

SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2000-KA-1186-SCT

AQUI RHODES

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

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 disqualification or recusal.

1. State of Mississippi

2. Aqui Rhodes

This 19th day of January, 2010

Respectfully Submitted,

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Miss. R. Evid. 606 (b)

Art. 4, 169 Miss. Constitution 1890

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STATEMENT OF THE ISSUES

- ISSUE NO. 1. WHETHER THE TRIAL COURT ERRED IN NOT ORDERING A NEW TRIAL DUE TO FAILURE TO PROCESS EVIDENCE AND JUROR MISCONDUCT?
- ISSUE NO. 2. WHETHER TRIAL COURT HAS JURISDICTION TO ENTER A CONVICTION ON AGGRAVATED ASSAULT?
- ISSUE NO.3 WHETHER THE ACCUSED HAS BEEN PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL?
- ISSUE NO. 4 WHETHER THE COURT ERRED IN ALLOWING TESTIMONY OF DRUG USAGE BY THE DEFENDANT?
- ISSUE NO. 5 WHETHER THE SUFFICIENCY AND THE WEIGHT OF THE EVIDENCE SUPPORTED THE CONVICTIONS?

STATEMENT OF THE CASE

Aqui Rhodes was convicted in the Circuit Court of Jefferson Davis County, Mississippi on two counts of murder and one count of manslaughter. Hon. Prentiss Harrell presided over the jury trial on March 30-April 1, 2009. Aqui Rhodes was convicted of two counts of murder and one count of aggravated assault. He was sentenced to life imprisonment with the possibility of parole on each murder conviction and twenty years on the aggravated assault, all terms consecutive.

FACTS

Randolph Sands and Robert Mcinnis were killed outside the city limits of Prentiss, MS on July 7, 2006. Responding officers from Jefferson Davis County, Mississippi and the Prentiss police department responded to the dispatch and investigated the incident with the Mississippi Bureau of Investigations.(T84,87,93, 95,104,379). Aqui Rhodes and Demetrius Rhodes were charged with the murder of Sands and McInnis and with aggravated assault on Jason McNair.

Randolph Sands suffered four gunshot wounds, two of which were lethal. Roberto McInnis, who died on the way to the hospital was also shot four times, two of which were lethal. (T215-223,227; 216-20;Exs54,67,68,69,.64,78).

At trial, Jason McNair testified that he, Sands and Mcinnis were drinking and smoking blunts that day when they happened to run into Rodney Sands driving down the street. According to McNair, they pulled over to the church parking lot to talk to Sands who questioned them about his house being burglarized and asked them if they had been involved. Shortly thereafter, Aqui Rhodes came drove nearby and seeing Sands, stopped to talk.(T 260-69,300-07,311;Ex.81, T266,335-36, 269,311, 268,272, 273-75,316: Exs. 10,80, T276-77,277-78, 278, 284,313,283,285,313,316-17:ex. 10,80,82).

Jason testified that the questioning continued when Rhodes came to the car. He

73,475,457,485,468:Ex,92 T 455,492,457476,475,484,499,500,256-60,438,281,474).

The first crime scene was at the Church of Christ on Mississippi Highway 84 outside Prentiss. MS where the shooting occurred. the second crime scene was at the hospital emergency room where Jason McNair had managed to call for help and drive himself to the emergency room. (T 98-99,380-81, Ex 88A, 38,61). Chief Deputy Sheriff Ronnie Barnes, one of the investigating officers, recorded a statement on videotape from McNair after the incident. (Ex 86). Inside the Pontiac, numerous large caliber shell casings and projectiles were found in the Pontiac.(T 115,122, 124-26, 139,154-60,163-64,171-72,184-85,187,190,195,200-04,402-03; Exs. 13,30 -59,61,81,88). Blood stains were in the car and the glass was shattered.

At the crime scene at the church, projectiles, shell casings, tennis shoes, a stained shirt, live ammunition and magazine clips were found on the grounds of the church. (T 114,118-22,125,128-30,141-54,156,182-83,190-92,194,196: Exs. 6,7,8,10,12-29). The MBI evidence crime scene investigator generated a computer diagram and collected and tagged extensive evidence at the scene. (T139-40,Exs. 11-13).

The Pontiac was thoroughly processed; however, the Explorer, which Rhodes was driving, was not processed although bullet fragment(s), bullet strikes and blood stains were apparent from the photographs. Chief Deputy Barnes testified that MBI was aware of the Explorer being discovered, but stated it was not processed for evidence of ballistics and stains, etc .Barnes offered no explanation for why the Pontiac was processed and the Explorer was not. (T 391-407).

