CERTIFICATE OF INTERESTED PERSON

KEITH LEON JOHNSON

v.

STATE OF MISSISSIPPI

NO. 2008-TS-00792

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

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STATEMENT OF THE ISSUES

1. The Court erred in refusing to approve jury instruction D-6.

2. The Court erred in refusing to grant jury instruction D-7.

3. The Court erred in refusing to grant jury instruction D-8.

4. The Court erred in refusing jury instruction D-9.

5. The Court erred in denying the motion to suppress statement of the case.

STATEMENT OF THE CASE

Keith Leon Johnson appeals his conviction from the Circuit Court of Newton County, Mississippi of willfully, unlawfully and feloniously having in his possession a Schedule II controlled substance, namely cocaine, in an amount of more than .10 grams but less than 2 grams, in Newton County, Mississippi, contrary to and in violation of Section 41-29-139(c)(1)(B), Miss. Code Ann. (1972), and sentence to 8 years in the custody of the Mississippi Department of Corrections, and order to pay a fine of $1,500.00.

Decatur Police Officer Chad Garvin was patrolling in a police car in the very early morning hours on October 18, 2006, saw a car with a headlight out, chased and stopped it. Appellant was a guest passenger in the front seat. Garvin recognized Appellant as a person he had had a difficult time with in the past. He went to the driver's side (T-66), looked at the license of the driver (T-66), smelled alcohol on the breath of the driver, ordered him out of the car, obtained his permission to search the car, placed him in handcuffs "for officer safety" (T-67).

On cross examination , Garvin testified as follows (T-143, T-144):

Q. Okay. The Defendant, Mr. Johnson, was not driving?
A. No, sir, he was not.
Q. And so when you started to approach the passenger side of the vehicle, you intended to put handcuffs on Mr. Johnson also, did you not?
A. Yes, I did.
Q. Okay. You had no probable cause, at that time, that any crime had been committed before you approached his window the second time, you had no probable cause that any crime had been committed, did you?
A. Not by him, no.
Q. Okay. You asked Mr. - - you asked Mr. Johnson to exit the vehicle and he refused, right?
A. That is correct.
Q. And you asked him again, and he again refused, right?
A. That is correct.
Q. And then you told him, if you don't exit the vehicle, you're going to put him under arrest, right?
A. I told him if he didn't exit the vehicle and step to the rear of the vehicle that I would place him under arrest for disorderly conduct by failing to comply with the request or command of a law enforcement officer.
Q. Okay. And so what did he do?
A. At that point he exited the vehicle and stood by the passenger door.
Q. And, but he - - but you say he didn't fully comply with your request at that time?
A. No, he did not.
Q. So therefore you were arresting him, right?
A. Yes, sir.

Garvin patted Appellant down to search for weapons (T-71).

Then Garvin attempted to handcuff Appellant (T-154, 155):

Q. (By Mr. Harris) Mr. Johnson didn't physically do anything until you started to put the handcuffs on him, did he?
A. That's correct.
Q. And at that point in time, he didn't start to pull away from you, right?
A. That is correct.
Q. And you grabbed him and tried to stop him from pulling away from you, right?

A. I took hold of the back of the seat of his pants. I didn't physically grab him.
Q. Oh, you grabbed his pants?
A. Yes, sir.
Q. He - - you said he tried to - - you said he tried to strike at you, and then you pulled your mace, I suppose?
A. That's correct. Yes, sir.
Q. And you sprayed him, right?
A. Yes, sir.
Q. And that didn't seem to have the desired affect, so you pulled your baton, right?
A. That is correct.
Q. And that's - - and that's basically a weighted instrument that police use to subdue a person that's being combative, right?
A. That's correct.
Q. And you hit him several times with the baton, right?
A. In the common peroneal.
Q. And what's a common peroneal?
A. It's a nerve motor point that's in the - - in the side of the leg.
Q. The inside or outside?
A. It's on the outside.
Q. Okay. So you struck him several times on the outside of the leg, right?
A. That is correct.
Q. Okay. And eventually he did get away from you and started running, right?
A. That is correct.
Q. And eventually he did get away from you and started running, right?
A. That is correct.
Q. You said that he pulled the shoes off and threw 'em on the highway, right?

Garvin further testified on direct examination (T-75):

A. I was actually jogging behind him.
Q. All right. Were you hollering at him or anything?
A. Yes, I was, I was yelling at him to stop running and lay down on the ground.
Q. What did Mr. Johnson finally do?
A. He finally stopped and turned around, had his hands tucked down the front of his pants, and told me that he gave up.
Q. He told you he gave up?
A. Yes, he did.

In one of the shoes that Appellant discarded Garvin found a baggie with cocaine in it.

SUMMARY OF THE ARGUMENT

1-4 An accused is entitled have a jury instruction which gives his theory of the case.

