IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01199-COA

DELORIS WATSON — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF ON THE MERITS BY APPELLANT

OFFICE OF THE PUBLIC DEFENDER,
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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 the Supreme Court and the judges of the Supreme Court may evaluate possible disqualification or recusal.

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So certified, this the 3rd day of March, 2008.

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STATEMENT OF THE ISSUES

I. The trial court erred in permitting Officer Todd Peterson to offer hearsay testimony from an unidentified Wal-mart employee that Ms. Watson was shoplifting in the store, as it provided a necessary element of the crime, and thus deprived her of fundamental rights under AMEND. V, VI and XIV, U.S. CONST., and ART. 3, §§ 14, 26, MISS. CONST.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Deloris Jean Watson was indicted by a grand jury of the First Judicial District of Hinds County, Mississippi for allegedly attempting an aggravated assault on a police officer with her car in violation of MISS. CODE ANN. § 97-3-7 (1972) and for feloniously fleeing police attempting to stop her, in violation of MISS. CODE ANN. § 97-9-72(2) (1972). CP 3.

Ms. Watson stood trial on February 6, 2007 on both counts of the indictment. At the close of all evidence, the trial court found Count One of "attempted aggravated assault on a police officer" was not a crime as laid in the indictment, but allowed the jury to consider whether Ms. Watson's actions constituted simple assault on a law enforcement officer. T. 154. After deliberation, the jury was unable to reach a verdict on Count One, after which the judge declared a mistrial. CP 14; T. 177; RE 14. The jury found Ms. Watson "Guilty" on Count Two of the indictment, feloniously eluding a police officer; the trial court subsequently sentenced her to four (4) years incarceration in the custody of the Mississippi Department of Corrections. CP15; RE 9; T.177. After pursuing post-trial motions, Ms. Watson appealed her cause, which has been assigned to this honorable Court.

B. STATEMENT OF FACTS

It began as a way for Deloris Jean Watson to earn an extra $10 for giving her friend Daphne a late night ride to the Clinton Wal-mart to purchase hair care products; it ended the next day with Ms. Watson under arrest for allegedly attempting an aggravated assault on a police officer and feloniously fleeing law enforcement officers who tried to stop Ms. Watson after she got in her car to leave Wal-mart. T. 138.

According to Ms. Watson, her friend Daphne offered her $10 for a ride to the Clinton Wal-Mart in order to purchase a hair permanent. It was in the early morning hours, Ms. Watson

testified, but she needed the money. About 3:45 A.M. of December 23, 2004, the two women pulled into the Clinton Wal-mart parking lot and went inside. T. 138. Ms. Watson testified the two separated upon entry; Ms. Watson examined some groceries while she assumed Daphne was looking for a permanent. Ms. Watson testified she purchased a soft drink with some of the $10 Daphne gave her, before she began looking for her friend. T. 139.

Ms. Watson testified she went to the front of the store and saw Daphne go through the check out line, emerging without a store bag. T. 139. Ms. Watson testified she went to the front of the store and asked the store guard, who told her Daphne had already gone outside. T. 139. Then a Wal-mart clerk approached and pointed back in the store, telling Ms. Watson Daphne was back in the store. T. 139. Ms. Watson went out to the car and testified she found Daphne "scooted down" in her green Dodge Shadow. T. 139. At that point, Ms. Watson testified, Daphne told Ms. Watson to go because Daphne had shoplifted a "Dark and Lovely" permanent. T. 140. About the same time, Ms. Watson testified she saw a police officer come out of the store, pointing a gun. T. 140. Daphne urged Ms. Watson to leave and said police would put them in jail. Ms. Watson testified she panicked at the thought of jail, because she said Clinton police had already warned her about driving in Clinton without a license, which was suspended. T. 140.

Ms. Watson testified she saw one law enforcement officer say "Hold it," but "the car was already in motion." T. 141. Ms. Watson testified she put the car in reverse to slide out of her parking slot, moving the car towards the front of the store before she headed for Highway 80 into Jackson. T. 140-141. The pair went to Daphne's home on Norman Street, close to Ms. Watson's home on Henley Street. T. 138; 142. Ms. Watson testified she had no idea Daphne intended to steal from the store. Ms. Watson testified she did not try to run over either officer, although she admitted she was driving fast due to her panicked state. T. 141.

