

**COPY**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2007-KA-01915-COA**

**FILED**

**MAY 05 2008**

Office of the Clerk  
Supreme Court  
Court of Appeals

**RENALDO BUTLER**

**APPELLANT**

**VERSUS**

**STATE OF MISSISSIPPI**

**APPELLEE**

**APPEAL FROM THE CIRCUIT COURT OF THE 1<sup>ST</sup> JUDICIAL DISTRICT  
OF  
HINDS COUNTY, MISSISSIPPI**

**BRIEF ON THE MERITS BY APPELLANT**

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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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***Anthony Thomas v. State of Mississippi***

**2007-KA-01781-COA**

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## STATEMENT OF THE ISSUES

- I.    **The trial court erred when it gave State's Jury Instruction S-3 and S-4 on constructive possession when no adequate evidentiary basis existed to support such instructions; The trial court erred in denial of Defense Jury Instruction D-7, defining actual possession, as facts in evidence established the basis for giving such an instruction, thus depriving Mr. Butler of his fundamental right to due process and proper instruction of the jury;**
  
- II.   **The trial court erred when it overruled a *Batson* challenge by the defense when the State exercised four preemptory strikes against African-American jurors;**
  
- III.   **The trial court erred when it overruled a relevance objection made by the defense when the court allowed the extensive and cumulative questioning of defense witness Sherly Chandler concerning the criminal histories of her two sons. This line of questioning was irrelevant and highly prejudicial to the defendant, and**
  
- IV.   **The trial court erred in denying the defense's Motion to Suppress the physical evidence.**

## **STATEMENT OF THE CASE**

### **A. COURSE OF PROCEEDINGS BELOW**

Renaldo Darrell Butler was indicted for possession of cocaine by a grand jury of the First Judicial District of Hinds County, Mississippi on February 10, 2005. CP 3.

Mr. Butler faced trial by a duly composed jury beginning February 6, 2007; he was found guilty of possession of cocaine, in violation of Miss. Code Ann. §§ 41-29-139 (1972). CP 43; 45. RE 12; 13. T. 165-166. Mr. Butler was sentenced to eight years imprisonment, six years to serve, two years suspended, and two years post release supervision, in the custody of the Mississippi Department of Corrections. CP 44-45; RE 13; T. 165-166.

After timely prosecution of post-trial motions, all of which were denied, Mr. Butler appealed his conviction, which is now before this honorable Court. CP 52; 28; RE 14.

### **B. Statement of Facts**

On the evening of October 25, 2003, Renaldo Butler, gathered at a car wash on the corner of Northside Drive and Mosley, with about 19 friends to have a repast in memory of their slain friend, Christopher Stiff. Mr. Butler's occupation was to wash cars at this facility and occasionally he stayed after hours washing cars, due to late business. (T. 135) Officer Casanova Reed, who had been on the police force only 10 months, was patrolling Northside Drive, near the Chuk Stop Gas Station and Car Wash. (T. 84). Officer Reed saw a group of about 15 to 20 individuals gathered at the car wash on the corner of Northside Drive and Mosley (T. 84; 92).

Officer Reed testified that he approached the car wash and noticed the group of individuals drinking, but did not offer any citations. (T. 85; 99)

Officer Reed states that he had clear visibility between 7 and 7:30 p.m. on the night of the alleged occurrence, however it was dark outside. (T. 85; 92) Officer Reed states that he saw Renaldo Butler walk in front of his patrol car as he approached the car wash (T. 95). Renaldo Butler states that when Officer Reed approached the car wash, everyone began to run different directions, except for him. However, Renaldo, the only one arrested, complied with the Officer Reed's command to stop. (T. 86) Officer Reed stated that Renaldo Butler walked behind the wall of the car wash and dropped by his foot, what he thought was crack-cocaine. (T. 86; 98; 101) Without any field testing, Renaldo was handcuffed, arrested and secured in Officer Reed's patrol car, without being read his rights, nor an explanation of the charges against him, until after he was placed in the police car. (T. 128) Officer Reed took Renaldo to the Standard Life Building where Sergeant Megehee, interviewed him alone. Officer Reed was not present during the interview, cannot recall how long the interview was, but was responsible for taking Renaldo to jail. (T. 98)

Officer Reed's report of the occurrence never stated that he saw Renaldo Butler walk in front of the police car, but behind a wall.(T. 94) However, Officer Reed testified that he saw Renaldo Butler come from behind a wall, but his report stated that he saw Renaldo Butler go behind a wall. (T. 96) At trial, Officer Reed offered testimony conflicting with his signed report.

