IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-~~0220~~2220-COA

CARL ELEY APPELLANT

VERSUS

STATE OF MISSISSIPPI APPELLEE

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

BRIEF ON THE MERITS BY APPELLANT

Appellant Will Seek Oral Argument

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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 Court of Appeals and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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So certified, this the 11th day of July, 2008.

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Carl Eley v. State of Mississippi

2007-KA-0220-COA

Table of Contents

Carl Eley v. State of Mississippi

2007-KA-0220-COA

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. The trial court erred when it denied the Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial due to the presence of a juror, Ronald Keith Cash, who not only knew one of the principal prosecution witnesses, but who also failed to disclose a prior cocaine possession charge during voir dire, and

II. The trial court erred when it denied the Motion in Limine by Mr. Eley to bar Mark Bannister, who did not witness the incident, from testifying.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Carl Eley was arrested and charged in Cause No. 06-1-174 with armed robbery, violating MISS. CODE ANN. § 97-3-79 (1972) in connection with the robbery of James Stone for $42.00 on August 25, 2006. CP 3. Mr. Eley stood for trial on the indictment beginning June 12, 2007; on June 13, 2007, the jury returned a verdict of "Guilty." T. 232; CP 30-32; RE 9-10. The trial court found Mr. Eley, 22 at the time of trial, had a life expectancy of forty-six (46) years and so sentenced him to twenty-five (25) years imprisonment in the custody of the Mississippi Department of Corrections. T. 190; 234; CP 31-32; RE 11.

The morning after trial, the prosecution disclosed that a member of the venire failed to disclose during *voir dire* that he knew Det. David Domino, the lead detective testifying in the case. Domino had also interviewed the juror, Ronald Keith Cash, when Cash was a victim of an armed robbery less than two years previously. T. 236-237; CP 33-35. After a hearing, the trial court denied Mr. Eley's *Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial.* T. 260; RE 12. Following denial of his motion, Mr. Eley appealed his conviction and sentence, now before this honorable Court. CP 45.

B. STATEMENT OF FACTS

James Stone and Mark Bannister worked together installing vinyl siding on homes in the Jackson metropolitan area, work in which they were engaged at 1716 Cox Street in Jackson on August 25, 2006. T. 111; 158.

Stone testified a boy had cruised by throughout the morning on his bicycle and chatted with the pair. T. 158. At one point, Stone gave him a cigarette. T. 159. Later that afternoon, as Stone and Bannister were wrapping up for the day, the boy came by again, this time with a friend. T. 159. The visitors continued the earlier conversation; the boy followed Stone into the

house as Stone carried lumber to store inside until the next day. T. 159; 171. Stone testified he heard the door shut behind him as he walked into the house with his armload of lumber; when he turned around the boy was standing there, holding a .25 caliber pistol, and asking for Stone's wallet. T. 159; 162; 172. Stone testified he had no cash in the wallet, so the robber told him to empty his pockets, netting the robber $42.00 in cash – two twenty-dollar bills and two one-dollar bills. T. 159. The robber then instructed Stone not to call the law or he would kill Stone. T. 172. While Stone testified at trial that the robber and his friend then ran off, he acknowledged the contradiction with Bannister's contemporaneous statement that the two walked away from the scene. T. 172.

After the robber left, Stone testified that he went to the bathroom in the house, then walked outside and told Bannister he had been robbed. T. 159; 170. Stone was nervous and wanted to leave the neighborhood before calling the police to report the incident, out of fear the boys lived in the neighborhood. T. 159;163;170. Stone testified he and Bannister drove to a nearby Chinese restaurant at the corner of Terry Road and U.S. Highway 80 with a parking lot large enough to accommodate their pick-up truck and sixteen-foot trailer and awaited police there. T. 163; 170; 172.

Officer Fredrick Reginald responded to the restaurant parking lot and took his report there from Stone. T. 111. Meanwhile, Bannister called the contractor for whom they worked and went with him through the neighborhood to see if they could find the two boys, which they did. T. 149. Bannister said his boss telephoned Stone to tell him the boys were still in the area at a convenience store. T. 149. Police found only one of the two at the convenience store, Eric Stringer, whom Bannister at trial identified as the second boy the robber brought with him in the afternoon. T. 112; 118; 123; Exhibit 1. Bannister assured authorities he could identify both men, including the one who allegedly robbed Stone. T.133.

