IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT ELLIS, JR. — APPELLANT

V. — NO.2007-KA-02178-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Robert Ellis, Jr.
4 Honorable Forrest Allgood the Lowndes County District Attorneys Office
5. Honorable Lee J. Howard

THIS 21st day of April, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Robert Ellis, Jr., Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgment of conviction for the crime of possession of less than .1 gram of cocaine against the appellant, Robert Ellis, Jr. Ellis was subsequently found to be an habitual offender under Miss. Code Ann. §99-19-81, as well as a second narcotics offender under Miss. Code Ann. §41-29-147. He was therefore sentenced to eight (8) years without the possibility of parole[1]. Tr. 186-88, C.P. 42-43, R.E. 14-15. This sentence followed a jury trial on November 15, 2007, Honorable Lee J. Howard, Circuit Judge, presiding. Ellis is presently incarcerated with the Mississippi Department of Corrections.

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[1] It should be noted that the transcript states the court sentenced Ellis to "one year," but doubled the sentence to "eight years." Tr. 187. However, given the subsequent sentencing order, it appears the court misspoke, and that the court's intention was to state "four years" and to enhance the sentence to eight years. C.P. 41-42. If charged as a felony, the maximum sentence for possession of less than 0.1 gram is four years. Miss.Code Ann §41-29-139(c)(1)(A) (Supp. 2005).

FACTS

According the trial testimony, during the early morning hours of May 4, 2006, Officer Kelvin Lee responded to a call for assistance from Office Ryan Woods. Tr. 68-69. Officer Lee was told that Woods was in pursuit of a suspect. When Lee arrived, Woods had chased down the suspect and Lee was able to help handcuff him. Tr. 69. The suspect, identified by Lee as the appellant, Robert Ellis, had already been tasered at least once by Officer Woods. Tr. 70.

Officer Wade Beard also responded to the call for assistance, but arrived after Ellis had been secured. Tr. 105. Beard testified that he noticed something in Ellis's mouth. Beard stated Ellis then began to crunch and chew. Tr. 106. Beard and Woods attempted to remove the item from Ellis's mouth. Beard pinched Ellis's nose to prevent him from swallowing. Beard explained when using this "tactic," a suspect cannot breathe and will spit the substance out of his mouth. However, this did not work and Ellis refused to spit the substance out. Tr. 107.

Meanwhile, Lieutenant Oscar Lewis had arrived and told officers to move Ellis to the front of his patrol car which had a camera. Tr. 85. After several more attempts to get Ellis to spit the substance out, Lt. Lewis ordered Ellis "drive stunned" with the taser. Tr. 85, 87. Lt. Lewis explained this was an attempt at "pain compliance," and was similar to a cattle prod. Tr. 87. When the bag did not come out of Ellis's mouth, Lt. Lewis authorized another dry stun. "It didn't work after several attempts. And I just said, enough's enough." Lt.

Lewis then testified he became concerned because he could see white chalky residue in Ellis's mouth and had Officer Beard call an ambulance. Tr. 88-89.

Lt. Lewis then identified a DVD as an accurate reflection of what happened at the scene when trying to get Ellis to comply with police commands to spit out the suspected evidence. The DVD was admitted as State's Exhibit 2. Tr. 91-92. The DVD was played for the jury. Tr. 93. Lt. Lewis claimed his main concern was for Ellis's well-being. He explained he did not initially call for an ambulance because he believed he could retrieve the substance without medical personnel. It was only after Ellis's condition worsened that he summoned medical assistance. Tr. 99, 133. Lt. Lewis admitted that Ellis was drive stunned four additional times. Tr. 104.

