IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-KA-00694-COA
NO. 2009-KA-00695-COA

REGINALD SHELTON, and
CALVIN P. SHELTON, JR. — APPELLANTS

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

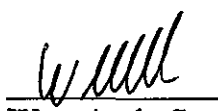
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Reginald Shelton
3. Calvin P. Shelton, Jr.

THIS ___ day of July, 2009.

Respectfully submitted,

REGINALD SHELTON, and
CALVIN P. SHELTON, JR.

By: 

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STATEMENT OF THE CASE

The appeal of these consolidated cases proceeds from the Circuit Court of Madison County, Mississippi, wherein the appellants Calvin and Reginald Shelton were convicted of possession of more than five (5) kilograms of marijuana in a jury trial held January 13-14, 2009, the Honorable William E. Chapman, III, Circuit Judge, presiding. Both appellants were sentenced to twenty-five years imprisonment, with five years of supervised release and both are presently incarcerated with the Mississippi Department of Corrections.

FACTS

On February 20, 2006, Calvin Shelton and his brother Reginald Shelton, both of Atlanta, were traveling southbound on Interstate 55 between Gluckstadt and Madison at about 2:15 a. m. [T. 6, 9, 13-14, 110, 143-45]. The car was rented and Calvin was driving. [T. 6, 146].

Officer Robert Sanders with the Madison County Sheriff's Office Interstate Crime Enforcement Unit was sitting on the side of the road at or near mile marker 112 near Gluckstadt. [T. 12, 14, 144-45]. Sanders could not recall on which side of the road he was parked. [T. 179].

The Shelton brothers were not speeding nor violating any other traffic law when Sanders first observed them. [T. 13, 180-82, 231-34]. Nevertheless, Sanders arbitrarily pulled out onto the highway and followed the Sheltons for the stated purpose of observing the driver and to "monitor their travel". [T. 25, 179].

Within two miles of pulling out behind the Sheltons, Sanders said he observed the Sheltons' vehicle "failing to maintain a single lane... [the] vehicle was observed weaving off to the shoulder of the road to the center lane" twice and Sanders initiated a traffic stop. [T. 7-8]. Sanders said, the driver "actually went over to the shoulder of the road ... [a]nd then whenever he corrected he actually went to the center." [T. 15]. Again, specifically, Sanders said the Shelton vehicle "crossed onto the fog line, then back over to the center line." [T. 183]. Sanders said he stopped the Sheltons for the purpose of

issuing a careless driving ticket and to make sure it was safe for them to continue down the road and that the driver was not too tired to drive or intoxicated. [T. 179, 187].

The Sheltons both testified that Sanders pulled up beside them on the highway, passed and then turned on his blue lights to effectuate the stop. [T. 33, 242]. Sanders denied pulling up beside the Sheltons' car. [T. 185]. In either event, the Sheltons pulled over and Sanders came in behind.

Sanders asked Calvin the driver to step to the rear of their vehicle with his drivers license and rental agreement. [T. 34, 145-47]. Sanders said he knew the car was a rental after he noticed a bar code on the window. [T. 147].

Calvin exited the vehicle and produced a valid Georgia drivers license and a valid rental contract. [T. 8-9, 15, 145-47]. Sanders said he had observed the brothers rummaging around for the rental papers and acting "nervous", which Sanders described as failing to make eye contact with the officer. [T.9-10, 190].

Sanders asked Calvin where the two had been, and was told they attended a wedding in New Mexico and were traveling back home to the Atlanta area. [T. 9, 190]. Sanders said he performed a pat down of Calvin and noticed a bulge in his pocket which Calvin reportedly said was "a couple of dollars." [T.10]. The amount of money was $2674 which Calvin said he earned from working. [T. 39].

Calvin said Sanders' first question was whether Calvin had been arrested before. [T. 35-36]. Calvin answered in the affirmative. [T. 11-12].

Sanders then approached the passenger side of the car to engage Reginald. [T. 9]. When asked about their travel, Reginald told Sanders the two had been in New Mexico visiting friends. [T. 10, 190, 231]. Again, Sanders said that Reginald avoided making eye contact with him. *Id.* [T. 150, 192].

Officer Sanders then returned to the back of the Sheltons' vehicle where Calvin awaited. [T. 11]. Sanders then asked for consent to search the vehicle which was denied. [T. 11, 35-36, 151-52].