Rodney Sands surrendered on July 12, 2006 and Aquil Rhodes was arrested in Wisconsin.

SUMMARY OF THE ARGUMENT

The weight and sufficiency of the evidence does not support a conviction of Aqui Rhodes. The trial court erred in failing to grant Aqui Rhodes a new trial based on failure to process evidence and juror misconduct. Further, the trial court erred in allowing evidence of bad character against the defendant.

ARGUMENT

ISSUE NO. 1. WHETHER THE TRIAL COURT ERRED IN NOT ORDERING A NEW TRIAL DUE TO FAILURE TO PROCESS EVIDENCE AND JUROR MISCONDUCT?

- A. The failure of the state to process exculpatory evidence for the defendant prevented the defendant from having access to proof for his defense.

The trial Court erred in not ordering a new trial. The first prong of this issue, for purposes of this appeal, is whether the state is compelled to disclose or produce exculpatory evidence or any evidence it has against the defendant. Courts have historically and repeatedly held that the “suppression by the prosecution of evidence favorable to an accused, upon request, violates due process, whether the evidence is material either to guilt or to punishment regardless of the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83 (1963).

The Court has more recently held that even where there is not a request by the accused, the duty to disclose is nonetheless applicable and that further, it encompasses impeachment evidence as well as exculpatory evidence. *United States v. Agurs*, 427 U.S. 97 (1976). Further, the duty encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). The rule also encompasses evidence known only to police investigators and not to the prosecutors. *Kyles v. Whitley*, 514 U.S. 438 (1995). Further, Courts have also explained that a duty may exist without regard to personal knowledge. Prosecutor’s office is a representative of the government and information known to police is also attributable to the government/prosecution. *Giglio v. United States*, 405 U.S. 150 (1972).

Significantly, the Court has most recently emphasized the importance of cross-examination and the danger of allowing testimony in informal ways that prevents the right of confrontation. *Crawford v. Washington*, 541 U.S. 36 (2004); *U.S. v. Cromer*, 2004 WL 2711130 (6th Cir. Nov. 29, 2004.)

In the case at bar, the defendant filed a timely motion for discovery (R35-39). Nevertheless, the defense was presented with crime results ,photographs and other evidence in the courtroom late and just prior to trial. (T451-452). Although the parties proceeded on the late evidence, the state subsequently was unable to produce other possible exculpatory evidence at all because the state failed to process the evidence although it was collected by the Mississippi Bureau of Investigation (MBI) and the sheriff's department. (Accordingly, a motion for a new trial was filed R 162-169). The MBI collected swabs, etc which were never processed.(TR162) The Sheriff department extracted projectile(s) from the defendant's vehicle, but on their own , decided that it was not worth processing. (TR 377-388; 390-407). The sheriff's department had no blood samples tested or any other testing although blood was clearly visible in the vehicle. On cross examination, Barnes, chief deputy admitted that he "dropped the ball" and stated that he had been too busy because he was running for circuit clerk at the time.(TR384).

In the instant case, the state's failure to process the vehicle which was driven by the defendant, which was riveted by bullet holes and the failure to process the tests taken for gun residue on the hands of the deceased victims, the failure to process collected swabs, clothing, projectile(s), blood samples, etc., prevented the defendant from having the opportunity of being able to present a full defense. Hence, The defendant was denied access to exculpatory evidence and the right to confrontation and cross examination of

that evidence which was never processed or presented.

The failure of the processing and or submission of exculpatory evidence in this case was particularly fatal because the case is one of self defense. The defendant's vehicle had been fired upon by one or more of the victims and the defendant was also shot by one of the victims. (Exhibits 85,87,92 composites). Proof that one has been assailed is an essential element of self defense. Not only was the defendant denied this proof, the jury was denied proof necessary to reach a credible verdict. Accordingly, the Court erred in not granting a motion for a new trial

B. The jury verdict is tainted as a result of unlawful contact between one or more jurors and the mother of a victim.

The second prong of the issue involves juror misconduct. One or more of the empanelled jurors was influenced and/ or tainted through personal contact. "Juries must be unbiased, impartial, and not swayed by the consideration of improper, inadmissible information." *Hickson v. State*, 707 So. 2d 536 (Miss. 1997). see also Miss. R. Evid. 606 (b). An investigation is warranted when there are allegations of juror misconduct. *Gerlach v. State*, 466 So. 2d 75 (Miss. 1985). Failure to make full disclosure during voir dire denies the examining attorney necessary facts and information that may be needed to exercise challenges to a juror. *Odom v State*, 355 So. 2d 1381 (Miss. 1978).