Predictably, Sergeant Todd Peterson of the Clinton Police Department testified to a wildly different version. Performing a "courtesy walk" at 3:45 A.M. for the Clinton area Wal-Mart, Peterson testified that an unnamed and otherwise totally unidentified "front-end manager" informed him Ms. Watson and a companion were possibly shoplifting or had shoplifted in the past. T. 99-92; 102-104. Peterson testified that Ms. Watson was wearing bulky clothing in which she could have concealed something, so he ordered Ms. Watson to stop as she left the store. T. 92. Peterson testified at trial that Ms. Watson was "running" from the store, but acknowledged the discrepancy with his written report completed the morning of the incident, in which he described Ms. Watson's exit as "continued walking." Peterson testified he pursued Ms. Watson out into the parking lot, wearing his Clinton Police Department uniform and identifying himself as a police officer. T. 93-94.

Ms. Watson got into a green Dodge Shadow and put the car in reverse to turn and exit out to U.S. Highway 80. T. 94. Peterson testified that he then drew his service weapon and gave "loud verbal commands" to Ms. Watson to stop. T. 95. At this point, Peterson testified that Ms. Watson came toward him – in reverse - "at a high rate of speed" – Peterson testified he was forced to jump out of the way to avoid serious bodily injury. T. 95-96.

Peterson testified to no bodily injuries as a result of the incident. T. 133

Peterson testified he jumped behind another vehicle parked on his left and that it appeared Ms. Watson drove up on the sidewalk edge in front of the store "before she regained control of the vehicle," exiting east onto Highway 80 into Jackson. T. 97. Peterson and an officer in training, Rick Townsend, pursued Ms. Watson in their patrol car and discerned a license tag number before losing her on Shaw Road, Townsend discerned a license tag number. T. 97; 118. Neither Peterson nor Townsend testified as to whether they pursued Ms. Watson with sirens and flashing lights on the patrol car.

The next morning, Peterson and Townsend went to the home of Ms. Watson, the registered owner of the car, but neither the car nor Ms. Watson was home. T. 98. According to the testimony of Townsend, the pair did speak with the children of Ms. Watson. T. 118. Then Peterson and Townsend went back to Clinton to do paperwork, including affidavits regarding the incident with Ms. Watson and her companion. T. 98; 105

That afternoon Peterson and Townsend attempted to serve the arrest warrant on Ms. Watson at her home, this time accompanied by a several members of a United States Marshals Service fugitive task force. T. 99. Again, Ms. Watson was not present, although the officers spoke again with her children who said they had not seen Ms. Watson. T. 119. Nevertheless, the officers began to "canvass" the area and located Ms. Watson and an unnamed, unidentified woman in the Dodge Shadow, driver's side door open, on Norman Street about one quarter mile from her home. T. 119; 122.

Peterson testified that he and Townsend drew their service weapons when Ms. Watson would not get out of her car. T. 100. Both Peterson and Townsend testified that before they informed Ms. Watson of the charges against her, she denied being the one who attempted to run them down earlier. T. 100. While Peterson professed to find her protests "curious," as Ms. Watson had not been home, he fails to take into account the two discussions the officers had with family members who surely informed Ms. Watson police were searching for her, despite her absence from home. T. 100.

There are crucial omissions and significant distinctions between Peterson's contemporaneous reports compiled the morning of the incident and his trial testimony. T. 104-105. Peterson testified he prepared affidavits and warrants, including a "detailed" written report, for the arrest of Ms. Watson upon losing the pursuit of her vehicle. T. 103; 104. Curiously, however, Peterson failed to get a statement from the unidentified Wal-mart manager who

initiated Peterson's interest in Ms. Watson at the store. T. 102. Peterson was also forced to acknowledge at trial that his affidavit for the arrest warrant stated "shoplifting in progress" when he personally failed to observe Ms. Watson hiding anything in her clothing. T. 103. Peterson also acknowledged that his detailed report lacked information that he told Ms. Watson to stop while she was still in the store, to which Peterson testified at trial. T. 104. In addition, Peterson also acknowledged he made no effort to identify or interview Wal-mart employees present at the scene inside and outside of the store. T. 109.

Townsend, who was present with Peterson throughout the incident, filed no report of any kind because Peterson never told him to prepare a report. T. 121. Finally, Det. Kenny Lewis, lead investigator in the case, testified that although he went to the store, he took no statements from anyone at the store, nor did he speak with the companion of Ms. Watson. T. 133.

No suspected crime Ms. Watson was alleged to have committed was ever specified in the indictment, nor was her companion ever arrested or even identified.