At this point Sanders said the purpose of the stop was not over, because, of the "conflicting" stories, wedding versus visiting friends. [T. 19]. Sanders did not conduct any field sobriety tests and never asked Calvin nor Reginald if they had been drinking. [T. 15, 187-88].

Sanders then went and retrieved a narcotics sniffing canine and walked the dog around the Sheltons' car. [T. 12, 13, 153-54]. The dog alerted on the trunk area by scratching. *Id.* Prior to this, Sanders had called for a backup unit and Officer Pecu arrived with his canine. [T. 11].

Sanders said he opened the trunk of the Sheltons' vehicle and found a duffle bag with "twenty-five" pounds of marijuana. [T. 13, 154]. The weight assigned subsequently by the Mississippi Crime Lab was eighteen pounds. [T. 175, 219]. The state never explained the discrepancy or how seven pounds of marijuana came up missing.

Sanders also said he found a black notebook in the back seat of the Shelton's car

in which he said there was an inscription, "keep quiet, they may have a bug in the car." [T. 163-66]. The notebook, although said to have been seized by Sanders along with the alleged marijuana, could not be located. [T. 200]. The Sheltons denied the existence of the black notebook. [T. 246-47].

The Sheltons denied that their vehicle was weaving and denied any knowledge of any marijuana in the car. [T. 32, 40]. Reginald said they did not even know what they were being charged with until their initial appearance. [T. 236-37, 239].

Sanders issued a traffic violation affidavit for "careless driving." [T. 211]. There was no video of the incident as Sanders said his camera was being repaired at the time. [T. 26, 200].

SUMMARY OF THE ARGUMENT

The officer's stop was pretextual and the scope of the stop was exceeded making the subsequent search and seizure illegal. The state failed to present a sufficient chain of custody for the alleged marijuana because the evidence was not labeled. The jury did not receive a valid requested defense theory jury instructions and the verdict was not supported by the weight of evidence.

ARGUMENT

ISSUE NO. 1: **WHETHER THE SHELTONS' MOTION TO SUPPRESS SHOULD HAVE BEEN SUSTAINED?**

Standard of Review

Under this issue there is a mixed standard of review. *Floyd v. City of Crystal Springs*, 749 So.2d 110, 113(¶ 11) (Miss.1999). For reasonable suspicion and probable cause, the review is *de novo*. *Id.* The trial court's factual findings made in support of its legal conclusions are reviewed under a clearly erroneous standard. *Id.* Otherwise, evidentiary rulings are reviewed on a standard of abuse of discretion and any resulting prejudice. *Id.* See also, *Dies v. State,* 926 So. 2d 910, 917 (¶ 20) (Miss. 2006).

Discussion

The Fourth Amendment to the United States Constitution and Article 3, § 23 of the Mississippi Constitution of 1890 secure an individual's right to be free from unreasonable searches and seizures. *Floyd* 749 So.2d at 114 (¶ 14). The purpose of the "Fourth Amendment is to 'shield the citizen from unwarranted intrusions into his privacy.' " *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253 (1958). The Fourth Amendment is incorporated to states through the Fourteenth Amendment. *U. S. v. Grant*, 349 F.3d 192, 196 (5th Cir.2003).

Except for a few specifically established exceptions, warrantless searches are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507 (1967).

Contraband that is discovered during an unreasonable, illegal, search may not be admitted into evidence at a subsequent trial. *Carney v. State*, 525 So.2d 776, 785 (Miss.1988), *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868 (1968). There is a rule of strict construction of search and seizure provisions in favor of the individual and against the state. *Barker v. State*, 241 So. 2d 355, 358 (Miss. 1970).

One exception to the warrant requirement is provided, due to impracticalities, for routine traffic stops which are treated as non-custodial investigatory stops under *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868 (1968). Traffic stops are seizures for the purposes of the Fourth Amendment. *Couldery v. State*, 890 So.2d 959, 962 (¶ 8) (Miss. Ct. App.2004), *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005).

That which justifies an investigative stop is a case by case determination. *Singletary v. State*, 318 So.2d 873, 877 (Miss. 1975). The test nevertheless is one of reasonableness and the United States Supreme Court has stated that, as a general rule, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996).