5. The first of an illegal arrest is inadmissible in Court.

ARGUMENT

I.

THE COURT ERRED IN REFUSING TO APPROVE JURY INSTRUCTION D-6

Proposed jury instruction D-6, propounded by the Appellant read as follows (c.p. 17).

> The Court instructs the jury that if you find from the evidence that someone other than the defendant, exercised conscious control over the substances, or if you believe that the State failed to prove, beyond a reasonable doubt, that Keith Leon Johnson exercised conscious control over the substances, the you must vote "Not guilty."

The trial court refused it because the court believed it to be a circumstantial evidence instruction (T-180).

Circumstantial evidence instructions are those that instruct the jury that the state must not only prove the case beyond a reasonable doubt but also that it must prove guilt to a moral certainty and to the exclusion of every other reasonable hypothesis. Barrett v. State, 253 So. 2d 806 (Miss. 1971); Henderson v. State, 453 So. 2d 708 (Miss. 1984). D-6 has none of these elements and recites the law correctly.

A defendant is entitled to a jury instruction which gives his theory of a case. Young v. State, 451 So. 2d 208, 210 Miss. 1984); Hester v. State 602 So. 2d 869 (Miss.

1992); De Silva v. State, 91 Miss. 776, 45 So. 611 (1908). Indeed, where there is serious doubt whether a requested jury instruction should be given, the doubt should be resolved in favor of the accused. Lenard v. State, 552 So. 2d. 93 (Miss. 1989); Wadford v. State, 385 So. 2d 951, 955 (Miss. 1980).

The prosecutor also asserted that this instruction was repetitive with jury instruction S-1, an instruction that the court had not yet considered, however the court did not mention or adopt this ground for refusing the instruction.

Refusal to grant this instruction was error. The verdict should be overturned.

II.

THE COURT ERRED IN REFUSING TO GRANT JURY INSTRUCTION D-7.

Proposed Jury Instruction D-7 read as follows (c.p. 18):

> The Court instructs the Jury that a person is under arrest "if in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."
> The Court further instructs the Jury that the validity of an arrest is determined by whether the facts available to the officer, at the time of arrest, warrant a man of reasonable intelligence and caution to believe an offense had been committed.

The trial court refused this instruction (T-183) as a comment on the evidence and as a suggestion that the jury invade the province of the court.

Appellant asserts that this instruction is a correct statement of the law.

A defendant is entitled to a jury instruction which gives his theory of a case.

Young v. State, 451 So. 2d 208, 210 Miss. 1984); Hester v. State 602 So. 2d 869 (Miss. 1992); De Silva v. State, 91 Miss. 776, 45 So. 611 (1908). Indeed, where there is serious doubt whether a requested jury instruction should be given, the doubt should be resolved in favor of the accused. Lenard v. State, 552 So. 2d. 93 (Miss. 1989); Wadford v. State, 385 So. 2d 951, 955 (Miss. 1980).

Refusal to grant this instruction was error. The verdict should be overturned.

III.

THE COURT ERRED IN REFUSING JURY INSTRUCTION D-8.

Proposed Jury Instruction D-8 read as follows (c.p. 19):

> The Court instructs the jury that if you determine the officer tried to arrest the defendant, but that arrest was not valid, then any evidence seized after the arrest from the Defendant was not validly seized.

The following colloquy between defense counsel and court (T-183, 184) highlight the issue:

> MR. HARRIS: Oh, Your Honor, again, I think the jury's got a right to be instructed on what the law is, and they've got a right to draw their own conclusions from the facts.
> THE COURT: I don't agree.

A defendant is entitled to a jury instruction which gives his theory of a case. Young v. State, 451 So. 2d 208, 210 Miss. 1984); Hester v. State 602 So. 2d 869 (Miss. 1992); De Silva v. State, 91 Miss. 776, 45 So. 611 (1908). Indeed, where there is serious doubt whether a requested jury instruction should be given, the doubt should be resolved

in favor of the accused. Lenard v. State, 552 So. 2d. 93 (Miss. 1989); Wadford v. State, 385 So. 2d 951, 955 (Miss. 1980).

Refusal to grant this instruction was error. The verdict should be overturned.

IV.

THE COURT ERRED IN REFUSING JURY INSTRUCTION D-9

Jury Instruction D-9 reads as shown below (c.p. 20):

The Court refused it as cumulative (T-184)

> The Court instructs the Jury, that if the arrest was not valid, a person has a right to resist an unlawful arrest.

The only instructions it would be cumulative with had been refused and it contains a correct statement of the law.

A defendant is entitled to a jury instruction which gives his theory of a case. Young v. State, 451 So. 2d 208, 210 Miss. 1984); Hester v. State 602 So. 2d 869 (Miss. 1992); De Silva v. State, 91 Miss. 776, 45 So. 611 (1908). Indeed, where there is serious doubt whether a requested jury instruction should be given, the doubt should be resolved in favor of the accused. Lenard v. State, 552 So. 2d. 93 (Miss. 1989); Wadford v. State, 385 So. 2d 951, 955 (Miss. 1980).