Katherine Gammon was one of the EMTs who responded to the scene. She was the driver of the ambulance. Tr. 111-12. Gammon testified that when she arrived, police had a man in handcuffs that looked like he was choking on something and was having trouble breathing. Tr. 112. She identified the person as Ellis. Tr. 113. After unsuccessfully trying the Heimlich Maneuver, Ellis was placed on stretcher and transported to the hospital. Tr. 113. En route, her partner, who was in the back of the ambulance with Ellis and Officer Woods, ask her to slow down[2]. Gammon pulled over. Her partner, using forceps, pulled a bag out of Ellis's mouth. Tr. 114-15. The bag was placed on the seat next to the officer. Gammon handed the officer a bio-hazard bag to use to keep the bag that was removed from Ellis's mouth. Tr. 116. Gammon never saw the officer or her partner place the evidence in

[2] This partner, Tommy Shellnut, was unavailable for trial. Tr. 111.

the bio-hazard bag. Tr. 122. She just assumed the officer retrieved it, as the last time she saw it was still on the seat next to Officer Woods. Tr. 123-24.

Officer Beard, Lt. Lewis, and Ms. Gammon all testified that the bag admitted as Exhibit 1 looked like the bag they saw in Ellis's mouth that night. Tr. 86, 109, 116. Brad Ray, a former police officer, testified he retrieved Exhibit 1 from an evidence locker. Tr. 150-51. Ray sent the item he retrieved to the Crime Lab. Tr. 153. Keith McMann, a forensic scientist with the Crime Lab testified that he tested Exhibit 1. Tr. 157. He concluded Exhibit 1 contained a trace amount of cocaine. Tr. 158. He could only call it a trace, or less than 0.01 gram, because the substance was wet and was unsuitable for weighing. Tr. 159.

SUMMARY OF THE ARGUMENT

The trial judge erred in refusing to suppress the evidence seized from the appellant in violation of Ellis's substantive due process rights under the Fourth, Fifth and Fourteenth Amendment to the United States Constitution and Article 3, Section 14 and Section 23 of the Mississippi Constitution. In *Rochin v. California*, 342 U.S. 165 (1952), the United States Supreme Court found that allowing police officers to struggle with a defendant to open his mouth and to try and remove what was there, and to subsequently have his stomach pumped involuntarily, clearly violated the defendant's due process rights. *Id.* at 170-72. The Court held this police conduct "shocks the conscience" and are "too close to the rack and the screw" to be permissible. *Id.* Likewise, in the case at bar, cutting off the air to this appellant

and subsequently subjecting him to multiple stuns from a taser is equally shocking and should result in the suppression of any evidence retrieved.

The trial judge also erred in allowing the jury to hear, in clear violation of a prior motion in limine, hearsay statements that the appellant was fleeing from police prior to his arrest. The officer who initially started the pursuit was unavailable to testify. There was therefore no evidence to show the stop was even valid or if Ellis was the driver to even be subject to arrest. It was extremely prejudicial for the jury to hear that appellant failed to yield through the testimony of several different officers with no personal knowledge of the stop.

Additionally, the unavailable officer was also a key member of the chain of custody of the evidence eventually admitted. This was evidence the crime lab forensic scientist testified was a bio-hazard. Tr. 161. The lab did not dry it out because it possibly contained a contaminate. Tr. 159-60. It was therefore necessary to have members of the chain of custody available since the evidence was contaminated at some point.

ARGUMENT

ISSUE NO. 1: THE TRIAL JUDGE ERRED IN FAILING TO SUPPRESS THE COCAINE ALLEGEDLY TAKEN FROM APPELLANT'S MOUTH IN VIOLATION OF HIS DUE PROCESS RIGHTS AND FOURTH AMENDMENT RIGHTS.

Substantive due process under the Fifth Amendment is violated by governmental conduct that either (1) deprives a plaintiff of an identified interest in life, liberty or property protected by the Fifth Amendment, or (2) "shocks the conscience." *Aversa v. United States*, 99 F.3d 1200, 1215 (1st Cir.1996), and *United States v. Salerno*, 481 U.S. 739, 746 (1987). The Fourteenth Amendment provides that no person shall be deprived "of life, liberty, or

property, without due process of law." Convictions based on evidence obtained by methods that are "so brutal and so offensive to human dignity" that they "shock the conscience" violate the Due Process Clause[3]. *Rochin v. California*, 342 U.S. 165, 172 (1952).