As stated in *Floyd, supra*, "given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest." 749 So.2d at 114 (¶16). Citing *Singletary v. State*, 318 So.2d 873, 876 (Miss.1975). See also *McCray v. State*, 486 So.2d 1247, 1249

(Miss.1986) and *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Under *Terry* there is a two-tiered "reasonable suspicion" inquiry under which a deciding court asks whether a officer's conduct was (1) justified at its inception; and (2) whether the search and seizure were reasonably related in scope to the circumstances which initially justified the stop. *Floyd,* 749 So.2d at 114 (¶17), *Terry*, 392 U.S. at 20, 88 S.Ct. 1868.

There is a requirement that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Unless there is additional articulable, reasonable suspicion, an individual's detention must end when the officer's suspicion is confirmed or disproved. *Id.* "At that point, continuation of the detention is no longer supported by the facts that justified its initiation." *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir.1993).

Under the automobile exception police may conduct a warrantless search of an automobile and any containers therein if they have probable cause to believe that it contains contraband or evidence of crime. *California v. Acevedo*, 500 U.S. 565, 576, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), *Millsap v. State*, 767 So.2d 286, 292 (Miss. Ct. App. 2000).

Since the present case involves a narcotics trained dog, it is pertinent to note that "free-air" dog sniffs do not generally constitute a search or seizure under the Fourth

Amendment. *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.1993), *United States v. Place*, 462 U .S. 696, 707 (1983). So, police do not generally need probable cause to run a dog around the exterior of a car. *United States v. Duffaut*, 314 F.3d 203, 208 (5th Cir.2002), *United States v. Hernandez*, 976 F.2d 929, 930 (5th Cir.1992), *United States v. Ibarra*, 493 F.3d 526, 531 (5th Cir.2007).

A. Application of the First Prong of the Terry Test

Here in the Sheltons' case, there was no justification for the stop of the vehicle from the outset. There was no "objectively reasonable suspicion" that illegal activity, specifically a traffic violation, occurred, or was about to occur. The stop was pretextual.

Sanders said the stop of the Shelton's vehicle was for failing to maintain a single lane of traffic. [T. 7-8]. However, what Sanders described was a vehicle remaining in its lane of traffic, specifically stating, "[the] vehicle was observed weaving off *to* the shoulder of the road *to* the center lane" twice. *Id.* Sanders said, the driver "actually went over *to* the shoulder of the road ... [a]nd then whenever he corrected he actually went *to* the center." [T. 15]. Sanders said the Shelton vehicle "crossed *onto* the fog line, then back over *to* the center line." [T. 183]. Sanders did not describe the vehicle leaving its lane of traffic. Therefore, there was no legal basis for the stop.

Careless driving is a statutory offense, defined in Miss. Code Ann. § 63-3-1213 (1972):

> Any person who drives any vehicle in a careless or imprudent manner, without due regard for the width, grade, curves, corner, traffic and use of the streets and highways and all other attendant circumstances is guilty of careless driving. Careless driving shall be considered a lesser offense than reckless driving.

In *Adams v. City of Booneville*, 910 So.2d 720, 722-25 (Miss. Ct. App. 2005), the issue was whether there was reasonable suspicion for the stop of the defendant's vehicle. It was New Year's Day around 2:30 a.m., an officer observed the Adams "in the middle of the two northbound lanes on a four lane road". By the time the officer stopped Adams, Adams had made a left turn into a parking lot. *Id.* The officer proceeded to make a traffic stop in order to issue a citation for careless driving. *Id.* Adams exited his vehicle obviously drunk, his speech was slurred and he flunked three field sobriety tests as well as a subsequent Intoxilyzer test. *Id.* So, he was charged with DUI also. *Id.*

Adams argued that the stop was illegal, and that he was merely changing lanes and making a legal left turn. The *Adams* court concluded that the defendant' traveling in the middle of the two northbound lanes met the statutory definition of careless driving. *Id.* at 724.

The facts of the present case are not comparable to *Adams*, the Sheltons were never described as driving in the middle of the road. The *Adams* court said that case was a "close call". 910 So.2d 725 (¶18). This Sheltons' case is not.

In *Henderson v. State*, 878 So.2d 246, 247(¶¶ 7-8) (Miss. Ct. App.2004), a police officer noticed Henderson driving his vehicle "erratically." The officer stated that

Henderson almost hit a curb, stopped at a stop sign, then proceeded through the intersection and almost hit another curb." The *Henderson* court concluded the officer's observations were enough for him to reasonably and objectively conclude that careless driving had taken place. *Id.*

What distinguishes the present case from *Henderson* is first, Shelton was not described as driving erratically, secondly, there is a distinct difference between a curb and white line on the highway. A curb is a physical barrier which could damage a vehicle or cause it to lose control, a curb is not ever intended to be crossed. The white line on a highway is informational, perfectly safe and designed to be crossed over.