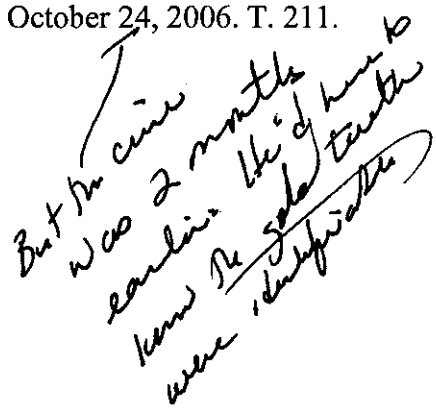
Detective David Domino, the lead investigator on the case, testified he received an anonymous telephone call from someone who identified himself as a friend of Eric Stringer. The friendly, anonymous stranger told Domino that Carl Eley was the robber. T. 133. Domino also acknowledged that Stringer was not indicted in connection with the case, only Mr. Eley. T.133. CP 3. At trial, Mr. Eley unequivocally testified that his relations with Stringer, a cousin, were virtually non-existent. T. 197. Stringer would come to Mr. Eley's home in search of either the older or younger of Mr. Eley's siblings; that was the extent of his relationship with Stringer. T. 199.

At issue both before and at trial was the identification of Mr. Eley based on the physical descriptions Stone and Bannister gave at the time and at trial, specifically the presence of four gold teeth in the upper part of the robber's mouth and no mention by either Stone or Bannister of the robber's tattoos. Despite his earlier assurances to police, Bannister could only identify Stringer from a photo line-up presented to him a month after the incident. T. 128; 132; Exhibit 4. Furthermore, although Stone gave a detailed physical description, including four gold teeth and the sleeveless tank top the robber wore, he makes no mention whatsoever of the very visible tattoos present on both of Mr. Eley's arms. T. 191.

Mr. Eley was arrested on October 24, 2006 and incarcerated until trial. Mr. Eley demonstrated to the jury he had no gold teeth and obvious tattoos, although booking records from a prior arrest in 2005 showed he had four gold teeth in the upper part of his month. T. 193. Mr. Eley denied ever having gold teeth, permanent or removable, and insisted the booking records were a mistake. T. 191; 192. Deputy Rhonda Daniels, booking clerk, testified over objection from defense counsel that she entered the condition of his teeth from Mr. Eley's 2005 arrest based on paperwork and physical observation during booking. T. 177. The 2005 records,

however, failed to show whether the gold teeth were "grills," detachable gold teeth, or permanent gold teeth presumably requiring removal by a dentist. T. 179.

Deputy Jerri Harris testified that deputies make inmates show whether gold teeth are "grills" or permanent. T. 209. If the gold teeth are grills, the item is considered jewelry, and is removed, sealed into an evidence bag and placed with the remainder of the inmate's personal effects. T. 208; 209. While booking records show Mr. Eley had four gold teeth, Harris testified that Mr. Eley's personal property, taken at his arrest October 24, 2006, list a belt, shoe laces and one dollar bill. There is no sealed evidence bag containing a removable gold grill among Mr. Eley's personal effects held by the Hinds County Sheriff's Office. T. 210. Harris also testified that Mr. Eley has been continuously incarcerated since October 24, 2006. T. 211.



SUMMARY OF THE ARGUMENT

Mr. Eley would respectfully argue that the trial court abused its discretion when it failed to follow the objective test of *Odum v. State*, 355 So.2d 1381, 1383 (Miss. 1978), which infers prejudice to a party when a potential juror fails to respond truthfully to a relevant, direct and unambiguous question during *voir dire*. In this case, Juror Ronald Cash failed to disclose a 2005 cocaine possession conviction, which he contended was later expunged. Cash also failed to disclose that he knew one of the state's witnesses, lead investigator Det. David Domino, who had interviewed Cash when Cash himself was the victim of an armed robbery less than two years before the trial took place.

In addition, Mr. Eley alleges it was fatal error under MISS.R. EVID. 602, 402 and 403 to deny the *Motion in Limine* to bar testimony by Mark Bannister. Bannister did not witness the alleged robbery and could not identify Mr. Eley as one who came to the jobsite where the incident occurred. Without personal knowledge of the incident, the testimony of Mr. Bannister was irrelevant and thus only served to confuse and mislead the jury.

In accord to this stern view by our nation's highest court, the Mississippi Supreme Court in *Odom v. State*, 355 So.2d 1381, (Miss. 1978) reversed the burglary conviction of Odom due to the failure of a prospective juror to disclose his brother was a policeman and an investigating officer of the crime being tried. The venireman, Freshour, was seated as a juror, heard testimony from his brother and was among those who rendered a unanimous verdict of guilty. Had defense counsel known of the relationship, the Mississippi Supreme Court reasoned, most assuredly counsel would have exercised a peremptory challenge or used a challenge for cause to remove Freshour from the panel. The question our Court considered was whether it was necessary for Odum to demonstrate prejudice in order to win a new trial. The Court held prejudice "reasonably could be inferred" and new trial ordered upon a finding that a prospective juror "fails to respond to a relevant, direct and unambiguous question" during *voir dire. Id.*, at 1382-1383.