In the seminal case of *Rochin v. California*, the United States Supreme Court held the due process clause was violated when the police entered the defendant's house without a warrant and forced open the door to his bedroom. The officers spied two capsules on a night stand by the bed. When asked who the capsules belonged to, Rochin seized the capsules and put them in his mouth. A struggle ensued in which three officers jumped on Rochin and attempted to extract the capsules. When the officers could not overcome Rochin's resistance they handcuffed him and took him to a hospital where a doctor pumped his stomach and he vomited up the capsules. At trial the capsules were shown to contain morphine and Rochin was convicted on a drug possession charge. *Id.* at 172.

Reversing the conviction the Supreme Court held the officers' behavior violated Rochin's right to due process of law. Summarizing the conduct described above the Court found itself "compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically.... They are methods too close to the rack and the screw to permit of constitutional differentiation." *Id.*

In the case *sub judice*, defense counsel properly objected to the admission of the evidence allegedly retrieved from Ellis.

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[3]See also Mississippi Constitution Article 3, Section 14.

> BY MR. GOODWIN: Comes now the defendant in this case and moves at the introduction of this evidence to suppress the evidence as being seized in violation of the due process clause of the United States Constitution, specifically citing Rochon versus California[4] as developed in the proof in this case and under the applicable similar provisions of the Mississippi Constitution, there being an unlawful search and seizure of the defendant's – rather of the substance from the defendant by means of essentially torture.

Tr. 118.

Counsel elaborated on his motion after additional testimony was taken to specifically include the claim that the evidence was also taken in violation of the Fourth Amendment to the United States Constitution as well as the similar unlawful search and seizure provisions fo the Mississippi Constitution.[5] Tr. 138-39. After hearing the arguments of counsel, the trial judge opined that the situation here was different than what occurred in *Rochin*.

> [BY THE COURT:] ...I cannot say that these officers violated the defendant's constitutional rights in retrieving this item or attempting to retrieve it. As a matter of fact, they're not the one that retrieved it. It was medical personnel on the way to the hospital that actually retrieved it. And I find it extremely distinguishable, and the motion is overruled.

Tr. 144.

The trial court erred in finding no constitutional violation in this case. If officers truly believed Ellis was in serious danger from ingesting cocaine, they should have immediately called for medical assistance and not continued to make the situation worse by repeatedly shocking Ellis with a taser. Although Officer Lee saw Ellis go into convulsions, but it was his belief it was from the taser, not the cocaine. Tr. 77-78.

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[4]Throughout the transcript the case is referred to as *Rochon* instead of *Rochin*.

[5] See Mississippi Constitution Article 3, Section 23.

The United States Supreme Court's last major pronouncement on the contents of a substantive due process claim came in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). The Court reiterated and reinforced its "shocks the conscience" test in *Rochin*, stating that "conduct that shocks the conscience and violates the decencies of civilized conduct" in turn violates due process rights. *Lewis*, 532 U.S. at 847. See also *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (reiterating that conduct that " 'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive due process. See also *Whitley v. Albers*, 475 U .S. 312, 327 (1986).

The test for excessive use of force under the Fourth Amendment is one of reasonableness. *Graham v. Connor*, 490 U.S. 386, 395 (1989), overruled on other grounds by *Saucier v. Katz*, 533 U.S. 194 (2001). The test is an objective one, focusing on the officers' actions, not with the vision of hindsight, but in light of the facts and circumstances confronting the officers at the time. *Graham* at 396-397.