Criminalist and drug analyst specialist Patricia Barnes testified that she tested the alleged substance and identified the substance as crack-cocaine, without

having any scientific data linking Renaldo Butler to the crack cocaine except what Officer Reed thought he saw. (T. 110) Mrs. Barnes also testified that she did not know where the crack came from, neither did she know which officer retrieved the substance.(T. 111) The prosecution failed to establish a proper chain of custody with the crack-cocaine.

Sheryl Chandler testified that she was present at the car wash on the night of the alleged occurrence, on October 25, 2003. (T. 114) Ms. Chandler testified under oath that the friends of the slain Christopher Stiff gathered at the car wash on the corner of Northside Drive and Mosley for a repast in his memory. (T. 114) Ms. Chandler testified under oath that Renaldo Butler was present at the time of the repast, and she did not see Renaldo Butler throw any drugs down on the ground or possess any drugs. (T. 114) Renaldo Butler did not have any drugs on his person nor did he throw any drugs to the ground. (T129)



### SUMMARY OF THE ARGUMENT

Mr. Butler submits that the trial court erred when it gave State's Jury Instruction S-3 and S-4 on constructive possession when no adequate evidentiary basis existed to support such instructions. The trial court erred in denial of Defense Jury Instruction D-7, defining actual possession, as facts in evidence established the basis for giving such an instruction, thus depriving Mr. Butler of his fundamental right to due process and a properly instructed jury; thus, the trial court allowed the jury to be improperly instructed concerning the facts in evidence. In the case at bar, Renaldo Butler was the victim of purposeful discrimination, and the trial court erred when it did not find a prima facie case of discrimination to sustain the Batson challenge. The trial court erred when it overruled a Batson challenge by the defense when the State exercised four preemptory strikes against African-American jurors. The irrelevant and highly prejudicial questioning of Ms. Chandler about her children's criminal record was cumulative and should not have been allowed. The trial court erred in denying the defense's *Motion to Suppress* the physical evidence. The arresting officer did not have probable cause to stop or make the arrest.

## ARGUMENT

- I. **The trial court erred when it gave State's Jury Instruction S-3 and S-4 on constructive possession when no adequate evidentiary basis existed to support such instructions; The trial court erred in denial of Defense Jury Instruction D-7, defining actual possession, as facts in evidence established the basis for giving such an instruction, thus depriving Mr. Butler of his fundamental right to due process and proper instruction of the jury;**

It is well settled that jury instructions must be based on the evidence presented at trial. "Trial courts are required to instruct juries regarding issues of fact only where there appears in the record credible evidence upon which the jury might reasonably find the fact in favor of the requesting party. *Hicks v State* 580 So. 2d 1302, 1306. (citing *Ashley v. State* 538 So.2d 1181, 1184 (Miss., 1989)). The court gave two (2) constructive possession jury instructions S-3 and S-4 when no basis existed for either. RE 12-14; T. 140-142.

Jury Instruction S-3: The court instructs the jury that if you believe from all of the evidence on this case, beyond a reasonable doubt, that Renaldo Butler at time and place in question was aware of the presence and character of the substance which he is charged with possessing and that he was in close proximity to the substance in question and that the substance was subject to his dominion and control, and that he acted in such a way as to exercise such dominion and control, then you must find him guilty of possession of Cocaine.

Jury Instruction S-4: The Court instructs the jury that to constitute "Possession as applied to this case, it is not necessary that the State prove actual physical possession; it is sufficient if the State establishes that the substance involved was subject to the defendant's dominion and control, and that he was aware or reasonably should have been aware, of its presence and character.

The Defense objected to both instructions on the basis that they were not supported by the evidence and facts at trial. (T. 140-141) The test to be applied in a constructive possession case is whether there are sufficient facts to warrant a

finding that defendant was aware of the presence and the character of the particular substance and was intentionally and consciously in possession of it. Actual physical possession is not needed in a constructive possession case. Constructive possession may be established through a defendant's dominion and control of the substance or area. *Curry v. State*, 249 So.2d 414,416 (Miss. 1971) Such instructions would only be appropriate if there were no evidence establishing actual possession of the contraband. *Hicks v. State*, 580 So.2d 1302, 1306.

