

IN THE MISSISSIPPI SUPREME COURT

CASE NUMBER 2007-KA-01555

JERRY COOLEY, JR.

Appellant

vs.

STATE OF MISSISSIPPI

Appellee

BRIEF FOR THE APPELLANT

LESLIE ROUSSELL,
ATTORNEY FOR APPELLANT,
JERRY COOLEY, JR.

AMENDED 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 disqualification or recusal.

Mr. Jerry Cooley, Jr. - Appellant

Mr. Michael Risen - Witness for the State

Mr. Russell Douglass - Witness for the State

Mr. Kevin Stevens - Witness for the State

Hon. Dan Angero - Assistant District Attorney

Judge Lester F. Williamson - Trial Judge

Hon. Marcus D. Evans - Trial Counsel for Mr. Cooley

Leslie Roussell - Trial counsel for Mr. Cooley

Cetrified this 20 day of February, 2008

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Hon. Marcus D. Evans - Trial Counsel for Mr. Cooley

Leslie Roussell - Trial counsel for Mr. Cooley

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STATEMENT OF ISSUES

I. Court Committed Reversible Error By Allowing The State of Mississippi to Introduce a Gun into Evidence Over the Objection of the Defendant.

II. The Court Committed Reversible Error by Failing to Grant the Defendant's Requested Directed Verdict as the State Failed to Submit any Evidence that the Defendant Was In Possession of a Firearm.

STATEMENT OF THE CASE

On or about September 8, 2006, Michael Risen was sleeping in his bed and was woken up by his barking dogs (R. 51). Mr. Risen got up and walked to his door to see why his dogs were barking (R. 51). When Mr. Risen looked outside his home he saw an unfamiliar vehicle in the driveway and an unfamiliar man walking in the driveway (R. 52-53). Mr. Risen then let his 125 pound dog out and the dog somewhat chased the unknown man back to the unfamiliar car (R. 53). At this point Mr. Risen grabbed a gun out of Mr. Risen's pick-up truck (which was parked under Mr. Risen's carport and in front of the unknown car) and made a call to the Sheriff's office on a portable phone (R. 54). At this point the unidentified man (who turns out to be the Appellant, Jerry Cooley, Jr.) begins to try and explain himself to Mr. Risen (R. 56). Mr. Cooley was attempting to explain to Mr. Risen that he had been fishing on that property and that Mr. Cooley knew who lived in the house and it wasn't supposed to be Mr. Risen.(R. 55). Mr. Risen claims Cooley was drunk (R. 55).

Mr. Risen then claims that Mr. Cooley got into his vehicle and kept trying to crank it to leave (R. 56). Mr. Risen was attempting to prevent Mr. Cooley from leaving (R. 56), Mr. Risen kept telling Mr. Cooley to stop but that Mr. Cooley persisted in trying to leave so Mr. Risen grabbed the door handle of Cooley's vehicle and opened it to try and prevent Cooley from leaving and that is when Mr. Risen saw the butt of a gun underneath the car seat (R. 56). Mr. Risen then claims that he grabbed the gun out of the Cooley vehicle and slung it as far as he could (R. 57).

After the gun was thrown, Mr. Cooley got out of the car and tried to leave walking (R. 57). Again, Mr. Risen used his own pistol and other force to prevent Mr. Cooley from leaving

(R. 57). Meanwhile, Deputy Russell Douglass pulled up to the scene and Mr. Risen showed Deputy Douglass where he had thrown the gun (over by a ditch) and Deputy Douglass recovered it in two pieces (R. 58, 61, 68-71). Officer Douglass then claimed he logged the gun into evidence at 10:07 a.m. the next morning (approximately 10 hours later) (R. 71-72).

Deputy Douglass took Cooley to the Sheriff's Department where he claims he turned him over and Investigator Kevin Stevens later charged him with Felon in Possession of a Firearm (R. 77). However, Kevin Stevens testified that Deputy Douglass actually charged Cooley with Felon in Possession of a firearm (R. 84). Either way, Deputy Douglass admits he never read Mr. Cooley any Miranda Rights prior to questioning him because, he only intended to charge him with a public drunk misdemeanor" (R. 76-77). Further, Deputy Douglass admitted on the witness stand that he had lied to defense council about the location where Deputy Douglass has retrieved the gun (R. 78) . During discussions with defense council, Deputy Douglass stated that he had retrieved the gun from inside the Cooley vehicle (R. 78). When asked why he lied about it to defense council less than an hour prior to trial, Deputy Douglass' response was, "I was not under oath at the time" (R. 78). Regardless, a State witness, who should be familiar with discovery rules (as an officer of the law) , intentionally lied to the defendant's attorney intentionally misleading them and the investigation of the defendant's case.

Mr. Cooley was found guilty of being in possession of a firearm by a convicted felon and sentenced to serve a term of three years as a habitual offender.