However, the officer did not describe the Shelton's vehicle crossing the white line. Without a traffic violation being described by Sanders in the present case, there was no objective basis for the stop. If the facts are such that what the police observed did not constitute a violation of the cited traffic law, there is no "objective basis" for the stop, and the stop is illegal. *U.S. v. Escalante*, 239 F.3d 678, 680-81 (5th Cir.2001).

Without a reasonable basis for the stop, this case is governed by decision in which the Supreme Court and the Court of Appeals "have ruled that actions which do not constitute criminal offenses are not objective bases for a stop, and, therefore, the stops are illegal." *McNeely v. State*, 277 So.2d 435 (Miss.1973); *Couldery v. State*, 890 So.2d 959 (Miss. Ct. App.2004).

In *Couldery*, the officer initiated a traffic stop for driving in the left-hand lane on

the interstate. After reviewing the statutory offenses the officer put forth as the basis for the citation, the Court concluded that the actions of the driver did not constitute a criminal offense, that driving in the left-hand lane on the interstate was not illegal. Therefore, the officer's misapprehension of the law precluded the stop from being valid. *Couldery,* 890 So.2d at 967.

Here, the evidence is that officer Sanders was acting on a hunch, or was on a fishing expedition, from the moment he pulled onto the highway. What Sanders said he observed was not a moving traffic violation because the Shelton's vehicle never left its lane of traffic, it only moved *to* the fog line and *to* the center line. Under a totality of the circumstances, Sanders did not have a reasonable, objective, basis that Calvin Shelton had committed the traffic offense of careless driving. Therefore, the alleged marijuana in this case is the fruit of a search incident to an illegal stop in violation of the Fourth Amendment right to be free from illegal search and seizure. See *Wong Sun v. United States*, 371 U.S. 471, 485-86, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963), and *Couldery,* 890 So.2d at 967.

B. The Second Prong of the Terry Test

If probable cause is proven, then a non-custodial investigatory stop should, nevertheless, not exceed the scope of the initial stop, i. e., the investigation should reasonably relate to the circumstances initially giving rise to the stop. *Terry,* 392 U.S. at

19-20, 88 S.Ct. 1868. Any detention of the individual must be "temporary and last no longer than is necessary to effectuate the purpose of the stop ...." *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir.2004) . If additional reasonable suspicion arises in the course of the stop, and before the initial purpose of the stop has been fulfilled, the detention may continue until the officer confirms or dispels the new reasonable suspicion. *Brigham*, 382 F.3d at 507. The permissible scope of the stop may expand to include the officer's investigation of the newly suspected criminal activity. *U.S. v. Kye Soo Lee*, 898 F.2d 1034, 1040 (5th Cir.1990) and *U.S. v. Santiago*, 310 F.3d 336, 340 (5th Cir.2002)]. Here it is the Sheltons' position that even if the court finds probable cause, Officer Sanders' detention of them exceeded the purpose of the initial stop and there was no legal basis to expand the investigation.

In *Jaramillo v. State* 950 So.2d 1104, 1106-07 (Miss. Ct. App. 2007) recognized that if a traffic stop is "prolonged unreasonably for the purpose of a canine sniff [a defendant may be] able to challenge the constitutionality" of any search resulting therefrom.

Here, since the purpose of the stop had been completed, namely, to check for intoxication or fatigue and issue a citation, the authority for the stop had ceased at the point Sanders saw that Calvin was not drunk or tired and had presented valid documentation. At that point the Sheltons should have been allowed to go on their way. Yet Sanders questioning of the Sheltons was a classic set up. There was no need for the

officer to ask where the defendants were they were going. Admittedly, the officer could make conversation to observe the driver, but there was no reason to ask the passenger where he had been, except to create the conflicting answer. It is common knowledge that two people asked the same question will rarely give an exactly identical answer. So, conflicting answers is not a reliable indication of possible illegal activity.

Sanders' pretextual intent is obvious. Even though he said he stopped the Sheltons on the suspicion of intoxication, he never asked if the driver nor the passenger were drinking and never performed any field sobriety tests. [T. 15, 187-88].