The test of constructive possession was not established because the defendant denied knowing of any drugs that night.(T.129, 138) The arresting officer did not do a field test to confirm that drugs were on the scene. (T.97) So, at the time of arrest, based on the testimony of Renaldo Butler and Officer Casanova Reed no one knew or was consciously aware of the presence or character of the substance that was found on the ground at a public car wash. (Supplemental Suppression Hearing Transcript p. 18; *See Motion for Supplementation of Record*, May 5, 2008) Officer Reed and Renaldo Butler both stated that there were 10-20 people at the Chuk Stop Car Wash.. (T.92) It would be impossible for Renaldo Butler to have dominion and control over the area. Proximity is an essential element of constructive possession, but by itself is not adequate in the absence of other incriminating circumstances. *Curry v. State* 249 So.2d 414,416(Miss.1971)

The arresting officer in this case says unequivocally that he saw the defendant throw a plastic bag with a substance that appeared to be crack cocaine to the ground.(T. 86,93, 95) After persistent questioning of Officer Reed he stated that he had clear visibility that night. (T.101-102). The State has the burden of proof.

The State presented direct evidence in their case in chief that Officer Reed arrested Renaldo Butler because he saw him throw something to the ground. Those facts clearly state that we have a “throw down” case which this Court has dealt with on many occasions. It is inappropriate for the judge to grant jury instructions that are not based on the evidence at trial.

The defense offered an actual physical possession jury instruction that was refused by the trial court. (T.140-142) RE 12-14.

Jury Instruction D-7: The court instructs the jury that actual possession means to have actual physical control, care, and management of the drug. The court also instructs the jury that a person is in possession of an illegal substance if he was aware of the presence and character of the particular drug and was intentionally and consciously in possession of it.

The officer stated that he saw Renaldo Butler drop an item from his pocket that night. (T. 86) This instruction was a proper statement of the law and should have been given. In *Hicks v. State*, 580 So.2d 1302 (Miss. 1991) the Court believed that clear evidence of establishing actual possession was the arresting officer’s view of the defendant throwing down a canister with cocaine packets in it. *Id.* In that case, the judge denied or refused any jury instructions on constructive possession because there was no evidence to support a constructive possession instruction. “The general rule is that all instructions must be supported by the evidence. Where an instruction is not supported by the evidence then it should not be given.” *Hicks v. State*, 580 So.2d 1302,1306 (Miss. 1991) . Granting instructions not supported by evidence is error. *Lancaster v. State*, 472 So.2d 363, 365 (Miss.1985) When the trial court denied the defense an actual possession instruction he was denied a properly

instructed jury and due of law. Mr. Butler respectfully requests this Court reverse and remand his cause for a new trial.

**II. The trial court erred when it overruled a Batson challenge by the defense when the State exercised four preemptory strikes against African-American jurors;**

The Constitution guarantees an inherent right to be tried by a jury of one's peers whom are fair and impartial. This standard impresses on the trial judge to proceed with the utmost caution and respect in the voir dire and jury selection process. The jury must be fair and impartial and free from racial discrimination. *Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecution in this case used four of its six preemptory challenges to strike African-American jurors. (T.69) Racial discrimination in the exercise of preemptory strikes violates the equal protection and due process rights not only of the defendant but also of the excluded jurors themselves. *Batson v. Kentucky*, 476 U.S. 79 (1986). The defense counsel raised a timely objection to the discriminatory practices. (T. 69-70) The court stated that it would take the objection under advisement and at the close of the jury selection process the court would determine if the Batson challenge should be allowed. (T. 70) At the conclusion of the jury selection process, the court stated that because the State had not exercised all of its preemptory challenges that meant a prima facie case of a Batson violation had not been made. (T.73) The court subsequently denied the Batson challenge because the defense did not make a prima facie showing of racial discrimination. (T. 74)

In order to establish a prima facie case of discrimination, the defendant must be a member of a cognizable racial or gender group, the opposing party must have

used a preemptory challenge against members of a particular race or gender, and the facts and circumstances raise an inference that the purpose of the strike is of a discriminatory nature. *Perry v. State*, 949 So.2d 764( citing *Snow v. State*, 800 So.2d 472, 478(Miss. 2001). The defense maintains that it established a prima facie case of discrimination when it made a timely objection and stated that four of six preemptory strikes were used to strike only black jurors. (T. 69-70) The court's ruling that a prima facie case had not been established denied Renaldo Butler the right to a duly composed jury of his peers. Furthermore, the court's ruling was without merit and was not based on the relevant circumstances at the time of the objection. The court waited until the end of the jury selection process and gave an erroneous ruling.

"A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. A combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination. In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson v. Kentucky*, 476 U.S. 96-98

The prosecution used a pattern of striking black jurors before the defense made its challenge. It was clearly the prosecutor's intent to strike black jurors solely because of their race. Because the court took the objection under advisement, it gave notice to the prosecution to cease the discriminatory practices before jury selection ended. However, this did not cure the denial of those black jurors the opportunity to serve

as jurors. As well, Renaldo Butler was still the victim of purposeful discrimination. The trial courts failure to properly handle the Batson challenge warrants this court to review the record and reverse the conviction.

