IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RENALDO BUTLER — APPELLANT

VS. — NO. 2007-KA-1915

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RENALDO D. BUTLER **APPELLANT**

vs. **CAUSE No. 2007-KA-01915-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF FACTS

On the night of October 25, 2003, Officer Casanova Reed of the Jackson Police Department observed a gathering of people at a local car wash. He also observed these people drinking in violation of a city ordinance. Though it was dark, the area around the car wash was lit by multiple lights. As he approached the car wash with the intention of dispersing the crowd, he witnessed one person, Appellant Renaldo Butler, drop an item from his pocket. He instructed Butler to stop, and Butler complied. Reed picked up the item Butler had dropped. The item was a plastic bag containing "a white, rock-like substance." Believing the substance to be crack cocaine, Reed arrested Butler. (R. Vol. 2, pp. 85-88). The substance later proved, through multiple tests, to be crack cocaine. (R. Vol. 2, pp. 106-08).

Sheryl Chandler, whose two sons were in the penitentiary, testified that she had not seen

Butler throw anything on the ground. (R. Vol. 2, p. 115). She admitted, however, that she did not know where Butler had been standing and that she could not say that she would have seen him throw anything down. (R. Vol. 2, p. 118). She further admitted that she did not know what he might have had in his pockets that night. (R. Vol. 2, p. 123).

The Appellant testified that he did not throw drugs down and did not know anything about drugs on the premises of the car wash that night. (R. Vol. 2, p. 130-31, 139).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN GIVING INSTRUCTIONS ON CONSTRUCTIVE POSSESSION OF NARCOTICS?

2. DID THE TRIAL COURT ERR IN OVERRULING THE APPELLANT'S *BATSON* OBJECTIONS?

3. DID THE TRIAL COURT ERR IN OVERRULING THE APPELLANT'S OBJECTIONS TO THE STATE'S CROSS-EXAMINATION OF THE WITNESS CHANDLER?

4. DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS THE COCAINE THROWN DOWN BY THE APPELLANT?

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY

II. THE TRIAL COURT DID NOT ERR IN OVERRULING A *BATSON* CHALLENGE

II. THE TRIAL COURT DID NOT ERR IN OVERRULING A *BATSON* CHALLENGE

IV. THE DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE WAS NOT ERROR

ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY

The appellant contends that the trial court was in error because it granted instructions defining constructive possession but denied an instruction defining actual possession. The

appellant bases this argument largely on *Hicks v. State*, 580 So. 2d 1302 (Miss. 1991). In *Hicks*, the appellant contended that the trial court had erred by denying a constructive possession instruction. The court determined that a constructive possession instruction was unnecessary because the officer saw the appellant throw drugs to the ground. This was sufficient to support a conviction based on a theory of actual possession. The appellant argues that because Officer Reed saw the appellant throw the drugs to the ground there is no evidentiary basis for a constructive possession instruction. Alleging that it is error to give instructions for which there is no evidentiary basis, the appellant contends that granting the constructive possession instruction was error. *Hicks*, 580 So. 2d at 1306.

In the case at bar, a law enforcement officer did witness the appellant throw an object to the ground. The object landed directly beside the appellant's foot. The officer told the appellant to remain where he was and the appellant complied. The officer picked up the bag, and, since the contents appeared to be crack cocaine, the officer arrested the Appellant. The bag contained cocaine. The officer was able to testify that the bag containing the drugs was the object that the appellant threw away when the officer arrived on the scene.

The Mississippi Supreme Court has addressed the question of whether it is error to give a constructive possession instruction when the evidence presented might support an instruction regarding actual possession. In *Smith v. State*, 839 So. 2d 489 (Miss. 2003) the appellant argued that a constructive possession was improper because there was testimony to indicate actual possession. The Court found that the instruction was not improper and explained: "Smith is in essence asking that the court not instruct the jury about the law. The law states that actual possession is not needed, that constructive possession will do."*Smith*, 839 So. 2d at 497. Even before *Smith*, the Mississippi Court of Appeals found that a constructive possession instruction

was proper where the drugs were not found on the defendant's person and where the defendant did not admit having possessed the drug. *Millsap v. State*, 767 So. 2d 286, 293 (Miss. App. 2000).