The Fifth Circuit has been very clear in this area, that independent probable cause to search the vehicle and its containers was needed after the purpose of the initial stop had been completed. See *U. S. v. Brigham*, 343 F. 3d 490, 499-505 (5th Cir. 2003), where the court found that detention and questioning following a clear computer and documentation check resulted in a coerced and invalid consent to search of a stopped motor vehicle. See also, *U. S. v. Dortch*, 199 F. 3d 193 (5th Cir. 1999) and *U. S. v. Santiago*, 310 F. 3d 336 (5th Cir. 2002).

The facts of *Dortch* are almost identical to the present case. At 11:30 p.m., two highway patrol officers stopped Dortch and his girlfriend, purportedly for traveling too close to a tractor-trailer. Dortch produced a valid license and car rental papers that were in another person's name. 199 F. 3d 195-96. Dortch was patted down search and he was not carrying a weapon. *Id.*

Dortch and the passenger gave inconsistent answers about the person who had rented the car. *Id.* Plus, even though Dortch said that the two had been in Houston, the rental papers showed was been rented out of Pensacola. Dortch said there was no luggage in the car. *Id.*

One officer questioned Dortch, the other took Dortch's license and rental papers and called in a computer check for warrants and to check on whether the car was stolen. *Id.* Contemporaneously, a request was made to search the vehicle. Dortch consented to a search of the trunk but not the rest of the vehicle, no search of the vehicle was conducted at that time.

However, the officers detained Dortch and the car and performed a canine search of it. *Id.* Dortch's driver's license and rental papers remained with the officers on a clipboard. The dog alerted on the driver's side door and seat, but no contraband was found in the car. *Id.* The officers then decided that contraband could be being held by the girlfriend who had been sitting in the driver's seat. Then one officer "conducted a more thorough search of Dortch's person" and felt a "hard bulge in the crotch area that did not appear to be 'part of his [Dortch's] body'" which ended up being a plastic bag with 137.35 grams of cocaine. *Id.*

Dortch, like the Sheltons here, contended that once the officers resolved the traffic violation and received information of no outstanding warrants, the justification for the stop ended, and the officers should have allowed him to leave. *Id.* at 197. Dortch did not

challenge the initial stop. *Id.*

In ruling that Dortch's stop exceeded its intended purpose the Fifth Circuit noted in regard to the conflicting explanations about the rental papers that, "there was no reasonable or articulable suspicion that Dortch was trafficking in drugs." The conflicting answers, even if suspicious, "gave rise only to a reasonable suspicion that the car might have been stolen." *Id.* at 199.

The *Dortch* court concluded that "the justification for detention ceased once the computer check came back negative." *Id.* at 200. At that point, Dortch's detention and seizure became illegal. The *Dortch* court said, "[a]ny probable cause established as a result of the canine search was subsequent to the unlawful seizure." *Id.* Dortch's conviction was reversed and the Sheltons' convictions should likewise be reversed for the same reasons.

The officer here said that the Sheltons appeared "nervous." [T. 9, 10, 190]. However, according to *Dortch, supra*, rejected the same argument to support reasonable suspicion of a particular criminal conduct. 199 F. 3d at 199. This finding is consistent with other cases, see *United States v. Jenson*, 462 F.3d 399, 404-406 (5th Cir.2006) (driver taking long time to pull over, combined with talkativeness and nervous behavior, did not create reasonable suspicion of drug trafficking); *United States v. Santiago*, 310 F.3d 336, 340 (5th Cir.2002) (nervousness and conflicting stories from driver and passenger did not create reasonable suspicion to search for drugs).

The other reason Sanders said he decided to detain the Sheltons was because they did not make eye contact with the officer. In several cases, "no-eye-contact" has been held to be an invalid, hence unreasonable, basis for searches and seizures. See *U.S. v. Lamas* 608 F.2d 547, 549-50 (5th Cir. 1979). "We have stated often that, because of the precarious position travelers on our nation's highways would be placed in if avoiding eye contact with an officer could be considered a suspicious reaction, "(t)his particular factor cannot weigh in the balance in any way whatsoever." Citing *United States v. Escamilla*, 560 F.2d 1229, 1233 (5th Cir. 1977) and, *United States v. Lopez,* 564 F.2d 710, 712 (5th Cir. 1977). See also *United States v. Chavez-Villarreal,* 3 F.3d 124, 127 (5th. Cir.1993), and *U.S. v. Nichols* 142 F.3d 857, 871 (5th Cir 1998) ["[O]ur cases establish that avoidance of eye contact is entitled to no weight in the determination of reasonable suspicion."

