test results to be procured.

What *Comby* held was that the "BODY" of the defendant is never suppressible. Not the results of a BLOOD TEST. *Comby* did conclude that the blood test results in that case were not suppressible because the defendant was found to have given valid consent to the blood test, NOT because blood test results are "never suppressible."

The United States Supreme Court has unequivocally held that "**all** evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in state court." *Mapp v. Ohio*, 367 U.S. 643 at 655 (1961) (emphasis added).

ARGUMENT II

THE CONSENT IS INVALID BECAUSE IT WAS NOT VOLUNTARY

While the Appellant/Defendant has clearly articulated in his original brief his reasons why the consent to the blood test was involuntary and invalid, notwithstanding that argument, should this Court find that the consent was valid and voluntary, the blood test results should still be suppressed because a later consent to search or seizure does NOT cure the taint of a constitutional rights violation. *Florida v. Royer*, 460 U.S. 491, 501-08 (1983).

The trial court below, after finding the Defendant's/Appellant's constitutional rights were violated, was initially unsure whether or not the constitutional right violation was later cured by the Defendant's/Appellant's alleged consent to the blood test. (TR 1/126-128). The trial court finally allowed the blood test results to be admitted on the basis that the Defendant/Appellant "knowingly" consented to the blood test. (TR 1/126-128). In doing so, the trial court totally ignored the fact that the first witness (Laura Kelly) that Deputy Turner had witness the blood test consent form testified in court that she did not see the Defendant/Appellant sign the consent form or hear anybody read it to him! (T.R. 1/93). The State's second witness (Vicky Moody) who the State claimed witnessed the Defendant/Appellant sign the blood test consent form, testified in court that she was not in the room when Deputy Turner allegedly read the consent form to the Defendant/Appellant and Mrs. Moody further testified that she could not say if the Appellant/Defendant was told he could refuse consent or whether he was advised of any other rights! (T.R. 1/100 – 104). The Defendant/Appellant DID testify that he was never advised he could refuse to sign the consent form, and further, testified to-wit:

A. No, Sir. I believe, you know, the way I was raised, when a cop tells you to do something, you do it, no questions about it. (T.R. 1/107).

It was based on the above testimony that the lower court based its ruling that the Defendant/Appellant had given valid voluntary consent to the blood test and therefore that consent cured the taint of the prior Fourth Amendment violation. (T.R. 1/122).

Based on the evidence, the alleged "consent" is invalid. Consent is not voluntary if given only in acquiescence to a claim of lawful authority. *Bumper v. N.C.*, 391 U.S. 543, at 548-49 (1968) and *U.S. v. Morales*, 171 F.3d 978, 983 (5th Cir. 1999).

The State in its Brief, claims that "[t]here is nothing in this record to show that the Appellant's consent to give a blood sample was anything but knowing and voluntary." See State's Brief, at page 10. In support of its argument, the State claims that "he was a young man tells the Court nothing about his ability to understand what he was told." See State's Brief, at page 9.

This Court reviews the voluntariness of consent to search based on the "totality of the circumstances," and "[t]his consideration includes, among other things: the location of the encounter, any overt coercion, the display of weapons, experience of the defendant with the criminal justice system, **and the defendant's age.**" *Melton v. State*, 950 So. 2d 1067, 1071 (Miss. App. 2007). (emphasis added).

In the case at bar, the Defendant/Appellant was eighteen (18) years old at the time of the incident, was in the presence of numerous law enforcement officers without any independent neutral parties present to dissipate the aura of lawful authority, had no experience with the criminal justice system and was in fact in custody at the time he gave his "knowing and voluntary" consent! (T.R. 1/106-107, 1/54-55).

When the totality of the circumstances surrounding the "consent" of the Defendant/Appellant to the blood test are examined, including the Defendant/Appellant's testimony that he in fact only acquiesced to signing the consent form because "when a cop tells you to do something, you do it, no questions about it," the law appears to lead to the conclusion that the consent was only given in acquiescence to a claim of lawful authority, and therefore was not voluntary at all.

ARGUMENT III

THE CONSENT IS INVALID BECAUSE IT WAS GIVEN AFTER THE DEFENDANT'S/APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED

The United States Supreme Court has held that where there is a violation of constitutional rights, subsequent consent to later searches and or seizures is invalid and does not "cure" the violation, unless the elements for any of the available exceptions to the exclusionary rule are met. *Florida v. Royer*, 460 U.S. 491, 501-08 (1983). In the present case, there is not sufficient evidence to prove, and the State has not proven, that the elements for ANY of these exceptions to the exclusionary rule were met.

If the consent is held to be valid by this Court, the consent should not serve to cure the taint of the trial court's finding that the Defendant's/Appellant's Fourth Amendment Constitutional Rights were violated and therefore, the trial courts admission of the blood test results in the face of the constitutional rights violation should be determined improper and reversal ordered as required by *Chapman v. California*, 386 U.S. 18, 23-24.

CERTIFICATE OF SERVICE

I, John M. Colette, attorney for Defendant/Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF FOR THE APPELLANT to the following:

Honorable Marcus D. Gordon
Circuit Court Judge
P.O. Box 220
Decatur, MS 39327

Honorable Mark Duncan
District Attorney
P.O. Box 603
Philadelphia, MS 39350

Honorable John R. Henry
Special Assistant Attorney General
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205-0220

THIS THE 26TH DAY OF DECEMBER 2007.

JOHN M. COLETTE
ATTORNEY FOR THE
DEFENDANT/APPELLANT

JOHN M. COLETTE, MSB[redacted]
401 EAST CAPITOL STREET
SUITE 308
P.O. BOX 861
JACKSON, MS 39205-0861
(601)355-6277 OFFICE
(601) 355-6283 FACISIMILE