In the event, however, that this Court should find that the trial court erred in granting a constructive possession instruction, rather than an actual possession instruction, we submit that any such error is harmless. There is no question but that the Appellant threw the bag containing the cocaine down. The bag and the Appellant were immediately taken into custody. No reasonable jury, in accordance with its oath, could have found the Appellant anything but guilty. Under these circumstances, there was no prejudice to the Appellant that the jury considered the case as a constructive possession case rather than an actual possession case. *Mosely v. State*, 396 So.2d 1015 (Miss. 1981); *Quick v. State*, 309 So.2d 859 (Miss. 1975).

The first assignment of error is without merit.

II. THE TRIAL COURT DID NOT ERR IN OVERRULING A *BATSON* CHALLENGE

The appellant contends that the trial court erred when it refused to sustain a *Batson*[1] challenge during jury selection. The Appellant failed to establish the prima facie case necessary to support a *Batson* claim.

During the jury selection process, the State peremptorily struck four black jurors, Ms. Cotton, Charlotte Veal, Katilya Harris, and Antoine Collins. The Appellant objected. When asked to state his factual basis in support of his claim of a *prima facie Batson* violation, the Appellant simply noted that the State's four peremptory challenges were against persons of the black race. The State pointed out, however, that it had accepted several persons of the black

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[1]*Batson v. Kentucky*, 476 U.S. 79 (1986).

race. The trial court made no ruling at that point, but took the matter under advisement until the jury was selected. (R. Vol. 2, pp. 70 - 71). After the jury was selected, the trial court pointed out that the State had not exercised all its peremptory challenges. It accordingly found that no *prima facie Batson* claim had been made out. (R. Vol. 2, pp. 74 - 75). The record tells no tales about the racial composition of the jury.

Prior to the exercise of these peremptory challenges, Ms. Cotton and Katilya Harris had already been challenged for cause by the State. Ms. Cotton had several experiences with law enforcement and a pending criminal matter in which her daughter was the victim of rape. (R. Vol. 2, pp. 66-67). Katilya Harris was challenged because of her work as a therapist treating drug and alcohol addicts. (R.. Vol. 2, p. 67). Both of these "for cause" challenges were denied.

First of all, we submit that the record on this issue is incomplete. The record does not indicate the race of other veniremen who were peremptorily challenged; nor does it indicate the racial composition of the jury as seated. It does not indicate the racial composition of the venire. Under these circumstances, it is impossible to find error on the part of the trial court. *Willis v. State*, No. 2007-KA-01405-COA (Miss. Ct. App., Not Yet Officially Reported, Decided 22 July 2008).

Assuming for argument that the claim is before the Court, there is no merit in it. As the Court is well aware, it is to give great deference to the trial court's determination under *Batson.* It will not reverse the trial court's determination unless the record indicates that the decision was against the overwhelming weight of the evidence or clearly erroneous. A *prima facie* case of purposeful discrimination is established by the objecting party showing: (1) that he is a member of a cognizable racial group; (2) that the opposing party utilized peremptory challenges to strike members of the objecting party's racial group from the venire; and (3) that the facts and

circumstances surrounding the use of the peremptory challenge raise an inference of discriminatory purpose on the part of the party making the challenge to strike minorities. *Willis, supra.*

In the case at bar, while it is true that the State challenged four members of the black race, it also accepted "several" of that race as well. Other than pointing out the fact of the four challenges, the defense offered nothing to attempt to show purposeful discrimination. Under these circumstances, it simply cannot be reasonably said that the trial court's decision was contrary to the overwhelming weight of the evidence or clearly erroneous. *Chandler v. State*, 967 So. 2d 47, 52 (Miss. App. 2006); *McCormick v. State*, 802 So. 2d 157, 161 (Miss. App. 2001); *Tillman v. State*, 841 So. 2d 1160, 1161-1162 (Miss. App. 2002); *Walker v. State*, 671 So. 2d 581, 629 (Miss. 1995). The State did not use all of its peremptory challenges.

In *Dennis v. State*, 555 So. 2d 679, (Miss. 1989), the State used five of seven peremptory challenges to strike black jurors and only one black juror was "in the [jury] box" at the time of the *Batson* challenge. The defendant failed to allege anything beyond "discrimination" when putting forth the challenge. The Mississippi Supreme Court affirmed the trial court's ruling that there was no inference that "prosecution purposefully and intentionally struck potential jurors solely because they were black." *Dennis*, 555 So. 2d at 681. In the case at bar, only four jurors were struck and the State's attorney indicated by using the word "several" that more than one black juror had already been accepted. Furthermore, like the defendant in *Dennis*, the appellant failed to set forth any circumstances beyond the four challenges themselves to show a discriminatory intent. (R. Vol. 2, p. 71).