In the later case of *Myers v. State*, 565 So.2d 554 at 558 (Miss. 1990), the Mississippi Supreme Court declared, "[f]ollowing a jury's verdict, where a party shows that a juror withheld substantial information or misrepresented material facts, and where a full and complete response would have provided a valid basis for challenge for cause, the trial court *must* grant a new trial, and, failing that, we must reverse on appeal. *We presume prejudice.*" [emphasis added] In *Myers,* the trial court discovered just prior to deliberation on an illegal liquor sale charge that one of the jurors had relatives, including her spouse, with illegal liquor convictions and replaced her with an alternate. The Court affirmed Myers' conviction on appeal, in which he alleged error in replacing the non-disclosing juror.

In the case at bar, Juror Ronald Keith Cash withheld information that he had been arrested for possession of cocaine in 2005 after the prosecutor asked of the venire in *voir dire* the following:

Q. But have – and I'm going to ask you panel by panel, again just like I just did. In the first panel in the jury box, has anybody in the jury box ever been booked into a jail of any kind?

T. 70.

While Juror Ronald Keith Cash responded that he had received a DUI some ten years previously, he failed to inform either the prosecutor, defense counsel or the trial court of a much more recent arrest for cocaine possession in 2005.

When did this occur?

Q. Mr. Cash, you are Ronald Keith Cash?

A. Yes, sir

Q. And you answered the question about being arrested as saying that you had a DUI about 10 years ago. Is that correct?

A. Yes, sir. It may be '95 or '96.

Q. Okay. Was there any other thing?

A. Sir?

Q. Was there any other occasion that you were arrested?

A. I have been before, sir, on something else but I was told since it was adjudicated that, you know, I did not have to – you know, it was not on my record and I did not have to disclose it.

Q. You were indicted in '05 for possession of cocaine?

A. Yes, sir.

BY MR. MILES: Nothing further.

A. That's why I didn't bring it up.

BY MR. MILES: Nothing further. T. 85

Upon challenge for cause due to Cash's dishonesty, Mr. Eley argued forcefully to keep Cash on the jury, upon which he was ultimately empanelled. T. 87; 94.

This omission was the not the full extent of Mr. Cash's dishonesty, however. On the morning after Mr. Eley was convicted, the prosecutor informed the trial court that the investigating detective, David Domino, had notified him of an investigation into an armed robbery less than two years before in which the victim was Ronald Keith Cash. Det. Domino recognized Cash when Domino testified at trial. T. 236-237.

Upon a hearing on the *Motion for Judgment Notwithstanding the Verdict or, in the alternative, A New Trial*, the trial court went through the three *Odom* factors. The trial court agreed that the question was relevant to the *voir dire* examination and that the question was unambiguous, but found that Cash lacked "substantial knowledge of the information sought to be elicited." *Odom*, at 1383; T. 260; RE 12. Therefore, the trial court refused to make any further any inquiry as to whether prejudice to Mr. Eley could be inferred and denied the new trial motion. T. 260; RE 12.

Pursuant to *Odom*, Mr. Eley respectfully asserts the trial court abused his discretion in finding Juror Cash lacked knowledge of the information sought. "The failure of a juror to respond to a relevant, direct, and unambiguous question leaves the examining attorney uninformed and unable to ask any follow-up questions to elicit the necessary facts to intelligently reach a decision to exercise a peremptory challenge or to challenge a juror for cause," the Court wrote in *Odom*. *Id.*, at 1383. Just so was the case here. On at least three occasions, the trial court, the prosecutor and defense counsel in *voir dire* asked jurors whether they could be fair and impartial or whether anything would hamper them from rendering a fair and impartial verdict. T. 41 (trial court); T. 59 (prosecutor); T. 79 (defense counsel). As noted in *Odom*, Freshour – as did Juror Cash in the case at bar – failed to respond to that query, as well. *Id.*, at 1381. Common

sense tells anyone that had the defense been aware that Juror Cash knew Domino or had been the victim of an armed robbery less than two years before, he most assuredly would have been excused for cause or peremptorily. Cash also knew other members of the venire declared their inability to be impartial due to knowledge of or kinship with victims of violent crime. Yet, he kept silent about the experience throughout trial. This is not unlike the facts of *Burroughs v. State*, 767 So.2d 246 (Miss.App., 2000), in which this Court reversed for failure to grant a new trial when it was discovered one of the jurors employed two of the assault victims. At the new trial motion hearing, the juror testified he did not recognize the names of the victims when they were called out during *voir dire* and only recognized one youth when the boy appeared to testify. Yet, the juror never informed a baliff, the trial court or the prosecutor. *Id.* 251-252.