Refusal to grant this instruction was error. The verdict should be overturned.

V.

THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS

At the outset of the trial, Appellant moved to suppress the evidence of the substance found in his shoe (T-57) because it followed from an illegal arrest. In the

hearing on the motion, Garvin, called by the state testified to the facts contained in the Statement of the Case. He testified that when he tried (T-71) to put handcuffs on Appellant, Appellant tried to get back in the car, that he tried to place Appellant and the driver of the car, Goodin, in handcuffs, not to arrest them but "for officer safety". (T-82-T-83):

Q. Okay. Did you have any - - at that point in time, did you believe that any crime had been committed?
A. I did.
Q. What was that?
A. Mr. Goodin had told me that he had had alcohol. I could smell it coming out of the vehicle.
Q. Okay. Do you believe that a crime had been committed, and what was that crime:
A. At that point, I believe that he was deriving under the influence.
Q. Did it turn out that he was?
A. No, it did not.
Q. Okay. So at that time, you believed Mr. Goodin was driving under the influence, right?
A. Yes, I did.
Q. Okay. So you were arresting him, right?
A. No, I was not.
Q. Okay. Well, when you placed the handcuffs on him, was he free to leave?
A. At that point, no, he was being detained.
Q. Okay. And if he was being detained, what was he being detained for?
A. For investigation while I checked to see if there was anything illegal in the vehicle after he gave me consent to search it.

and (T-84):

Q. Okay. So, did you have any reason to believe a crime had been committed by Mr. Johnson?
A. At that point, no, I did not.

and (T-86, T-87):

A. My intention was just to have him step out of the vehicle while I looked through the vehicle.
Q. Were you going to place him also in handcuffs?
A. Yes, I was.

Q. Okay. And you intended to search him down and handcuff him also, right?
A. No, I did not.
Q. You didn't intend to search him first?
A. At that point, no, I did not.
Q. But you intended to get him out and place him in handcuffs?
A. Yes, I did.
Q. And what were your reasons for placing him in handcuffs?
A. For officer safety, because of past knowledge of him.
Q. And you don't think that's - - you don't think that's an arrest?
A. No, I do not.

and (T-92, T-93):

Q. You asked - - let's see, it says, "after being told this, Mr. Johnson exited the vehicle and stood by the passenger door. I instructed Mr. Johnson to move to the rear of the vehicle, place his hands so he could pat him down." He moved to the rear and allowed you to pat him down.
A. That's correct.
Q. So at what point is he really not complying with what you're requesting him to do, just because you have to tell him twice?
A. That's correct. Because I had to tell him several times to step out of the vehicle.
Q. And of course, when you were telling him to step out of the vehicle, your intention was to get him out and put him under arrest - - put him in handcuffs, as you refer to it, for officer safety, right?
A. That's correct.
Q. And you don't contend that that's an arrest, right?
A. No, I do not.
Q. Even though that person's not free to leave?
A. I don't believe it's an arrest.
Q. And you - - at the time you started questioning him about telling him to get out of the vehicle you had no probably cause whatsoever to believe any crime had been committed, correct>
A. Not by him, no.

The Court denied the motion.

The issue of what constitutes arrest is settled law. When one is not free to flee, he is arrested. U.S. v. Di Re, 332 U. S, 581, 68 S. Ct. 222 (1948); Morales v. New York, 396 U.S. 102, 905. Ct. 291 (1969).

When an arrest is illegal, the evidence thereby obtained is inadmissible. United States v. Di Re, 332 U.S. 581, 68 S. St., 222 (1948); Johnson v. United States, 333 U.S. 10, 92 L. Ed 436, 68 S. Ct 367 (1948); Giordenello v. United States, 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245 (1958); Henry v. United States, 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. (1959); Rios v. United States, 364 U.S. 253, 4 L. Ed. 2d 1688, 80 S. Ct. 1431 (1960); Beck v. Ohio, 379 U.S. 89, 13 L. Ed 2d 142, 85 S. Ct. 223, 3 Ohio Misc. 71, 31 Ohio Op. 2d 80 (1964).

Appellant was not free to leave; he was arrested without probable cause. His arrest was unconstitutional; thus the fruit of the search of his shoe was inadmissible.

The verdict must be overturned.

CONCLUSION

The verdict should be overturned.

RESPECTFULLY SUBMITTED,

EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Vernon R. Cotten, 205 East Main Street, Carthage, MS 39051, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: December 5, 2008.

Edmund J. Phillips Jr.

EDMUND J. PHILLIPS, JR.
Attorney for Appellant