When faced with circumstances strikingly similar to those presented here, the Mississippi Court of Appeals affirmed the trial court's ruling that no prima facie showing had been

established so as to require further inquiry under *Batson*. In *Florence v. State*, 786 So. 2d 409 (Miss. App. 2000), the trial court had heard a *Batson* challenge. All four strikes by the State had been against black men, two of whom had been challenged for cause for race neutral reasons. The trial judge deferred his decision until after the jury selection was complete, at which time he ruled that the defendant had failed to show that the State was being purposefully discriminatory. In examining *Florence* on appeal, the Court upheld the trial court's determination. The court noted that, as here, at least two of the jurors had been challenged for race neutral reasons and multiple black jurors had been accepted before the four were struck. *Florence*, 786 So. 2d at 416.

The explanations of the "for cause" challenges demonstrate that there were race neutral reasons for striking the two women.

The appellant did not establish a prima facie case that the State was acting with a discriminatory purpose by striking black members of the venire. The trial court's decision to deny the *Batson* challenge was not error and therefore should not be reversed.

The Second Assignment of Error is without merit.

III. THE TRIAL COURT DID NOT ERR IN PERMITTING SHERYL CHANDLER TO BE QUESTIONED REGARDING HER SONS' CRIMINAL HISTORIES

The appellant contends that the State's questions to defense witness Sheryl Chandler regarding the conviction of one son and the incarceration of another should not have been admitted. Chandler was one of those present at the carwash, celebrating the life of Christopher Stiff with a "repass." She was not related to the Appellant. On direct examination, she was asked whether it was dark at the time of the Appellant's arrest, whether the Appellant was present, and whether she saw the Appellant throw a bag to the ground. (R. Vol. 2, pp. 114 - 115).

The prosecutor, on cross- examination, questioned Chandler about her son's murder conviction, eliciting her testimony that he himself had been the prosecutor at her son's trial. The appellant alleges that the prosecution turned this into a personal attack, but the record shows no indication that the questioning was hostile or even aggressive. The State's attorney asked whether Chandler knew him and how, then limited himself to asking only the fact of the sons' convictions and sentences. He concluded this line of questioning by asking whether Chandler was happy about her son's conviction, to which she responded in the negative. (R. Vol. 2, pp. 116-17). After moving on to other testimony, the prosecutor returned to the issue of bias, questioning Chandler very briefly about her other son, then in the custody of the Mississippi Department of Corrections. Again, he asked only the facts regarding his status and then moved on. (R. Vol. 2, p. 121).

Upon the defense's objection to these questions, the prosecutor clearly stated that they were relevant to show the bias of the witness against the state. The defense requested and was granted an instruction limiting the jury to consider the testimony in question only to determine Chandler's possible bias against the State.

The appellant argues that these questions were inadmissible because they were irrelevant to the issue of whether Butler was in possession of cocaine. The appellant is correct that the legal troubles of a defense witness's children are irrelevant to prove the defendant's guilt or innocence. However, these questions were not meant to show whether or not Renaldo Butler had cocaine on the night in question. They were presented for the purpose of showing that the witness had personal reason to be biased against the State, specifically the conviction of one son and the incarceration of another. Mississippi Rules of Evidence, Rule 616 allows "[w]ide open cross-examination of any matter bearing upon the credibility of a witness...including the possible

interest, bias, or prejudice of the witness[.]" The Mississippi Supreme Court has long considered the right of cross examination of the highest importance. According to *Prewitt v. State*, 126 So. 824 (Miss. 1930), cross examination is a "test of the accuracy, truthfulness, and credibility of testimony" to which there is no equivalent. Cross examination may be conducted to the fullest extent necessary to test "the memory, accuracy, sincerity, interest, or bias of the witness" and should not be interfered with "except in clear case of irrelevancy, trespass beyond admissible ground, or extremes of continual, aimless repetition." *Id.* at 825. Where bias is the chosen for of impeachment, wide latitude is allowed in cross - examination. *Fort v. State*, 752 So.2d 458 (Miss. Ct. App. 1999)

