

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2220
NO. 2007-KA-0220-COA

CARL ELEY

FILED

OCT 10 2008

OFFICE OF THE CLERK
SUPREME COURT
OF APPEALS
VERSUS

APPELLANT

STATE OF MISSISSIPPI

APPELLEE

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

REPLY BY APPELLANT

Oral Argument has been requested

OFFICE OF THE PUBLIC DEFENDER,
HINDS COUNTY, MISSISSIPPI

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Carl Eley v. State of Mississippi

2007-KA-0220-COA

Table of Contents

Table of Contents	i
Table of Authorities	ii
Reply	1
Conclusion	4
Certificate of Service	5

elicited. Cash lied about a prior drug conviction, upon which the prosecution sought to have him expunged from the prospective panel and it is very likely that he lied about knowing Det. David Domino – principal detective not only on this case, but that of Cash himself, less than two years before. Even if Cash did not recognize Domino's name, he surely recognized him at trial and failed to disclose that information. The trial court found that questions were relevant to voir dire and were unambiguous but failed to find Cash had "substantial knowledge" of the information sought to be elicited. T. 260; RE 12

Mr. Eley respectfully contends Cash had full knowledge of the sort of knowledge counsel sought from the members of the venire. Cash had already heard several state their inability to be fair due to the violent loss of loved ones or having themselves experienced an armed robbery or other crimes. On no less than three occasions, the judge, the assistant district attorney and counsel for Mr. Eley asked prospective jurors whether they could be fair and impartial and if anything in their background might hinder them from rendering a fair and impartial verdict. T. 41; 59; 79. Had defense counsel known that Cash was himself the complaining witness in an armed robbery case, he most assuredly would have asked for his removal from the jury ultimately empanelled. Mr. Eley also believes the trial court was disingenuous in finding that Det. Domino was trained to remember faces and individuals and that Ronald Keith Cash was *not* so trained. As prosecutors from time immemorial have argued, the experience of having undergone an armed robbery or other violent crime sears indelible details upon the complaining witness, such as identification of a suspect and law enforcement personnel who respond.

Mr. Eley would also respectfully contend that the State's reliance on *Herrington v. State*, 690 So.2d 1132 (Miss. 1997) is misplaced for the case is substantively distinguishable on its facts. In that case the juror did not know her children went to the same school as those of the victim until after trial and did not know the victim. In this case, it is absolutely uncontroverted

that Cash had direct dealings with Det. Domino upon reporting an armed robbery, as Det. Domino so testified.

Also factually distinguishable is *Salter v. Watkins*, 513 So.2d 569 (Miss. 1987) in which the challenged juror was unaware until empanelled and in trial that he knew members of the plaintiff's family. Not so here. This was not an issue of whether a prospective juror did or did not know parties to the lawsuit or had any kind of known affiliation with parties. This is a case regarding past experiences and criminal violations of the venireman, essential for attorneys to know in selecting an impartial jury. In any objective test regarding application of the *Odom* factors, common sense soundly affirms this was information defense counsel would absolutely need. Ronald Keith Cash most certainly remembered he, too, was once a complaining witness in an armed robbery, that he most certainly recognized Det. Domino and that this was information attorneys would very much need in assessing his capacity for serving impartially.

Mr. Eley respectfully contends that the cases of *Burroughs v. State*, 767 So.2d 246 (Miss.Ct.App., 2000) and *Atkinson v. State*, 371 So.2d 869 (Miss. 1979) are controlling in this instance. As cited in Mr. Eley's *Brief on the Merits*, pg.11, the facts of *Burroughs* are closely analogous to this case; the juror discovered during trial that he employed two assault victims, whom he did not recognize until the youths appeared to testify. The juror's failure to inform the baliff, the judge or one of the assistant district attorneys was sufficient to order a new trial for *Burroughs*. *Id.*, at 251-252.

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:

Honorable Robert Shuler Smith,
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Honorable W. Swan Yerger
CIRCUIT JUDGE
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And by United States Mail, postage prepaid, to

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So certified, this the 10th day of October, 2008.


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