So, proper application of the two part *Terry* test would require suppression of the drug evidence in this case because there was no probable cause to stop and the scope of the stop was exceeded. The Shelton's respectfully request a reversal and rendering of acquittal or with remand for a new trial.

ISSUE NO. 2.: WHETHER THE STATE PROVED CHAIN OF CUSTODY OF THE ALLEGED DRUG EVIDENCE?

There were defense motions to exclude the drug evidence here on the basis that the state failed to prove a chain of custody and because there was no discovery provided

that the evidence was turned over to another officer prior to going to the crime lab. [T. 154-57, 167-68].

Sanders said he gave twenty-five pounds of marijuana to an officer Tucker. [T.197-99]. Yet, neither Sanders nor Tucker initialed or tagged the evidence. *Id.* There was no tag on the dope bags at all, there was a crime lab case number tag on the duffle bag, and there was an evidence submission form from the crime lab. *Id.*

The witness from the crime lab said the marijuana evidence was not tagged nor labeled prior to coming to the crime lab contrary to standard procedure. There were no submitting officer initials so the lab could not tell where the evidence came from. [T. 220-22].

As pointed out in *Anderson v. State*, 904 So. 2d 973, 979 (Miss. 2004) chain of custody issues such as these concern admissibility and are governed by Miss R. Evid. 901(a), "which requires the proponent to produce 'evidence sufficient to support a finding that the matter in question is what its proponents claim.'" M.R.E. 901(a).

The *Anderson* court referred to *Gibson v. State*, 503 So.2d 230, 234 (Miss.1987), wherein the ruling was that the "test for the continuous possession [i.e., 'chain of custody'] of evidence is whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." *Anderson* 904 So. 2d 979 There normally is a "presumption of regularity" (quoting *Nix v. State*, 276 So.2d 652, 653 (Miss.1973).

The defendants in this case dismantled the presumption of regularity with the crime lab witness who stated that the regular procedures were not followed. Moreover, there were discrepancies in the amount of marijuana involved. [T. 175, 219]. Missing drugs and missing labels clearly establish more than an inference of probable tampering.

Here there was a clear lack of reliability in the circumstances surrounding the handling of the evidence sought to be introduced. In *Nix v. State*, 276 So. 2d, 652, 653 (Miss. 1973), the Mississippi Supreme Court looked to *Gallego v. U.S.*, 276 F.2d 914 (9th Cir. 1960), where it was explained that a court must review, among other things, "the circumstances surrounding the preservation and custody" of the evidence.

Looking at the circumstances in the present case, the unlabeled evidence to another officer was never shown to have been secure. It was never shown that the alleged evidence taken on the side of the highway was the same evidence which was brought into the trial of this case.

This is not a case, such as *Ellis v. State*, 934 So.2d 1000 (Miss.2006), where there is perhaps a simple, excusable, gap in the chain of custody. Here Officer Sanders, admitted to not labeling the drug evidence and not showing that the evidence was secure between exchanges in the chain of custody. So, that the reasonable conclusion should be that the evidence was mishandled and not shown to be that which it is purported to be under Rule 901(a).

In *Butler v. State*, 592 So.2d 983, 984-85 (Miss.1991), the Court explained that an

evidentiary predicate must include proof that will "support a finding that the proffered item is what it is said to be"which should include "testimony along the several links of the chain of the manner of safekeeping and that there has been no change or alteration of the object" See *Monk v. State*, 532 So.2d 592, 599 (Miss.1988). The *Butler* court reiterated that the state's burden is to show that there is no "inference of material tampering with or (deliberate or accidental) substitution of the evidence"; because if there is a "reasonable inference of tampering substitution, the proponent's proof is insufficient" to conclude that the evidence "is what its proponent claims." [Citations omitted].

Therefore, the trial court abused its discretion in admitted the drug evidence the Sheltons are entitled to a new trial.