The manner in which police conducted the search of Ellis's mouth was unreasonable. In *Winston v. Lee*, 470 U.S. 753, 761-62 (1985), the Court announced a three-part balancing test for determining the reasonableness of a search procedure. *Winston* requires that the reasonableness of force used in a body search be measured against (1) the extent to which the procedure used may threaten the safety or health of the individual, (2) the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity, and (3) the community's interest in fairly and accurately determining guilt or innocence. *Id.* Whether a person's right to be free from unreasonable searches has been violated under the

Fourth Amendment is dependent on the facts and circumstances of each individual case. *Schmerber v. California*, 384 U.S. 757, 772 (1966).

In this case, we do not even know the reason why the police began to pursue the car Ellis was occupying. There was no evidence presented on why Ellis was placed in custody except for his flight from police. Police may have been warranted in doing an investigatory stop of all the individuals in the car, but to subject the appellant to this conduct under the facts in this record was unreasonable under the Fourth Amendment.[6] Although there are few cases dealing with the use of tasers to compel a defendant to comply with police, there are cases holding that it is unconstitutional to choke a defendant into spitting out suspected contraband[7]. In *Conwell v. State*, 714 N.E.2d 764, 766-69 (Ind.App.1999), the Court of Appeals in Indiana found excessive force in coercing a defendant to spit out suspected cocaine. The court additionally found no probable cause to search Conwell's mouth.

Conwell had been stopped him for speeding and failing to use a turn signal in a high crime area. Conwell was handcuffed and the officer discovered he was on probation. He

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[6] See also *Carr v. State*, 770 So.2d 1025 (¶10) (Miss.App. 2000) (defendant fleeing an officer's command to stop justified investigatory stop and *Terry* search, but without a valid arrest, the subsequent warrantless search was illegal.

[7] See generally, *People v. Sanders*, 74 Cal.Rptr. 350, 352 (Cal.App. 1969) (evidence obtained by choking defendant to prevent him from swallowing contraband inadmissible), and *People v. Bracamonte*, 124 Cal.Rptr. 528, 535 (Cal.1975)(unconstitutional to inflict unnecessary pain to cause suspect to vomit up balloons of heroin), *State v. Trapp*, 353 So.2d 265 (La. 1975)(unconstitutional to beat and choke a defendant to get him to spit out contraband), *Locke v. State*, 588 So.2d 1082, 1084 (Fla.App. 1991)(ordinarily not proper for police to choke a defendant to prevent swallowing of drugs unless to save a suspect's life), *State v. Williams*, 560 P.2d 1160, 1162-63 (Wash.App. 1977)(choking unreasonable force to recover evidence and violates Fifth Amendment).

then refused to open his mouth so the officer could make sure he had no contraband hidden there. Conwell then began to make a chewing motion. The officer choked Conwell to prevent him from swallowing and sprayed him with CS spray. After another officer arrived and he was sprayed again, Conwell spit out cocaine. *Id.* at 765-66.

The Indiana court found the evidence should have been suppressed. *Id.* at 766. As in this case, the court found there were safer alternatives to effect recovery of the evidence. *Id.* at 768. In fact, the Fifth Circuit has found it constitutional to force a suspect who swallowed heroin to have his stomach pumped when the suspect appeared to be unconscious or semiconscious, and the officers acted in good faith to prevent further harm to him. *United States v. Owens*, 475 F.2d 759, 760 (5th Cir.1973). The Fifth Circuit emphasized that a forced stomach pumping to respond to medical need, rather than gather evidence, "bears no resemblance to *Rochin*." *Id.* In this case, officers could have immediately sent Ellis to the hospital where qualified medical personnel could have monitored him for any signs of cocaine ingestion. If deemed medically necessary, under *Owens*, his stomach could have been pumped with no constitutional violation.