In *Odom*, supra, the court set forth three factors the trial court must examine when a juror fails to respond to a voir dire question. the inquiry is whether the non-answered question was 1) relevant to the voir dire examination; 2) whether it was ambiguous; and, 3) whether the juror had substantial knowledge of the sought after information. If the answer to these questions is yes, if prejudice to the defendant can be

reasonably inferred from the failure of the juror to respond. If so, the trial court must order a new trial.

In the case at bar, after the trial commenced, Mrs. Sands was personally observed outside the courthouse on Tuesday of the trial having a conversation and walking with a female juror named Jackie Coleman during lunch recess. The two women were also observed talking and exchanging an undisclosed item. both women were also seen together at Ward's restaurant in Prentiss, MS during the trial. (another elder female was also observed talking outside the courthouse with other family members of the victims and individuals in the courtroom audience. (R. 162-82; R.E. 17-45).

During voir dire, none of the jurors had admitted being related to the parties on trial. However, it was later learned that the mother of Randolph Sands was related to a juror, Jackie Coleman. (T 14,20). The defendant would have an interest in knowing that a relative of the deceased victim was sitting on the jury and prejudice resulting from that non-disclosure would require a new trial under Odom, supra. See also, *Lindsey v. State*, 965 So. 2d 712 (Miss. Ct. App. 2007) and *Boyles v. State*, 778 So. 2d 144 (Miss Ct. App. 2000). See also, *Lattimore v. State*, 958 So. 2d 192 (Miss. 2007) where the court determined that the failure of the defense to make a full inquiry or seek to voir dire the jurors directly does not bar consideration of the issue at the appellate level. Accordingly, the request for a new trial should have been granted and Aqui Rhodes requests a new trial for the above stated reasons.

failed to produce discovery in a timely manner or failed to process all the evidence;

2) Failure to reference with specificity MRE 404 B on alleged use of illegal drugs (marijuana) by Aquil Rhodes.

3) Failure to subpoena Jackie Coleman and Randolph Sands' mother to testify at the hearing on the motion for a new trial.

To prevail on a claim of ineffective assistance of counsel, the appellant must show that counsel's performance was deficient to the extent that he was deprived of a fair trial.

Holland v. State, 656 So. 2d (Miss. 1995); *Strickland v. Washington*, 466 U.S. 468, 687-96. In determining whether counsel's efforts were deficient and prejudicial to the appellant, the Court reviews the totality of circumstances. See *Holland* at 1197.

In the instant case, the mishandling and or intentional destruction or refusal to process evidence prevents the Court and the defense from making a proper evaluation of the evidence in this cause, particularly as to the existence of evidence exculpatory to the defendant. The manner in which this investigation was conducted and the failure to properly process and secure the integrity of the evidence makes it necessary for this Court to make a finding that all or much of the evidence against the accused is or would have been exculpatory to the accused. Notwithstanding the above cited deficiencies of trial counsel, the Court is urged to follow the reasoning of *Holland, supra*. and not deny defendant a remedy that he would otherwise be entitled to as a matter of law. Appellant requests reversal of all convictions.

ISSUE NO.4 WHETHER THE COURT ERRED IN ALLOWING TESTIMONY OF DRUG USAGE BY THE DEFENDANT

In the instant case , the state witness, McNair, gave testimony about himself and the two deceased victims drinking and using drugs. (T 260-9; 300-07). The testimony by the state witness, Jason McNair, about drug usage by Aqui Rhodes (T 347) offered no probative value to any material issue. Trial counsel objected to the question on the basis that it was beyond the scope of the direct. The Court's overruling of the objection resulted in prejudice to the defendant and is in contravention of Miss. R. Evid 404 (b). See also *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446(Miss. 1997) holding that a witness should not be permitted to testify about an exhibit during redirect if the exhibit was not produced at the direct or cross examination. Testimony in a trial should be confined to the charge for which the accused is on trial. *Gallion v. State*, 469 So. 2d 1247(Miss. 1985). Evidence which is incompetent and inflammatory in character carries a presumption of prejudice. *Id.* citing *Tucker v. State* 403 So. 2d 1274 (Miss. 1981). See also, *Ainsworth v. State*, 756 So. 2d 826 (Miss. Ct. App. 2000).

