

IN THE SUPREME COURT OF MISSISSIPPI

RANDY SHON HOWARD

v.

STATE OF MISSISSIPPI

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SUPREME COURT
COURT OF APPEALS

NO. 2007-KA-00799-COA

Appeal from Circuit Court of Neshoba County, Mississippi

BRIEF FOR APPELLANT

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Oral Argument Not Requested.

CERTIFICATE OF INTERESTED PERSON

RANDY SHON HOWARD

v.

STATE OF MISSISSIPPI

NO. 2007-KA-00799-COA

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/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

RANDY SHON HOWARD
Appellant

Hon. Jim Hood
Attorney General
State of Mississippi

Hon. Mark Duncan
District Attorney

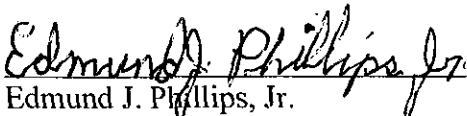

Edmund J. Phillips, Jr.
Attorney of record for Randy Shon Howard

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STATEMENT OF THE ISSUES

The Court erred in removing Evelyn Burkes from the jury and seating the alternate.

The Court erred in denying Appellant's motion to suppress the results of the search and in overruling Appellant's objection to introduction into evidence of said results.

The Court erred in overruling Appellant's objection to the state's redirect examination on matter not covered on cross examination.

STATEMENT OF THE CASE

The Appellant, Randy Shon Howard, appeals his conviction by the Circuit Court of Neshoba County, Mississippi, on the charges of possession of more than .10 grams and less than 2 grams of methamphetamine and possession of less than 30 grams of marijuana and his sentence to serve eight (8) years in the custody of the Mississippi Department of Corrections and to pay a fine of \$1,750.00.

Richard Sistrunk and Grant Myers, drug officers with the Neshoba County Sheriff's office (T-56), while out of uniform but in a marked sheriff's office car, saw Appellant driving a four-wheeler (all terrain vehicle) (T-57), on a public road and pursued him. He stopped at his residence. They seized him as he dismounted the ATV, searched a bag on his person and found contraband methamphetamine and marijuana in

the bag (fanny pack). They had thought he was speeding. They arrested him for felony possession of methamphetamine and misdemeanor possession of marijuana but did not charge him with speeding or driving an unauthorized vehicle on the public highways, and did not issue him any traffic citations.

SUMMARY OF THE ARGUMENT

(1) A party who fails to object to the jury's composition waives any right to object to it thereafter.

(2) An arrest without probable cause leading to discovery of contraband vitiates validity of prosecution for possession of the contraband.

(3) The scope of redirect examination is limited to that of cross examination.

ARGUMENT

I.

THE COURT ERRED IN REMOVING EVELYN BURKES FROM THE JURY AND SEATING THE ALTERNATE

After the jury had been seated and the first witness had been called, and before direct examination had begun, the prosecution moved to have Evelyn Burkes removed from the jury, because, approximately thirteen years before the trial, Appellant's father had worked for the same company as Ms. Burkes (T-40). Appellant objected and the Court held a hearing out of the presence of the jury to determine whether to remove the juror. The evidence showed that Randolph Howard, the father, had known Ms. Burkes

but had not had a close relationship with her (T-46). No evidence was adduced that Ms. Burkes knew that Randolph Howard was Appellant's father.

During voir dire, no questions had been asked of the venire about Appellant's father (T-43) and she did not respond untruthfully to any question put to her.

The prosecution argued that Ms. Burkes should have volunteered that she had known Randolph Howard.

The Court granted the State's motion (T-51).

A party who fails to object to the jury's composition before it is impaneled waives any right to complain thereafter. *Bell v. State*, 7025 So.2d 836 (Miss. 1998). The Court's removing the juror was error. The verdict should be overturned.

II.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF THE SEARCH AND IN OVERRULING APPELLANT'S OBJECTION TO INTRODUCTION INTO EVIDENCE OF SAID RESULTS

The Court held a hearing out of the presence of the jury on Appellant's motion to suppress the fruit of the search and objection to its introduction into evidence (T-60).

Officer Sistrunk testified (T-75):

- Q. So the stop was at his house?
- A. That's right.
- Q. When, when you got stopped, did you and Officer Myers both immediately exit the patrol unit?
- A. Yes, sir.
- Q. Did, to your recollection, do you recollect my client, Mr. Howard, getting off of the four-wheeler?
- A. I don't remember - - I - - when I walked up to him, I think he

was still sitting on the four-wheeler, but I can't - - I can't remember which time he got off of it. I think he got off of it whenever we -- he went to get his license. He got off the four-wheeler and got his license out.

Officer Myers first denied and then admitted that he had physically restrained Appellant as he started to walk away (T-88).

While there was substantial variance between the testimony of Sistrunk and Myers, both stated that Appellant opened the fanny pack to pull out his driver's license, that Sistrunk then saw marijuana in the fanny pack, that this justified Myers searching the fanny pack and finding the methamphetamine.

Megan Stovall, Appellant's live-in lady friend saw the incident through the window of the mobile home in which they lived.