It is important to note that officers called an ambulance (4:29 on the DVD) prior to the first drive stun on the video (4:48 on the DVD). Exhibit 2. Officers had summoned medical help, but felt compelled to drive stun Ellis anyway, multiple times. The call for help also came well after officers first noticed white powder on Ellis's mouth (3:50 on the DVD), negating Lt. Lewis's claim that the ambulance was only summoned because of a concern that Ellis ingested cocaine. Tr. 133.

In conclusion, affirming this case under these facts, would allow officers to place evidence collection above the health and safety of suspects. Medical personnel are better trained to make decisions on whether or not the body should be invaded without a warrant. Exigent circumstances did not occur in this case until well after Ellis was shocked several times by police. This conduct can not be sanctioned when other, clearly safer alternatives existed to officers. Ellis's case should be reversed and rendered.

ISSUE NO. 2: THE TRIAL JUDGE ERRED IN ALLOWING HEARSAY COMMENTS BY SEVERAL POLICE OFFICERS THAT THE APPELLANT WAS FLEEING FROM POLICE.

Prior to opening statements, defense counsel related to the court that he was unaware that Officer Woods was not going to testify.

> BY MR. GOODWIN: Your Honor, I was a little bit surprised that the officer that tried to make the initial stop in this case is not going to be present. Because of that, I would now move that the Court instruct the district attorney in limine to refrain from arguing to – from making any reference in the opening statement to the jury as to what that officer allegedly saw and heard. That will be central also to our motion to exclude the evidence and suppress the evidence at the time we make our contemporaneous objection. If that officer is not here to testify about why the vehicle was stopped and why the defendant was searched. Obviously, there should be no reference to that in the opening statement.
>
> BY THE COURT: Response.
>
> BY MR. ALLGOOD: If Your Honor please, I have no intention of referring to it in the opening statement. I'm going to say a routine traffic stop was made.
>
> BY MR. GOODWIN: I understand what he's saying, but I don't think he can say it's a routine traffic stop. I don't think he can make any reference to it being anything like that because he has no proof it's a routine traffic stop. He

Officer Lee continued on to relate that Officer Woods said "he had one running." However, this was not the only evidence admitted on this matter. The trial judge allowed testimony from Lt. Oscar Lewis, who testified he heard over the police radio that Officer Woods had a vehicle that was not stopping. Trial counsel's objection was again overruled. Tr. 82. Finally, Officer Wade Beard gave the following testimony:

> A. Officer Ryan Woods advised he had a vehicle trying to get away from him. I responded to the area. By the time I got to the area, Officer Ryan Woods had chased the subject behind a house probably half a block, maybe block and a half in a little wood line in a fence area. Officer Ryan Woods advised he had to tase the subject....

Tr. 105.

The same hearsay testimony from three different officers was clearly prejudicial to Ellis. He was being charged with possession of cocaine, yet the jury heard repeated references to him fleeing from police, including the fact he had to be tasered in order to be apprehended. Even if not hearsay, this was clearly unnecessary to prove the charge and resulted in prejudicing Ellis in the eyes of the jury. The prejudicial nature of the testimony clearly and substantially outweighed any probative value of explaining why the officers needed to assist Officer Woods.

In initially ruling on this issue, the trial court recognized it was not necessary to show why Ellis was stopped, especially since the pursuing officer was unavailable. Tr. 56-57. Although the evidence may not have been offered to prove Officer Woods was chasing Ellis, that is exactly what the jury heard. This type of uncharged misconduct evidence does not meet any exception to MRE 404(b). Furthermore, after hearing the motion in limine from

counsel, and hearing the officers go far beyond what was necessary, the court failed to perform the necessary MRE 403 balancing test.

Furthermore, it can not be argued this was evidence of flight which showed consciousness of guilt, as there was absolutely no evidence presented to the jury that Ellis was the driver of the car or the occupant who was running. It is well-known that the admission of evidence is reviewed as an abuse of discretion. *Townsend v. State*, 847 So.2d 825 (¶18) (Miss. 2003). However, as the record reflects, this was not an isolated reference to Ellis fleeing, but no less than three officers were allowed to tell the jury that the appellant was fleeing from police, something completely outside of their personal knowledge. The trial court clearly abused its discretion in allowing this testimony.