SUMMARY OF THE ARGUMENT

The State of Mississippi was erroneously allowed to introduce a gun into evidence in this case. They were allowed to do so even though the officer admitted that prior to trial he lied to defense council about where he found the gun. They were allowed to do so even though gun was found in two pieces and presented in Court to be in one piece. They were allowed to do so even though two Officers (one of which was completely unknown to the defendant until his name was mentioned in trial) had handled the gun prior to trial with no account for their handling of the gun, nor any documentation or proof regarding the time, date and reasons for their handling the gun. The Trial Court committed reversible error by allowing the State to introduce the gun into evidence over objection of the Defendant.

The gun in this case was not a firearm. Prior Mississippi law states that when a pistol no longer fires it is not a weapon for weapon concealment purposes. Using the same logic, a gun that no longer fires cannot be considered a firearm. The State has the burden of proving all elements of the crime charged in a felon in possession of a firearm case, including that the instrumentality in question is a "firearm". This means they must prove the gun works which they could simply do by having an officer or crime lab official place a bullet inside it and attempt to fire it in a controlled environment. The State did not do that here and they are not allowed the luxury of presuming that elements to a crime are satisfied. There was no proof whatsoever offered on the element and a directed verdict should have been granted by the Court when requested by the Defendant.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE OF MISSISSIPPI TO INTRODUCE A GUN INTO EVIDENCE OVER THE OBJECTION OF THE DEFENDANT.

During the States case-in-chief, it requested that the dilapidated, ragged gun discussed above be admitted into evidence (R. 72). The Defendant objected because the proper chain of custody was not established by the State to allow the introduction of the gun into evidence; as well as an objection based on the gun being tampered with and no longer in the same condition that it was in when it was recovered by Deputy Douglass (R. 72-75).

Although Deputy Douglass lied to the attorney for the defendant about where Douglass found the gun (R. 78), at trial, Douglass testified that he found the gun in two pieces near a ditch (R. 68-69). Then he testified that he kept the gun until 10:07 a.m. the next morning when it was put into an evidence locker (R. 71). Upon further interrogation, Douglass claimed he placed the gun in the evidence locker where it remained until it was given to him the morning of trial by Investigator Stevens (R. 74). When asked why he had intentionally lied to defense council prior to trial about the location of the gun, Deputy Douglass responded by saying, "Because I was not under oath then" (R. 78).

There was absolutely no testimony as to where the gun was in the interim. If you believe the Douglass, the gun went from the ditch where Douglass found it, to the evidence vault at 10:07 the next morning where it stayed until the morning of Court (R. 71-74). (Deputy Douglass was also not under oath then). Then, Deputy Douglass obtained the gun from Investigator Stevens. The State fails to account for Investigator Stevens' handling of the gun.

Deputy Douglass' own testimony proves that Investigator Stevens had possession of the gun at some point (R. 74). Interestingly, Investigator Stevens, during his testimony, claimed he had gotten the gun from an Officer named Mike Mazingo; "Actually Mike Mazingo brought it (the gun) over here and we secured it in the witness room awhile ago" (R. 85). There was never any mention of any Officer named Mazingo in this entire case until Kevin Stevens stated on the witness stand that he had received the gun from Mazingo. There are certainly chain of custody issues here. There are also issues regarding the gun having been in two pieces and then presented in one piece in the courtroom.

Understanding that the law is that the State is not responsible for producing every single person that came into contact with the gun, they are at least required to provide a reasonable, honest chain of custody that can be investigated by the defendant. A chain of custody should at least answer: Why was the gun found in two pieces and presented in the Courtroom in one? Someone put it back together. Where did Mazingo get it from. Where did Kevin Stevens get it from. Who actually brought the gun to Court? Where was it prior to Court? Where are the records detailing the whereabouts of the gun? Where are the sign in and check out sheets that should be logged when putting evidence in and out of storage? Did Deputy Douglass actually find the gun near a ditch as he stated at trial or in the back of a car as he told defense attorneys prior to trial? None of these questions can be answered.

The point is the gun was not presented in Court in the same manner it was recovered at the scene which means that someone adjusted it or put it together. This is the very reason chain of custody is required to be proven.

This Court has said:

The trial court is largely vested with the discretion for determining whether an adequate evidentiary chain of custody has been established by the State. *Morris v. State*, 436 So.2d 1381, 1388 (Miss.1983). The burden of producing evidence to demonstrate a break in the chain of custody rests with the defendant, and the applicable test for determining whether the defendant has met this burden "is whether there is any reasonable inference of likely tampering with or substitution of evidence." *Brooks v. State*, 761 So.2d 944, 948(¶ 18) (Miss.Ct.App.2000). The Pittmans maintain in their briefs, as they did at trial, that the reliability of Officer Overstreet's testimony was unsubstantiated; however, they failed to come forward with any proof at all to even suggest any impropriety regarding the evidence presented at trial. The Pittmans address their failure by claiming that the court prevented their obtaining such evidence by not requiring every officer to testify. Establishing a proper chain of custody, though, has "never required the proponent to produce every person who handled the object, nor to account for every moment of every day." *Butler v. State*, 592 So.2d 983, 985 (Miss.1991).