She testified (T-96 et seq.):

- Q. When did you first see him?
- A. I looked out the window, he was pulling in like, he was on the edge of the road pulling in their yard, like they was actually - - gotten into the yard in front of the house.
- Q. Did you see any another vehicle?
- A. Yea, there was a cop car parked, like, in the road.
- Q. Tell us what you saw?
- A. Like I said, I heard him coming back, and I looked outside, and he was coming down, like, he was right there at the house literally just in front of it. The cop car was in the road.
- Q. Okay. I want to ask you this question: when you looked out, tell us whether or not you saw any blue lights?
- A. No, like I said, all I heard was the - -
- Q. Tell us whether or not the reason you looked out was because you heard police sirens?
- A. No, sir.
- Q. What did you see Randy do?

A. He - - at first he was sitting on the four-wheeler, and he went to get off. And the officers - -

(T-98, 99):

Q. (By Mr. Collins) When he got off the four-wheeler, did you see any policemen or deputy sheriffs?
A. Yes.
Q. How many did you see?
A. There was two.
Q. What were they doing?
A. They'd gotten out of the vehicle, and when Randy got off the four-wheeler, he had gotten like one step, and was grabbed.
Q. Did you recognize either of the deputy sheriffs?
A. There was a tall one named Ricky - - all I know, his last name is Sistrunk. Sometimes I want to call him - - I know there's Dickie and Ricky, but he's not Dickie, I know which one that one is. And Grant.
Q. You say Grant, you knew him?
A. Grant grabbed him, and I know his face, I know who he is.
Q. Tell us whether or not they approached Randy?
A. You could say that. Because when he stepped off the four-wheeler, he got like - -
Q. Okay, "he" doesn't help us.
A. He, Grant grabbed him.
Q. What did he grab to?
A. He grab ahold to him, and put him against the police car.
Q. Tell us whether or not you saw Randy reach for anything about his person?
A. Huh-huh.
Q. What happened next when he was on the patrol car?
A. They proceeded to pat him down and searched him, and he had a bag that they had took away from him in the process.

On cross examination she testified (T-104, 105):

Q. When they came over there, did he get off? Of did he get off and go join them?
A. It wasn't like that. They come to a complete stop, and Grant opened his door first. And then Randy went, I guess they said something to him or something, and Randy got off the four-wheeler, and stepped towards them in the direction of the house,

- or carport, and next thing you know Grant grabbed hold to him.
- Q. How long from the time you saw them stop until you saw Grant push Randy Howard onto the car?
- A. It was within a minute or two, tops. It wasn't - - they weren't - - I guess they had enough time to ask him one, a questions or something like in a sentence or something. That would be the length of time. Because when he went to step off - - he was just politely was stepping off his four-wheeler like anybody would, and he stepped in the direct towards the house like he was going to come in or something. And next thing you know Grant had done got out of his vehicle and both of them were out and grabbed him.

The search was invalid for two reasons:

- (1) the probable cause was pretextual and,
- (2) a traffic stop is not ground for a search.

The prosecutor argued that the officers had probable cause to make the traffic stop in that the vehicle was speeding and that an ATV cannot receive a license and was not permitted on the public roads (T-110) of Mississippi.

Sistrunk and Myers were drug officers not in uniform. Their duties were to enforce the narcotics contraband laws not the traffic laws. They did not issue Appellant any traffic citations, tickets or charges. Those traffic violations were their claimed probable cause for stopping Appellant (T-110) and ultimately for searching him.

Such probable cause is required. *Davis v. Mississippi*, 394 U.S. 721, 89 Sup.Ct. 1394 (1969).

Minor misdemeanor violations do not justify searches. *U.S. v. Mills*, 153 U.S. App. D.C. 156, 472 F.2d 1231 (1972); *Knowles v. Iowa*, No. 97-7597, _____ U.S. _____ (1998).

Here the probable cause for arrest for traffic violations is not shown because no tickets were issued.

The results of the search were fruit of the poisonous tree.

The verdict should be overturned.

III.

THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S REDIRECT EXAMINATION ON MATTER NOT COVERED ON CROSS EXAMINATION.

Mississippi Crime Laboratory forensic scientist Brandi Goodman testified about the identity and amount of the contraband narcotics. During examination on her expertise, Appellant's counsel made the point that she relied on the accuracy of computer driven machines to identify the drugs, not on her own expertise (T-151, 152). After the Court accepted her as an expert, she then testified as to the identity and weight of the drugs.

Appellant's cross examination covered only her use of scales to weigh the drugs (T-168, 169).

The prosecutor on redirect harkened back to the voir dire on Ms. Goodman's expertise, a matter not discussed on cross examination (T-169-170):

Q. The machinery that you used to conduct the test on the two exhibits we have today, was the machinery working correctly?

A. MR. COLLINS: Your Honor, I object to that as being outside the scope of the cross-examination.

THE COURT: Overruled.

Q. (By Mr. Thames) You can answer the question. Was it working properly?

A. Yes, it was.

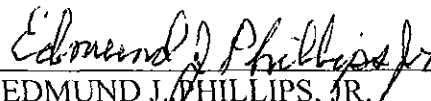
The scope of redirect examination is limited to that of cross-examination. Blue v. State, 674 So.2d. 1184 (Miss. 1996); Jackson v. State, 684 So.2d. 1213 (Miss. 1996).

The redirect here covered matters not considered on cross examination . The Court erred in overruling Appellant's objection on this ground to the redirect examination.

CONCLUSION

The verdict should be overturned.


RESPECTFULLY SUBMITTED,


EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney; the Honorable Vernon R. Cotton, Circuit Court Judge, 205 Main Street, Carthage Mississippi 39051, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: October 8, 2007.


EDMUND J. PHILLIPS, JR.
Attorney for Appellant