



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-KA-01776-COA

CHRISTOPHER LASHON JOHNSON

VS.

STATE OF MISSISSIPPI

FILED

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APPELLANT

APPELLEE

APPELLANT'S BRIEF

APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI
CAUSE NO. CV08-534(G)M

ORAL ARGUMENT REQUESTED

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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 Court of Appeals may evaluate possible disqualification or recusal:

- (a) Christopher Lashon Johnson
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- (b) Judge Thomas J. Gardner, III
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- (c) Honorable Paul Gau
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This the 15th day of March 2010.

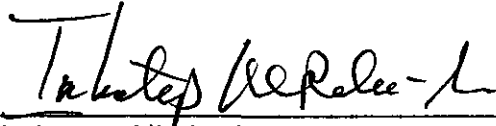

Imhotep Alkebu-lan

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STATEMENT OF THE ISSUE

- I. **THE TRIAL COURT REVERSIBLY ERRED IN DENYING JOHNSON'S MOTION FOR POST-CONVICTION RELIEF.**
- II. **THE TRIAL COURT SHOULD HAVE GRANTED JOHNSON'S MOTION TO RECUSE.**

STATEMENT OF THE CASE

On November 3, 2004 a jury convicted Christopher Johnson of Depraved Heart in cause number CR2002-168. The Circuit Court of Monroe County sentenced Johnson on November 4, 2004 to serve a term of life in the Custody of the Mississippi Department of Corrections. This Court issued its Mandate affirming the conviction on March 20, 2007, *Johnson v. State*, 950 So. 2d 217 (Miss. Ct. App. 2006). After timely filing his Motion for Post-Conviction Relief, the Supreme Court of Mississippi, on July 17, 2008, granted Johnson a hearing on his Motion for Post-Conviction Relief. In its January 9, 2009 Order requiring the State to file a written response to Petitioner's Motion for Post-Conviction Relief, the trial stated that but for the Supreme Court granting leave to file his Petition in the trial court itw would have summarily dismiss the Petition¹. On January 21, 2009 the court filed its Order denying Johnson's Motion to Recuse². After the hearing, on September 29, 2010,. the Circuit Court of Monroe County issued its Order Denying Petition for Post-Conviction Relief³. Johnson timely filed his Notice of Appeal on October 28, 2009⁴.

¹ R.E. 30-33. In this Brief, R.E. refers to the Record Excerpts Page. The record page is cited as Volume:Page:Line(s).

² R.E. 45.

³ R.E. 54.

⁴ R.E. 58-59.

STATEMENT OF THE FACTS

Jamine Deloach was shot and killed at an auto sound system show and contest in Aberdeen, Monroe County, Mississippi on April 14, 2002. A large crowd had gathered when shots were fired at the end of the contest. At trial, in their case in chief, the State called five eyewitnesses. At the evidentiary hearing on Johnson's Motion for Post-Conviction Relief, three of these witnesses testified for Johnson and recanted their trial testimony.

SUMMARY OF THE ARGUMENT

The trial court clearly erred in denying Johnson's Motion for Post-Conviction Relief. The recanted evidence that Johnson could have had a cell phone in his hand and could not have fired in the air was sufficient to cause the trial court to be satisfied that the trial testimony was untrue and that there is reasonable probability that a different result would have come from granting a new trial.

The trial court error in denying Johnson's Motion to Recuse. A reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.

ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED IN DENYING JOHNSON'S MOTION FOR POST-CONVICTION RELIEF.

THE LAW

When reviewing a trial court's decision to deny a petition for post conviction relief, this Court will not disturb the trial court's factual findings unless they are found to be clearly

erroneous⁵ However, where questions of law are raised, the applicable standard of review is de novo⁶.

THE FACTS

At trial, Warren G. Cousin, Jr. testified that he saw Johnson fire a shot in the air. Several guys were pulling at Johnson and as his arm came up the gun went off again firing several more shots. At the hearing, Cousin testified that the first shot in the air did not hit anyone⁷. After firing one shot Johnson went to help his friend. Cousin then heard other shots in rapid succession and it could not have been Johnson firing⁸.

Cheryl Cousin testified at trial that she saw Johnson with a gun. She heard a shot first and then saw Johnson bring his arm down. She then turn to run to her car where she heard several more shots. At the hearing, she testified that the gun fire was coming from Johnson's vicinity⁹. She also testified that the black object she saw in Johnson's hand could have been a cell phone¹⁰.

At trial, Perry McAllister testified that he saw a black guy fire two shots in the air. As a white guy was pulling the black guy back McAllister could not tell who had the gun because they were falling back. McAllister also testified he talked to Johnson after the

⁵ *Jordan v. State*, 21 So. 3d 697 (Miss. Ct. App. 2009) citing *Brown v. State*, 731 So. 2d 595, 598 (¶ 6) (Miss. 1999).