In the case at bar, the court allowed evidence of bad character of the accused by failing to overrule the objection to the state's questions regarding marijuana usage by the defendant. Admission of character evidence for improper purposes is reversible. In that this line of question had no probative value to any material issues in the case, the only possible purpose for its introduction was to show the defendant as a bad person who engaged in illegal conduct. This is a forbidden purpose and the court is requested to reverse and order a new trial.

ISSUE NO. 5 WHETHER THE SUFFICIENCY AND THE WEIGHT
OF THE EVIDENCE SUPPORTED THE CONVICTIONS?

The issue before the court, in considering whether the motion for directed verdict should be granted is whether there was evidence sufficient presented to support that Rhodes was guilty of murder beyond a reasonable doubt. Every element of the offense must exist or the evidence will be insufficient to support the conviction.

Bush v. State, 895 So. 2d 836 (Miss. 2005). *McClain v. State*, 625 So. 2d 774 (Miss. 1993). When considering a motion for directed verdict, if the evidence and reasonable inferences therefrom "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty", the appellate court must reverse and render.

The evidence in the instant case does not establish that Rhodes actions embodied malice aforethought. According to Rhodes testimony, he stopped to talk to Rodney Sands after seeing him standing beside a Pontiac talking. Rhodes testified that he was unarmed and did not even have on a shirt when he approached the vehicle and did not have a gun..(T 439-457). He further stated that he and Sands asked if they had information about money being stolen from his house. About that time, Rhodes states that he moved away from the car after hearing a pistol cock and Roberto began shooting. (T447-48;450, 467-68) Rhodes testified that he was shot and the Explorer that he was driving was hit by gunfire.(Ex. 91).

The critical time, in questioning the malice aforethought, is the period before the gunfire when Rhodes states that he was talking with his bare arms posted over the car,

unarmed and without a shirt. In support of his testimony, Jason McNair testified unequivocally, on the videotape taken immediately after the event, that Rhodes did not have a gun, did not have on a shirt and backed up from the car running backward after the shooting erupted. (Ex 86 Videotape). McNair, after being asked several times, unequivocally states that Rhodes did not have a gun when the shooting started. Even after the state tried to lead McNair into changing his testimony about Rhodes not having a gun or shooting when he was at the car, McNair, was still unable to say that he ever saw Rhodes shoot as he was backing up from the Pontiac, even though he stated he watched him backpedal all the way to his truck. (T322-24; 337; 346). Neither McNair's testimony nor Rhodes testimony supports that malice aforethought was established.

In evaluating the videotape of McNair's testimony and his subsequent testimony of less candor, the Court should recognize that McNair had an obvious interest in absolving himself and putting the blame elsewhere.

Finally, to the extent that the court may consider the terms 'malice aforethought' and 'deliberate design' synonymous, the argument for directed verdict is intended to apply to both terms. The motion for directed verdict should have been granted. .

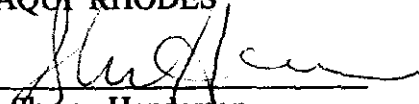
Further, the weight of the evidence does not support the convictions and the Court is requested to render acquittal or order a new trial.

CONCLUSION

Aqui Rhodes is entitled to have his convictions reversed and rendered or remanded for a new trial as to counts 1 and 2. The verdict in Count 3 should be vacated due to the defective indictment.

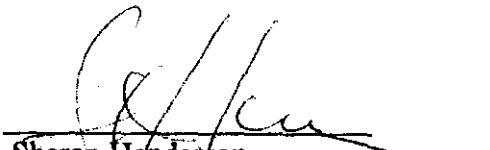
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BY:


Sharon Henderson
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CERTIFICATE OF SERVICE

I, Sharon Henderson, hereby certify that I have this 19th day of January, 2010, mailed a true and correct copy of the above and foregoing brief of appellant Aqui Rhodes to: Hon. Prentiss Harrell, Circuit Judge, P.O. Box 488, Purvis, MS 39475, Hon. Michael Horan, Asst. D.A., 500 Courthouse Sq., Columbia, MS 39429, Hon. Charles Maris, Asst. Attorney G, P.O. Box 220, Jackson, MS 39205, U.S. Mail, first class, postage pre-paid.


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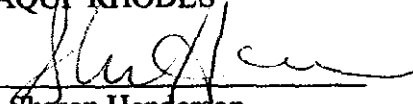
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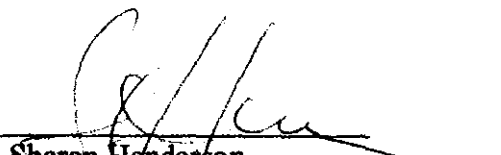
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