SUMMARY OF THE ARGUMENT

Ms. Watson submits that her conviction requires reversal due to the manifest error by the trial court in permitting into evidence hearsay from Officer Todd Peterson regarding statements allegedly made by an unidentified Wal-mart employee. T. 91. According to the testimony of Peterson, which was at significant variance with written materials prepared at the time, these accusations by the Wal-mart employee were the basis for Peterson's initial pursuit of Ms. Watson. Under MISS. CODE ANN. 97-9-72 (1972), an officer must have "reasonable suspicion" that the driver has committed a crime. No suspected crime was listed in the indictment. CP 3. Therefore, it was crucial to the confrontation rights of Ms. Watson to permit her to examine the Wal-mart employee who ostensibly provided the information about Ms. Watson to Peterson. Without such information, the jury was deprived of evaluation of the credibility of the accusation and whether Peterson acted with "reasonable suspicion" that Ms. Watson had committed a crime.

ARGUMENT

I. The trial court erred in permitting Officer Todd Peterson to offer hearsay testimony from an unidentified Wal-mart employee that Ms. Watson was shoplifting in the store, as it provided a necessary element of the crime, and thus deprived her of fundamental rights under AMEND. V, VI and XIV, U.S. CONST., and ART. 3, §§ 14, 26, MISS. CONST.

The right to a trial by jury is among the fundamental guarantees that define this country. The component rights, including the right to confront witnesses against one, to have the force of law to summon witnesses in one's defense, to have the assistance of counsel, all express the attitude of this country that basic fairness is required in a criminal proceeding. And it is that fairness the trial court denied to Deloris Watson when she sought full confrontation of a witness or witnesses who accused her of a crime – shoplifting – for which she was never charged, that led to trial for assault on a policeman and feloniously eluding an officer who attempted to stop her on the basis of accusations from unknown, unidentified and untested witnesses.

Under MISS. CODE ANN. 97-9-72 (1972), prosecutors were required to prove *beyond a reasonable doubt* that Ms. Watson (1) willfully failed to obey a visible or audible signal to stop by a law enforcement officer (2) in the lawful performance of duty (3) who had a *reasonable suspicion* to believe the driver in question has committed a crime. [emphasis added] The fact is the indictment fails to specify *any* crime Ms. Watson may have committed at the time. CP 3.

At trial, Officer Todd Peterson was permitted to testify over the objection of defense counsel, as to the alleged statements by an unidentified Wal-mart employee that Ms. Watson either *had* shoplifted in the past or that she and her companion were both then engaged in shoplifting from the store. T. 91;102-104; RE 11. Peterson also testified that he observed both Ms. Watson and her companion as wearing "bulky clothing" (it was December 23, 2004, a cold winter month) which could conceal items. Nevertheless, Peterson was also forced to admit he

never saw Ms. Watson concealing anything, merely that she could have been hiding something. T. 104.

The trial court permitted the hearsay testimony, offered a limiting instruction and allowed Peterson to testify as what the unknown Wal-mart clerk said for the limited purpose of explaining "what the officer did." T. 91; RE 11.

Ms. Watson submits that the trial court abused its discretion and engaged in a fiction to permit the officer to testify to otherwise inadmissible hearsay regarding an essential element of the crime, *reasonable suspicion* a crime had been committed.

MISSISSIPPI RULE OF EVIDENCE 801(c) defines hearsay "as a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." MISS.R.EVID. 103(a) stipulates that no reversal may be predicated on the admission or exclusion of evidence unless a "substantial right" of the accused was prejudiced. Further, there are cases in which the hearsay so elicited is so prejudicial that even a limiting instruction or instruction to disregard fails to salvage the damaged process. In *Snelson v. State*, 704 So.2d 452, 457; ¶ 30 (Miss. 1997), the state Supreme Court held upon review that hearsay testimony that the accused had committed other murders was so prejudicial to Snelson's fair trial rights that despite the limiting instruction, reversal was the only remedy. In *Brooks v. State*, 903 So.2d 691, 697-698 (Miss. 2005), the state Supreme Court found that hearsay testimony admitted at trial regarding statements by Brooks' mother, Towanda Nobles, that Brooks said he killed Merry Wilson, was error. Coupled with denial of the right to counsel at a line-up, the Court found Brooks was denied his fundamental right to a fair trial based on the errors committed. *Id.*