⁶ *Id.*

⁷ 1:5:5-10.

⁸ 1:5:11-18.

⁹ 1:12:5-12.

¹⁰ 1:12:13-18.

incident. Johnson told him that he fired in the air but then some one took the gun as he was falling back. At the evidentiary hearing, McAllister testified he did not have his glasses on at the time¹¹. A black guy and a white guy were wrestling over a gun. He saw a gun shot in the air, then a bullet hit the wall next to him and he started running¹².

Bruce Gunn testified at trial that Johnson fired two shots in the air and then into the crowd. He saw Johnson after the incident and Johnson said he fired only one shot in the air.

William Martin testified at trial that he did not know Johnson. The guy doing the shooting had a hat on. Martin could not see the shooter's eyes.

Shortly after the shooting, Johnson voluntarily took a gun shot residue test to determine if he recently fired a gun. The test results were negative.

ANALYSIS

The recanted testimony of Warren and Cheryl Cousin and Perry McAllister were not known to Johnson at the time of his trial. If the jury had heard the recanted testimony, particularly that the object Johnson had in his hand could have been a cell phone, and that McAllister did not have his glasses on at the time of the shooting, there is a reasonable probability that a different outcome would result.

The trial court stated its factual findings in denying Johnson's Motion¹³. The trial court found that Johnson's witnesses expressed doubt but not that their testimony was

¹¹ 1:16:25-29; 1:17:1.

¹² 1:17:14-21.

¹³ 1:34:27-29; 1:35:-1-29. 1:36:1.

incorrect. The trial court's factual findings are clearly erroneous.

The trial court's factual findings belie what it found to be the evidence of what Johnson had in his hand could have been a cell phone. This evidence was sufficient to cause the court to be satisfied that the trial testimony was untrue and that there is a reasonable probability that a different result would come from granting a new trial. In the interest of justice, the Court must vacate the trial court's findings and grant Johnson a new trial.

II. THE TRIAL COURT SHOULD HAVE GRANTED JOHNSON'S MOTION TO RECUSE.

THE LAW

The Mississippi Supreme Court has held the law surrounding the recusal of a judge in Mississippi is well settled. Under Canon 3 of the Code of Judicial Conduct, an appellate court, in deciding whether a judge should have disqualified himself from hearing a case uses an objective standard. A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standard and is consistent in the application. This Court presumes that a trial judge is qualified and unbiased, and this presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption. When a judge is not disqualified under the constitutional or statutory provisions[,] the decision is left up to each individual judge and is subject to review only in a case of

manifest abuse of discretion¹⁴.

THE FACTS

After receiving Johnson's Motion for Post-Conviction Relief and the Mississippi Supreme Court Order granting Johnson leave to proceed on his motion in the trial court, the trial court Order issued its November 26, 2008 ordered the State to file a written response to Johnson's Motion within sixty (60) days of the filing of the Order. The Court's Order stated the court would not "summarily dismiss" the Motion and pursuant to applicable statute, the State must file an answer before further proceedings may be had.

ANALYSIS

It is reasonable for one to conclude that but for the Mississippi Supreme Court Order granting Johnson leave to proceed in the trial court on his Motion for Post-Conviction Relief, the trial court would have "summarily dismissed" Johnson's Petition. This dismissal would have come before the trial court heard any of Johnson's evidence the Mississippi Supreme Court found would justified conducting a hearing.

Where the trial court would have "summarily dismissed" Johnson's Petition, but for the Mississippi Supreme Court directive, and without hearing any evidence, a reasonable person would harbor doubts about the trial court's impartiality of whether Johnson's evidence warranted the granting of a new trial. The trial court's subsequent denial of Johnson's Motion, in light of evidence the trial court admittedly found was sufficient to cause the court to be satisfied that the trial testimony was untrue and that there is a reasonable probability that a different result would come from granting a new trial, is further

¹⁴ *Tubwell v. Grant*, 760 So. 2d 687, 689 (¶ 7) (Miss. 2000) (internal quotations and citations omitted).

proof the trial court should have granted Johnson's Motion to Recuse.

As a result, this Court should grant Johnson a new trial. In the alternative, in the interest of Justice, this Court should enter an Order directing a new evidentiary hearing before a new, impartial trial judge.

CONCLUSION

The trial court's factual finding were clearly erroneous. Johnson could have had a cell phone in his hand instead of a gun. A different result than Johnson's conviction would come from granting a new trial.

It is reasonable for one to conclude that but for the Mississippi Supreme Court Order granting Johnson leave to proceed in the trial court on his Motion for Post-Conviction Relief, the trial court would have "summarily dismissed" Johnson's Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the foregoing was mailed first class, postage prepaid, to the following individuals:

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This the 15th day of March 2010.


Imhotep Alkebulan