Not only do the Mississippi Supreme Court and the Mississippi Court of Appeals permit a broad scope of cross examination, they leave the extent of that breadth primarily to the discretion of the trial judge. In *Ward v. State*, 479 So. 2d 713 (Miss. 1985), the Mississippi Supreme Court determined that "questions regarding the scope of cross-examination rest within the sound discretion of the trial court and are subject to reversal only upon a clear abuse of that discretion. *Id.* at 716 (*citing Shanklin v. State*, 290 So. 2d 625 (Miss. 1974)). The Mississippi Court of Appeals reiterated the extent to which trial judges are given deference regarding the scope of cross examination in *Sims v. Collins*, 762 So. 2d 785 (Miss. App. 2000), stating that "parties may liberally cross-examine a proffered witnesses [sic] on the basis of his opinion and regarding bias and interest. The extent of cross-examination, however, lies within the sound discretion of the trial court, and we will reverse only when an abuse of that discretion is shown." *Id.* at 790. The parties are given, at the discretion of the trial court, wide latitude with which to show an adverse witness's possible bias. It is then the role of the jury to determine the credibility of that witness. *Street v. State*, 754 So. 2d 497, 502 (Miss. App. 1999) (permitting, for the

purpose of showing bias, testimony showing that witness was married to a member of the defendant's gang).

The appellant further contends that this line of questioning was prejudicial to the defendant, confusing to the jury, and cumulative. However, we have not found that the Appellant based his objection on M.R.E. 403. The Appellant may not now make this a basis for his objection. *Brown v. State*, 965 So.2d 1023, 1029 (Miss. 2007).

The matters of possible prejudice and confusion of the issues were both cured by the limiting instruction given to the jurors permitting them to consider the testimony regarding Chandler's sons only in determining her credibility as a witness. The instruction plainly instructed the jurors that these questions "may not be considered by you as evidence to determine guilt or innocence in this trial." (Instruction S-6, R. Vol. 1, p. 32). The defense failed to even request such an instruction and so can hardly complain on appeal that one was not give *sua sponte* in open court. In any event, what the Appellant's complaint is about this is obscure. Whether the court did or did not give an instruction *sua sponte* is of no importance in view of the fact that such an instruction, originating with the State, was given.

The appellant also appears to argue that the admission of Chandler's earlier statement to the State was improper because it was cumulative evidence showing bias to the State. No such argument was raised in the trial court. The only complaint made by the defense concerning the witness' statement was that there was, allegedly, a discovery violation. The argument raised here, if that is what it is, is not properly before the Court.

That statement was not used to show bias, but to show that Chandler's direct examination was at best incomplete and at worst contradictory to what she had already given in a signed statement. M.R.E. Rule 613 permits questioning of witnesses regarding prior statements.

The State was not trying to "have its cake and eat it too". It was simply demonstrating that, in addition to the fact that the witness had reason to be biased against the State, her testimony was in conflict with her prior statement. This was an entirely valid evidentiary purpose. Chandler's statements to the State were neither cumulative nor inadmissible under the Mississippi Rules of Evidence.

Where, as here, the trial court found cross examination testimony to be relevant and admissible, there must have been a clear abuse of discretion in order for an appellate court to reverse that decision. The appellant has failed to show how the decisions of the trial court constitute an abuse of discretion so as to require reversal.

The Third Assignment of Error is without merit.

IV. THE DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE WAS NOT ERROR

Prior to trial, the trial court held a hearing on the Appellant's motion to suppress the cocaine the Appellant dropped on the ground. In the course of that hearing, Officer Casonova Reed testified that he was at the Chuk Stop car wash on the evening of 23 October 2003, patrolling the area. As he was doing so, he noticed that there were a number of people at the car wash. They appeared to be drinking.

He drove up to the car wash and informed those present that drinking in public was prohibited by city ordinance. As he was doing so, a young man – the Appellant, as it turned out – went outside a car wash booth and dropped something on to the ground. Reed told him to stop. Reed then went to the Appellant and saw a small bag right beside the Appellant's foot. The bag contained what appeared to be crack cocaine. Reed arrested the Appellant at that point and seized the bag. The area was very well illuminated.

The car wash was privately owned property. None of the participants in the "repass" were cited for drinking in public. No field test was performed on the crack cocaine, but the officer testified that he recognized the substance through his training and experience. (R. Supp. Vol.).