**III. The trial court erred when it overruled a relevance objection made by the defense when the court allowed the extensive and cumulative questioning of defense witness Sherly Chandler concerning the criminal histories of her two sons. This line of questioning was irrelevant and highly prejudicial to the defendant.**

A criminal defendant has a constitutional right to call witnesses on his behalf in a criminal proceeding. In this case, the defense called Sheryl Chandler as a witness to the events that took place on October 25, 2003 at the Chuk Stop Car Wash. The prosecution cross-examined Ms. Chandler and subjected her to hostile and harsh treatment on the witness stand. Re 15-21; T. 114-120. The prosecution questioned Ms. Chandler extensively about the criminal records of her children. (T. 114-116, 120) The prosecution begin his cross examination about one of Ms. Chandler's sons being sentenced to life imprisonment for murder.(T. 116) The prosecution did not just ask the questions; he made this a personal attack as he was the prosecutor who prosecuted one of her sons. The defense made a timely objection to the relevance of this line of questioning.( T. 114-115, 120) The prosecution stated that this line of questioning was being used to show bias against the state.( T. 114-115, 120) The Court erred in overruling defense objection to the State going into the convictions of Ms. Chandler's sons to show bias. This line of questioning was irrelevant to the issue of whether Renaldo Butler possessed cocaine. As well, the questioning was highly prejudicial in that the jury may have found that the defendant was guilty by association rather the evidence presented at trial.

Under M.R.E. Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. When the trial court allowed Ms. Chandler to be questioned about both of her sons' criminal records, this was cumulative evidence and should not have been permitted. This questioning confused the issues and allowed the jurors to focus on Ms. Chandler's children not Ms. Chandler or Renaldo Butler.

It must have the tendency, in the case being tried, to make the facts to which the witness testified less probable than it would be without the evidence of bias. Thus, evidence of bias, or any other evidence that is remote, is a function of relevancy. Evidence can be remote, either in time or because it is far-removed from an issue in the trial. *Tills v. State*, 661 So. 2d 1139 (Miss. 1995) Ms. Chandler was a credible witness who on the day of trial gave a voluntary written statement to the prosecution. (T. 116) Ms. Chandler did not have to give the Prosecution a statement before court. She was aware that she could make her statements on the witness stand. If Ms. Chandler were so biased against the state and prosecutor who prosecuted her son, she would not have given them a voluntary statement before court. The prosecution cannot have it both ways. The prosecution cannot say that Ms. Chandler is biased against them then use Ms. Chandler's words and statements to support their case against the Defendant, Renaldo Butler.

The prosecution used the statement that Ms. Chandler gave on the morning of trial as extrinsic evidence to show bias and her credibility. The Court allowed



questioning about a prior statement to show bias and the credibility of Ms. Chandler, which is cumulative evidence as the State had already been allowed to impute the criminal convictions of Ms. Chandler's son to show bias against the State. (T. 115, 117-118, 120) The court did not give a *sua sponte* limiting instruction in open court. The court stated to both sides outside the presence of the jury that the matter would be dealt with in a limiting jury instruction stating that it has nothing to do with the guilt or innocence of the defendant. (T. 118). The judge abused his discretion in allowing the testimony. The general rule is that on issues of admissibility of relevant evidence in accordance with bias the rules should be looked at as a whole.

#### **IV. The trial court erred in denying the defense's motion to suppress the physical evidence.**

Renaldo Butler filed a *Motion To Suppress* the physical evidence in the instant case. A hearing was held on said motion on February 6, 2007. Officer Casanova Reed testified for the State in the suppression hearing. Officer Reed testified that as of February 6, 2007, he had been employed with the Jackson Police Department four years. *Motion to Supplement Transcript* (hereinafter ST) 2. The arrest of Renaldo Butler occurred on October 23, 2003 around 7:30 at night. ST.2,5,6. Officer Reed was a patrol officer at the time of Renaldo Butler's arrest. ST.2. Officer Reed had only been an officer a matter of months when he arrested Renaldo Butler. ST. 13 . Officer Reed testified that as he was patrolling the area by the Chuk Stop Car Wash when he saw "some people gathered there drinking at the carwash." ST.3. He drove up "to inform them that they were in violation of the city ordinance, drinking

in public.” ST.3. When asked by the State if he saw any particular activity taking place once he drove up, Officer Reed responded, “The drinking. And I also saw a young man – at that point when I was – drove up and stopped the vehicle, a young man went to the outside of the car wash booth and at that time he dropped an item on the ground. I told him to stop right there where he was and don’t move.” ST.3 Officer Reed further testified that “Once I told him to stand still, I approached him and put -- I saw him – I mean, I – once I approached him, there was a small bag right beside his foot .... And at the time I picked the bag up. It appeared to be cocaine by my -- by me looking at it. I didn’t know but it appeared to be crack cocaine. At that time I arrested the young man and told him that he was arrested for being in possession of cocaine.” ST 4-5.