Under Mississippi law, a juror is deemed "disqualified" when she or he has withheld information or misrepresented material facts." MISS. CODE ANN. § 13-5-67 (1972). Clearly, Juror Cash misrepresented his felony background, his knowledge of Det. Domino and the fact that he, too, had been a victim of a violent crime, the same crime for which he sat as a juror, all factors that just as "clearly had an adverse effect on appellant's right to challenge [Cash] peremptorily." *Odom*, at 1381. Just as obviously, the trial court abused its inherent discretion in failing to find that Mr. Eley's motion met all three prongs of the *Odom* test. Surely at some point in the *voir dire*, Juror Cash had the "substantial knowledge" of the information to be elicited. Counsel for Mr. Moore submits that even if Juror Cash were confused as to whether his cocaine possession arrest had been expunged, even if he did not recognize the name of Det. Domino or failed to recognize Domino, there is still the matter that he failed to disclose he had been a victim of the same crime, armed robbery, sufficient for the Supreme Court in *Atkinson v. State*, 371 So.2d 869 (Miss. 1979) to reverse for a new trial. Counsel for Mr. Eley submits it is disingenuous in the extreme to claim otherwise.

Therefore, based on the state and federal authorities cited above, Mr. Eley respectfully requests this honorable Court reverse and remand his cause for a new trial.

II. The trial court erred when it denied the *Motion in Limine* by Mr. Eley to bar Mark Bannister, who did not witness the incident, from testifying.

Under the Mississippi Rules of Evidence, personal knowledge is required for one not testifying as an expert. MISS.R. EVID. 602. Otherwise, the witness's testimony is irrelevant and subject to the restrictions of MISS.R.EVID. 402 and 403, which bar the use of irrelevant evidence and prevent admission of evidence that may be relevant but confusing or misleading to the jury.

Mr. Eley contends it was error for the trial court to deny his *Motion in Limine* to prohibit Mark Bannister from testifying at trial. T. 23; RE 13. Bannister was working outside, loading items on the pick-up truck as he and Stone finished for the day. T. 150. Bannister acknowledged that the alleged robber had been by three or four times that day but despite that fact, Bannister could not identify Mr. Eley as the youth who had been by the Cox Street house earlier that day conversing over work to the home. T. 151-152. Furthermore, Bannister was unsure at trial of his description of clothing the alleged robber wore and said absolutely nothing about the very visible tattoos that covered the arms of Mr. Eley. T. 191.

The Mississippi Supreme Court in *Estate of Carter v. Phillips and Phillips Constr. Co.*, 860 So.2d 332 (Miss.App.Ct., 2003) reversed the result in that case due to testimony by a police officer of the accident scene at the time of the accident when in fact, the officer was *not present* the night of the accident. And, in *Jones v. State*, 678 So.2d 707 (Miss., 1996), it was reversible error to permit a state Department of Human Services worker to opine that ingestion of cocaine by vapor was a child's cause of death.

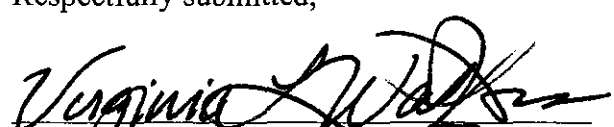
The testimony of Mr. Bannister was made without knowledge of the critical event, i.e., the alleged armed robbery of James Stone and with a complete inability to identify the individual

CONCLUSION

Mr. Eley respectfully contends that under *Odum v. State,* 355 So.2d 1381, the trial court abused its discretion in failing to find the dishonesty by Juror Ronald Keith Cash regarding his past criminal background, his relation with investigating Det. David Domino and that Cash himself had, less than two years before, been a victim of an armed robbery denied to him the impartial jury promised by the U.S. Constitution, the Mississippi Constitution and a long line of federal and state case law interpreting these fundamental guarantees. Furthermore, Mr. Eley submits that the trial court erred in permitting Mark Bannister to testify, as Bannister lacked the requisite personal knowledge of the incident. Thus his testimony was irrelevant and could only serve to confuse and mislead the jury as the events of that day in August, 2006.

On the basis of these demonstrated errors, Mr. Eley requests this honorable Court vacate his conviction and remand this matter for a new trial to the Circuit Court of Hinds County.

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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