The appellant contends that Officer Reed did not have probable cause to arrest because he did not perform a field test on the substance in the white bag to and therefore could not absolutely confirm that it was crack cocaine. In the actual motion to suppress the evidence, the defense argued that the open container violation was a pretextual reason for Reed to stop and harass the appellant. (R. Vol. 1, pp. 16-17).

In denying the motion to suppress the physical evidence, the trial court found that "at the time the defendant abandoned the plastic bag he was not under arrest. He had no expectations of privacy in the plastic bag that he discarded; that the officer had probably [sic] cause to make the arrest[.]" (R. Supplement Vol. 1, p. 18).

In reviewing rulings on motions to suppress evidence, this Court looks to determine whether, from the totality of the circumstances, the trial court's findings were supported by substantial credible evidence. Where supported by substantial credible evidence, the trial court's decision will not be disturbed. *Hampton v. State*, 966 So.2d 863, 865 - 866 (Miss. Ct. App. 2007).

The facts here are quite simple and to the point: The officer, seeing that a group of people was violating city ordinance by drinking in public, approached the group to inform them of that fact. The Appellant stepped out, dropped something on the ground. The officer's curiosity piqued, the officer went to the Appellant, retrieved what had been dropped, and saw that it appeared to contain crack cocaine. It was at that point that the Appellant was arrested. There

was probable cause to effect the arrest. *Jones v. State*, 877 So.2d 562, 564 (Miss. Ct. App. 2004).

The fact that the officer did not utilize a field test to determine whether the substance was crack cocaine is neither here nor there. The officer testified that he believed that it was, based upon his experience and training. This was entirely sufficient to arise to probable cause. *Hampton, supra.* While the Appellant attempts to say that the officer did not have training sufficient to recognize crack cocaine, that is not what the officer testified to. Based on his law enforcement training and experience, Reed believed the contents of the bag to be crack cocaine. He testified to this both in the hearing on the motion to suppress and at trial. (R. Supp. Vol. 1, pp. 5, 13, 18; R. Vol. 2, pp. 87-88, 98, 102). Upon examination, he testified that during training at the police academy he had been shown different types of drugs and had also had experience with identifying drugs during the course of his employment as a law enforcement officer. (R. Vol. 2, p. 102)

In addition to the foregoing, we will point out that the Appellant abandoned any privacy interest he may have had in the contents of the bag when he dropped it on the ground in a public place. *Ranier v. State*, 944 So.2d 115 (Miss. Ct. App. 2006); *Williams v. State*, 892 So.2d 272, 278 (Miss. Ct. App. 2004). Once the bag was abandoned, it was no longer protected by any legitimate expectation of privacy. Reed committed no Fourth Amendment violation when he picked the bag up for examination.

The Mississippi Supreme Court has repeatedly determined that sufficient probable cause for arrest exists when an officer observes a person in contact with or disposing of contraband. In *Young v. State*, 562 So. 2d 90 (Miss. 1990), officers were deemed to have sufficient probable cause where they saw the defendants handling items on a porch ledge of an abandoned apartment

and those items later proved to be drugs. In a remarkably similar case, *Branning v. State*, 222 So. 2d 668, (Miss. 1969), an officer witnessed defendants dropped three bottles to their feet upon his approach. These bottles turned out to contain narcotics. The Mississippi Supreme Court found that the bottles were abandoned. Examination of them did not constitute a search and the defendants' Fourth Amendment rights were not violated. The Court also found that the bottles afforded probable cause to arrest the defendants.

Clearly, Reed's examination of the bag did not violate the appellant's Fourth Amendment rights. The Appellant abandoned the bag and its contents when he dropped it. Beyond this, as in *Branning*, Reed had probable cause to seize the bag dropped by the Appellant, Reed being aware that crack cocaine is commonly carried in such a way.

The Fourth Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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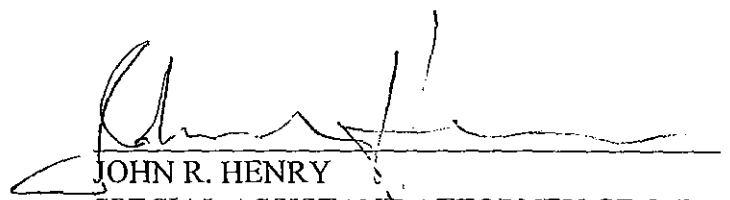
This the 7th day of August, 2008.



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