There were other individuals in the vehicle that Officer Woods stopped. Tr. 71. There was no direct evidence that Ellis was the driver who was fleeing police, yet that is the clear impression the jury received from three different officers who were not even involved in the chase. The State failed to show the relevance of this testimony and the trial should have sustained trial counsel's objections. For evidence of flight to be admissible, its probative value must substantially outweigh its prejudicial effect. *Walker v. State*, 913 So.2d 198 (¶125) (Miss. 2005), citing *Mack v. State*, 650 So.2d 1289, 1309-10 (Miss. 1994). There was no probative value in the jury hearing this evidence. The trial judge abused his discretion and Ellis is entitled to a new trial.

ISSUE NO. 3. THE EVIDENCE WAS IMPROPERLY ADMITTED WITHOUT THE NECESSARY ESTABLISHMENT OF THE CHAIN OF CUSTODY.

Finally, the appellant would assert that the trial judge erred in failing to suppress the evidence based on the lack of a proper chain of custody. Counsel specifically argued to the court that the prosecution failed to properly show the chain of custody "from the time of the alleged seizure in the vehicle to the day that this alleged substance appeared in court." Tr. 139. This Court has held that testimony that a particular material is a controlled substance is of no relevance unless the prosecution also proves the defendant's connection to the substance. *Robinson v. State*, 733 So. 2d 333, 335 (¶6) (Miss.App. 1998). The State must show a reliable chain of custody to prove the matter in question is what the State claims it to be. MRE 901(a).

Officer Woods was the only officer who could testify the bag allegedly pulled from Ellis's mouth was the same bag admitted as Exhibit 1. Although appellant counsel has tremendous respect for Officer Woods's service in the military, Ellis is nevertheless entitled to a fair trial, which includes the opportunity to confront all the witnesses against him. Without Officer Woods's testimony, it is unclear what happened to the evidence after it was placed on the seat next to Woods in the ambulance. Ms. Gammons testified she just assumed it went in with the patient and Woods. Tr. 123-24. The individual who actually pulled the bag from Ellis's mouth, Tommy Shellnut, was also unavailable for trial. Tr. 111. The next time the Exhibit 1 is accounted for is when Brad Ray picked a bag up with Woods's name on it from the evidence locker. Tr. 150. There is no indication from the record on when or

even if Woods immediately put the evidence in the bio-hazard bag, or if Tommy Shellnut handled the evidence further. If it went into the ER room, as Ms. Gammon suspected, where was it kept until Officer Woods placed it in the evidence locker?

Given this uncertainty, plus the fact that Keith McMann testified the evidence was possibly contaminated, the court abused its discretion in admitting Exhibit 1. Tr. 159-60. The test for admission of evidence with a break in the chain of custody is "whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." *Gibson v. State*, 503 So. 2d 230, 234 (Miss. 1987) (quoting *Grady v. State*, 274 So. 2d 141, 143 (Miss. 1973)). Again, the standard of review for admission of evidence is abuse of discretion. *Nix v. State*, 276 So. 2d 652, 653 (Miss. 1973). Given the circumstances of this case, the trial judge abused his discretion resulting in prejudice to Ellis. Ellis was sentenced to eight years without parole for possessing a "trace" of cocaine with a broken chain of custody. This Court should order a new trial.

CONCLUSION

Given the facts presented in the trial below, Robert Ellis, Jr. is entitled to have his conviction for the possession of less than .1 gram of cocaine reversed and rendered. At the very minimum, given the prejudicial evidence of flight and the broken chain of custody, this Court should reverse and remand this case for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Robert Ellis, Jr., Appellant

By: 

Leslie S. Lee

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 21st day of April, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant, by United States mail, postage paid, to the following:

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