On cross examination, Officer Reed admitted that at the time of Renaldo Butler’s arrest that he did not do a field test to determine if the substance was in fact cocaine. ST.13. Officer Reed testified that he had not been taught to do a field test in his training with the Jackson Police Department. ST.13. Further on cross, Officer Reed admitted that he did not give any one a citation for an open container violation although this was reason he pulled up to the Chuk Stop Carwash. ST. 9. Officer Reed also admitted that Renaldo Butler was on private property at the time of his arrest. ST.5.

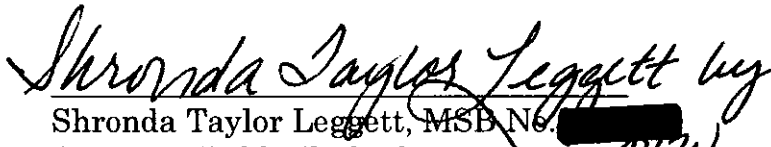
A police officer may arrest without a warrant where officer has reasonable cause to believe a felony has been committed and that person proposed to be arrested is the one who committed it. *Powe v. State*, 235 So.2d 920 (Miss. 1970). The court in *Powe*

held that “probable cause for arrest without warrant means less evidence than would justify condemnation but more than a bare suspicion.” In the instant case, Officer Reed testified that he saw Renaldo Butler dropped an item and immediately told him to stop. Renaldo Butler stopped. Officer Reed picked up the item and in his words, “I didn’t know but it appeared to be crack cocaine. At that time I arrested the young man and told him that he was arrested for being in possession of cocaine.” ST. 5. By Officer Reed’s own sworn testimony he didn’t know what the “item” was but nonetheless he arrested Renaldo Butler for possession of cocaine. If Officer Reed did not know what the item was then it stands to reason that he could not arrest Renaldo Butler for possession of cocaine. Also, since he did not know what the item was Officer Reed should have field tested it for the presence of cocaine prior to arresting Butler. Officer Reed testified that he was not taught to field test drugs as part of his training. It stands to reason that if Officer Reed was not taught how to field test for drugs that he probably did not receive any training in drug recognition and classification. In light of Officer Reed lack of training, he could not have formed the requisite probable cause that Renaldo Butler was in possession of cocaine at the time of his arrest. As such, the arrest of Renaldo Butler was unlawful and the evidence seized as result of said arrest should have been suppressed. The Supreme Court held in *Conerly v. State*, 760 So. 2d 737 (Miss. 2000) that “if arrest was illegal then defendant’s confession should have been excluded under the “fruit of the poisonous tree” doctrine. Likewise in the instant case, the alleged cocaine should have been excluded as fruit of the poisonous tree i.e. an illegal arrest.

### CONCLUSION

Mr. Butler respectfully submits the trial court's rejection of his proffered actual possession jury instructions and insertion of constructive possession was error. Jury instruction must be based on the evidence and facts at trial, and to give them is error. Renaldo Butler was the victim of purposeful discrimination by the state in the jury selection process by the state using its preemptory challenges to keep as many black jurors off the jury as possible. The trial court ruled that the defense did make a Batson prima facie showing. There is clear evidence that a pattern of strikes against a minority is sufficient to establish a prima facie case. Because, the trial court allowed irrelevant testimony and questioning of the defense witness the jury was allowed to be confused and misled and Renaldo Butler was guilty by association. Furthermore, the arresting police officer had no basis to arrest Renaldo Butler at the scene because; possession of cocaine had not been established. For these reasons and based on the authorities presented herein, Mr. Butler 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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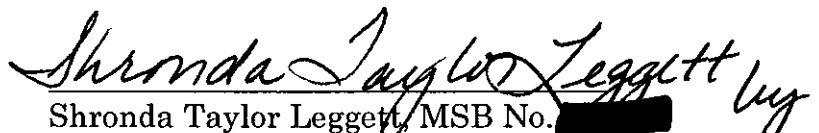
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