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

APPELLANTS' REPLY BRIEF

Oral Argument Requested

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TABLE OF AUTHORITIES

CASES:

STATUTES

none

OTHER AUTHORITIES

REQUEST FOR ORAL ARGUMENT

Pursuant to M. R. A. P. Rule 34, Appellants respectfully request oral argument. This case involves important Fourth Amendment search and seizure issues and related underlying probable cause factors in traffic stop situations. A decision in this case may also affect the current common law in the area of chain of custody and what is specifically required of law enforcement in the documentation and safe keeping of evidence. Finally, there is an issue of significant import involving theory of defense instructions. The appellants would also like to be heard as to the weight of evidence.

REPLY ARGUMENT

ISSUE NO. 1: *Search and Seizure / Pretextual Stop*

The state failed to show from the record that Officer Robert Sanders objectively observed the commission of a traffic offense prior to conducting the traffic stop in this case, and thus, failed to distinguish this case from the authorities cited by the appellants in their initial brief, including *Couldery v. State*, 890 So. 2d 959 (Miss. Ct. App.2004), which was never referenced by the state.

Even though Officer Sanders did not clearly describe the appellants crossing the fog line, the state cites several cases for the position that "crossing a fog" line can be a valid ground for a stop. Each of the state's cases is distinguishable from the present case.

The facts in *Henderson v. State*, 878 So. 2d 246, 247 (Miss. Ct. App. 2004), are not comparable to the facts here. Henderson was driving in town and "almost hit a curb.

Then Henderson stopped at a stop sign, proceeded through the intersection and "almost hit another curb." *Id.* Henderson was described as "driving his vehicle erratically." *Id.* Almost hitting a curb during in-town driving is a drastically different situation from bumping a fog line while traveling at highway speeds.

In *Saucier v. City of Poplarville*, 858 So. 2d 933, 934 (Miss. Ct. App. 2003), the officer observed Saucier intermittently "increase and decrease her speed and 'bump' the centerline" while traveling slowly, "between fifteen and twenty miles per hour in a thirty-five mile per hour zone." The officer followed Saucier "for about eight miles" and saw Saucier drive "into the center lane" jerking her car back into the right lane. *Id.*

In the present case, there were no speed issues, and the officer did not follow the appellants for any reasonable distance and did not observe them traveling in an incorrect lane. Plus, there was no erratic driving.

The state's citing of *Tran v. State,* 963 So. 2d 1, 13-14 (Miss. Ct. App. 2006), is no help, because, here there is no clear proof that the appellants actually "crossed the fog line" giving probable cause to stop. Without a clear basis, there should be more observation and objective indicia of an actual traffic offense being committed.

The case of *Adams v. City of Boonveville,* 910 So. 2d 720 (Miss. Ct. App. 2005), is easily distinguished as the defendant "was riding in the middle of the two northbound "lanes." The state's reliance on *Guerrero v. State,* 746 So. 2d 940, 941 (Miss. Ct. App. 1999), is, likewise, unpersuasive. Guerrero was described as crossing "the center line

two to three times." *Id.*

The state also failed to show that Officer Roberts' stop of the appellants was anything other than pretextual. Of note, the state suggest that asking a driver where he or she is coming from and going to is within the realm of acceptable police conduct. However, as shown in the record, Roberts used his questioning of the passenger as well as the driver, as a claimed basis for the search. He asked neither if they were tired or had been drinking.

Under the case cited by the state on this point, *U. S. v. Davis,* 61 F. 3d 291, 300 (5th Cir. 1995), questioning during a stop, even of the driver alone, must nonetheless be reasonable. According to *Davis*, "[s]uch questioning is reasonable if the detention continues to be supported by the facts justifying the initial stop." *Id.* Here, since there were no signs of intoxication or fatigue, Roberts continuing interrogation of the driver and occupant on unrelated matters, was patently unreasonable under *Davis*.

The purpose of the stop and surrounding circumstances should guide the court in what is reasonable or not. As established in *U. S. v. Dortch*, 199 F. 3d 193, 199-200 (5th Cir. 1999), which the state failed to distinguish, once the purpose of the stop is complete, which in this case was to issue a careless driving citation, further detention becomes unreasonable and, therefore, unlawful. During the lawful questioning period in the present case, as in *Dortch*, "there was no reasonable or articulable suspicion" that the appellants were "trafficking in drugs." *Id.*

Officer Roberts was on a fishing expedition. Otherwise, the appellants rely on their original arguments and authority.

ISSUE NO. 2: *Chain of custody.*

According to the record, the duffle bag containing the evidence only had a crime lab tag. [T. 197-99, 220-22]. The witness from the crime lab said there was no tag from the Madison County Sheriff's office. *Id.* There were no submitting officer initials according to the crime lab analyst, so neither the court nor the lab could not tell where the evidence came from. *Id.*

The state makes attempt to justify the missing seven pounds of pot by citing *Milliorn v. State,* 755 So. 2d 1217, 1225 (Miss. Ct. App. 1999). In *Milliorn* police said they seized approximately 218 pounds of marijuana, yet the crime lab weighed only 205 pounds, a 13 pound difference. The Court of Appeals said the 5% discrepancy was of little or no consequence. *Id.*

Here the seven pounds of missing drugs from the unlabeled, untagged, evidence constitutes 28% of the initial twenty-five pounds. This is more than five times the missing percentage of drugs in *Milliorn*, hardly a minor discrepancy.

The Shelton brothers clearly met whatever burden they had to show a "reasonable inference of probable tampering with the evidence or substitution of the evidence." *Anderson v. State,* 904 So. 2d 973, 979 (Miss. 2004) . Otherwise, the appellants rely on

their original arguments and authority.

ISSUE NO. 3: *Defense Instructions*

The state missed the point of the appellants' arguments under this issue, and in so doing, misdirects the court from the gravamen of this issue. The appellants never expected the jury to rule on the admissibility of evidence as suggested by the state's argument. The purpose of the requested instructions was to provide the jury with the legal basis of the defense that the search was illegal. Otherwise, the jury may be of the false belief that police can stop and search people without probable cause. The instructions also aid the jury in determining the veracity of the state's witnesses.

Since the instructions were accurate, had a factual basis, and were tendered in support of defense theories, either or both of the instructions at issue should have been given. *Chinn v. State,* 958 So. 2d 1223 (Miss. 2007).

ISSUE NO. 4: *Weight of Evidence*

In this case the questionable testimony of officer, the missing and unlabeled evidence are, at best, unreliable and insufficient to support the conviction. *McClain v. State*, 625 So. 2d 774, 778 (Miss.1993).

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 15th day of September, 2009, mailed a true and correct copy of the above and foregoing Appellants' Reply Brief 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. Stephanie B. Wood, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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