ISSUE NO. 3: **WHETHER THE SHELTONS WERE WRONGFULLY DENIED A THEORY OF DEFENSE INSTRUCTION?**

A main part of the Sheltons' theory of defense in this case is that Officer Sanders conducted an illegal search and planted the dope evidence. To this end defense counsel requested two instructions explaining the prohibition against unreasonable search and seizure as D-10 and D-11.[1]

1

D-10: Under the Fourth Amendment of the United States Constitution, the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [R. 31]. D-11, is

Criminal defendants are entitled to jury instructions embodying their theories of defense if the same have a factual basis. *Welch v. State*, 566 So.2d 680, 684 (Miss. 1990). Failure to afford the same constitutes reversible error. *Id.*

In *Chinn v. State* 958 So.2d 1223 (Miss. 2007), the Court made it clear that "every accused has a fundamental right to have [his] theory of the case presented to a jury, even if the evidence is minimal. The trial court's denial of the accident instruction in *Chinn* was determined to be a denial of a fundamental right requiring reversal. *Id.*

> According to *O'Bryant v. State*, 530 So. 2d 129, 133 (Miss. 1988):
> It is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based on meager evidence and highly unlikely to be submitted as a factual issue to be determined by the jury under proper instructions of the court. This court will never permit an accused to be denied this fundamental right.

A new trial is the requested relief.

ISSUE NO. 4: WHETHER THE VERDICT IS SUPPORTED BY THE WEIGHT OF EVIDENCE?

The officer could not remember from when he pulled out onto the highway. [T. 179]. The evidence was not labeled. [T. 154-57, 167-68]. Seven pounds of alleged marijuana was missing. [T. 175, 219]. The black notebook got lost or never existed. [T. 200, 246-47]. The officer said a law was violated, but the defendant's car never left its lane of travel. [T. 15, 183]. The officer said under oath that he stopped the vehicle on the

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identical except it references Art. 3, § 23 of the Miss. Const. of 1890. [R. 32].

suspicion of intoxication or fatigue, yet he never asked about drinking nor conducted any field sobriety test. [T. 15, 187-88]. The officer used invalid reasons (nervous and no eye contact) to search the defendants' vehicle and he officer asked pointless questions to create the pretext for a search. [T. 9-10, 190].

This case came down to whether or not the jury believed Officer Sanders or the Sheltons. Normally, conflicting testimony is relegated to the jury for resolution. This is as it should be, in most cases. However, there is a dividing line when discrepancies are so conflicting, in the state's case in chief, that this Court has to say that a verdict of guilty cannot be supported. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993) In this case the questionable testimony of officer, the missing and unlabeled evidence are, at best, unreliable and insufficient to support the conviction.

It is the appellant's position that the conviction in this case cannot, in the interest of justice, be supported by the state's evidence which viewed in the light most favorable to the state, should have lead reasonable jurors to have reasonable doubt about the Sheltons' guilt. It follows that the jury's verdict is not supported by credible evidence and is contrary to the overwhelming weight of evidence. So, the Sheltons respectfully requests that the Court reverse the convictions, and order a new trial.

In *Lyle v. State*, 8 So. 2d 459, 460 (Miss. 1942), the court recognized:

> the rule that where, upon the entire record, it is manifest that sound and reasonable men engaged in a search for the truth, uninfluenced by bias or other improper motives or considerations, could not safely accept and act upon the

> evidence I support of an issue as true, a jury will not be permitted to consider it.

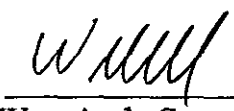
In *Lyle*, the Supreme Court reversed and rendered an arson conviction based on weak improbable testimony of the state's key witness. *Id.* The Sheltons request the same relief, or alternatively, a new trial; because, reasonable jurors could not "safely accept and act upon" the testimony of Officer Sanders as it was presented in the trial of this case.

CONCLUSION

The Sheltons are entitled to have their convictions reversed and rendered or remanded for a new trial.

Respectfully submitted,

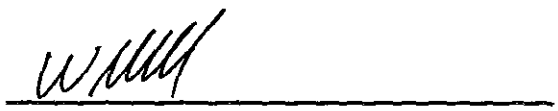
REGINALD SHELTON, and
CALVIN SHELTON

By: 

Wm. Andy Sumrall, Counsel for Appellants

CERTIFICATE

I, Wm. Andy Sumrall, do hereby certify that I have this the 23 day of July, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. William E. Chapman, III, Circuit Judge, P.O. Box 1626 Canton, MS 39046, and to Hon. Hon. Bryan P. Buckley, Asst. Dist. Atty. Post Office Box 121,Canton, MS 39046, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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