Furthermore, this Court has often held that witness statements in a police report are hearsay and not otherwise admissible, as in *Bingham v. State*, 723 So.2d 1189, 1192 (Miss.Ct.App. 1998). In *Bingham*, the Court affirmed the exclusion from evidence of a police

incident report which Bingham, the accused, sought to introduce for the witness statements it contained. While the Court said "[s]tatements and information contained within the report that are *factual* in nature would be admissible and qualify as information routinely obtained in the regular course of business under Rule 803(6), this Court also declared, "[h]owever, the very nature of police investigation reports also requires the taking of statements from parties, witnesses, and bystanders, *statements which lack the safeguards outlined within the definition of hearsay and non-hearsay under Rule 801.*" *Id.* [emphasis added]

Yet the strongest argument against the use of hearsay is found in *Crawford v. Washington*, 541 U.S.36 (2004) and *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006). *Crawford* reversed a murder conviction involving admission of statements made by the wife of the accused shortly after the incident. The spousal privilege applied at trial to prevent the Crawford's wife from testifying so, pursuant to Washington state evidence rules, the trial court declared her "unavailable" and permitted testimony of the wife's statements inculpatory of her husband. The United States Supreme Court reversed, essentially revitalizing the common law ban against use of hearsay, stating that in such cases, the only remedy is the one prescribed by the Sixth Amendment to the U.S. Constitution: Confrontation. The Supreme Court found the ban applied only to "testimonial" statements or "solemn declaration or affirmation made for the purpose of establishing or proving some fact." The Supreme Court went on to say, "An *accuser* who makes a *formal statement* to *government officers* bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.*, at 51. [emphasis added]

In *Davis v. Washington*, 547 U.S. 813 (2006) and *Hammon v. Indiana*, 547 U.S. 183; 126 S.Ct. 2266 (2006) , the U.S. Supreme Court further refined the context of when a statement may be considered testimonial and thus subject to the Confrontation Clause, or non-testimonial and therefore regulated by state evidence rules. In *Davis*, the Court found that a complainant's 911

call identifying her attacker was *not* testimonial, in that the primary purpose of the information was necessary for police to meet an ongoing emergency, one in which the life of the complainant, a domestic violence victim, was arguably at stake. In *Hammon*, however, the Court found that written statements by a domestic violence victim in response to police interrogation was testimonial and therefore, within the ambit of the Confrontation Clause, because "there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Hammon v. Indiana*, 547 U.S. 813, ---; 126 S.Ct. 2266, 2274.

In the case at bar, the indictment is devoid of *any* crime in progress or "ongoing emergency." CP 3. No explanation was offered at trial as to the absence of the unidentified Wal-mart clerk or clerks. Peterson himself testified he observed neither Ms. Watson nor her companion as hiding anything, merely that their bulky clothing (worn during wintertime months) *could* conceal items. T. 104. It is not even clear from Peterson's testimony whether the accusations against Ms. Watson came as a result of perceived *past* conduct or *ongoing* conduct. T. 102-104. There is not even a mention as to what Ms. Watson was allegedly shoplifting; the indictment certainly lists nothing. CP 3. None of this information was forthcoming at trial, nor was any information made available to the jury so it could decide whether or not Peterson had a "reasonable suspicion" for initially stopping Ms. Watson.

Therefore, how could Peterson establish that the information given was in response to an "ongoing emergency" or given in response to past conduct, for investigation as to whether a crime had occurred? Particularly when *no crime* was specified in the indictment. CP 3.

Finally, as a matter of public policy, Ms. Watson would submit that to permit such testimony under such a shallow fiction, is to foster shoddy police investigations and result in the conviction of innocent persons. T. 91; RE 11. To allow a police officer to testify as to hearsay,

when that hearsay forms an essential element of the crime, is an insidious erosion of bedrock constitutional freedoms, such as the right to confront witnesses against one.

Ms. Watson respectfully requests that her conviction be reversed and her cause remanded for a new trial, due to the error of the trial court in permitting introduction of otherwise inadmissible hearsay which prejudiced the jury against her.

CONCLUSION

Counsel for Ms. Watson respectfully submits the admission of hearsay evidence described herein deprived her of her constitutionally guaranteed right to confront witnesses arrayed against her, a crucial element of her right to a fair trial secured under AMENDS. V, VI, XIV, U.S. CONST. and state constitutional guarantees. Without the testimony of the anonymous Wal-mart employee and without specification of a suspected crime in the indictment, the jury lacked critical information to judge whether or not Peterson had reasonable suspicion to suspect a crime had been committed, an essential element of feloniously eluding a law enforcement officer in a motor vehicle.

Based on the authority recited above, Ms. Watson humbly asks this honorable Court to vacate this conviction and reverse and remand for a new trial.

Respectfully submitted,

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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:

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