Pittman v. State, 904 So.2d 1185, *1191 (Miss.App.,2004)

The Defendant has shown a probability that this gun was tampered with. The State's own testimony was that it was found in two pieces and it was presented in one piece at Court. At a minimum the State should have been required to show how it got back into one piece and how it got from Deputy Douglass to Officer's Mazingo and Stevens. This gun should not have been allowed to be passed through the hands of other officers and then be in one piece at court without having those officers testify what they did with the gun while in possession of it, or at least a log detailing where the gun went, who had it, and why they had it. (There may not always need to be a log, but when the evidence is admittedly removed from an evidence locker, there should always be a record of who took it, when and why).

II. THE COURT COMMITTED REVERSIBLE ERROR BY FAILING TO GRANT THE DEFENDANT'S REQUESTED DIRECTED VERDICT AS THE STATE FAILED TO SUBMIT ANY EVIDENCE THAT THE DEFENDANT WAS IN POSSESSION OF A FIREARM.

Mississippi Code § 97-37-5 states (in relevant part) "It shall be unlawful for any person who has been convicted of a felony under the laws of this state, or any other state, or of the United States to possess any firearm . . ." The word gun is never used. It is not illegal to possess a gun, it is illegal to possess a firearm. There is a difference. A firearm must work and must fire projectiles. If a gun is no longer an operating, functioning, fireable weapon, then it is not a firearm. Burnside v. State, 62 So.2d 420 (Miss. 1913).

In Burnside v. State, 62 So.2d 420 (Miss. 1913), the Mississippi Supreme Court stated that although the object in question was a pistol, it could no longer be called a pistol because it was rusty, filled with dirt and mud and could not be loaded or fired. Thus the pistol was no longer a weapon (firearm). "A pistol, which cannot be loaded, unloaded, or fired, and is so rusty that it cannot be made to open, to work, and to cock, and which is filled with dirt, is not a weapon." Burnside v. State, 62 So. 420 (Miss. 1913). This case suggests that a gun must operate (i.e., it must be able to fire) before it can be considered a weapon for conviction of illegal concealment of a weapon charge. Thus, reason suggests that a gun must operate before it can be considered a firearm for purposes of felon in possession of a firearm conviction.

There is absolutely no evidence in this case that the gun (found to be in two pieces by Deputy Douglass) was a working firearm. Deputy Douglas stated that it was in two pieces when he found it. The testimony was that the stock section was separated from the barrel section, thus making the gun impossible to fire (R. 79-80).

The State has the burden of proving beyond a reasonable doubt that the gun fires. The State is not allowed the luxury of assuming the gun works. It must test the gun. All the State would have had to have done was attempt to fire the gun. Then we would know beyond a reasonable doubt whether it worked or not. As of right now, we still don't know. But the State had the burden to know and it simply neglected to perform the test. In fact, the State, as part of its argument in admitting the gun in the first place, claimed there was never any intent or design to have the gun tested (R. 73-74). They argued that because there was no test there was no need to account for the guns whereabouts from the time it was logged in by Deputy Russell until it made it to the Court room. The State simply assumed that once a gun always a firearm. The words gun and firearm are not synonymous. All guns are not firearms. Once they quit working, they lose that firearm distinction.

Interestingly, the State practically makes the same claim in its response to summary judgment by claiming that if the Court could look at the gun and see that it did not work then the Court could dismiss the case (R. 94). And although the record is not completely clear about the gun's condition, it was obviously an old gun (R. 68-71, 79-80, 94), found in two pieces (R. 68-71), in a unfireable condition when found (R. 79-80), and the State's Attorney said he would not put a shell in it and attempt to fire it because it might blow up (indicating the bad shape of the gun) (R. 95). The State argues that the Defendant claims he used to shoot the gun. But even deputy Stevens admitted that he did not ask the Defendant how long ago the gun was fired. A question was asked by Defense, "So you don't know if he fired it three weeks ago or three years ago", Deputy Stevens responded by saying no. The truth is noone knows how many years it has been since that gun would work. Maybe the gun did work, maybe it would fire . . . maybe not?

The State didn't bother to find out.

I sincerely hope that this Court will not shift the burden of proving the firearm's disability to the Defendant. The State has to prove via drug tests that what looks and smells like marijuana is marijuana. Shouldn't it also have to prove, via similar expert testimony, that a gun is a functioning firearm before they can obtain a conviction for possession of one? The cost and burden to the State would be minimal. They could simply have an officer attempt to load and fire it. It was error for the Court to refuse the Directed Verdict.

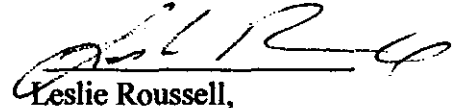
CONCLUSION


Mr. Cooley was convicted of this charge without the State meeting its burden of proof.

The gun in this case was inoperable, or at least the State failed to prove that it was operable.

Further this gun should have never even been admitted into evidence. Therefore, there can be no conviction and this case should be reversed and/or remanded.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the
above and foregoing on the following:

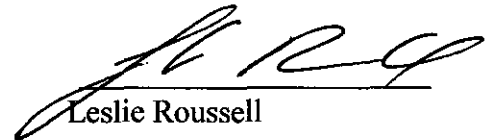
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This 18th day of February, 2008.


Leslie Roussell