IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TERRANCE CONNER — APPELLANT

VERSUS

NO. 2009-KA-01298-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT
TERRANCE CONNER

APPEALED FROM
THE CIRCUIT COURT OF COAHOMA COUNTY, MISSISSIPPI
ELEVENTH JUDICIAL DISTRICT
CAUSE NO. 2008-0104

ORAL ARGUMENT IS NOT 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. Their representations are made in order that the Justice of this Court may evaluate possible disqualification or refusal:

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This the 21 day of January, 2010.

RICHARD B. LEWIS

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BRIEF OF APPELLANT

COMES NOW the Appellant, Terrance Conner, and states the following issues concerning the appeal of his conviction in the Circuit Court of Coahoma County, Mississippi and the Lower Court's denial of Appellant's Motion for Judgment Non Obstante Verdicto Or Alternatively For A New Trial:

STATEMENT OF INCARCERATION

The Appellant is presently in MDOC custody in Walnut Grove, Mississippi. The Appellant was sentenced on August 3, 2009 to serve a term of 5 years in the custody of Mississippi Department of Corrections followed by one and one-half years of post release supervision for the crime of possession of a firearm by a convicted felon. (R.E. 3-7)

STATEMENT OF ISSUES

I. **APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AND SUBSEQUENT MOTION FOR JUDGEMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A NEW TRIAL SINCE THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.**

II. **APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO ALLOW THE STATE'S WITNESS TO GIVE TESTIMONY DERIVED FROM SPECIALIZED KNOWLEDGE WITHOUT QUALIFYING SAID WITNESS AS AN EXPERT.**

STATEMENT OF THE CASE

The Appellant was indicted on the 18h day of November, 2008, for crime of possession of a firearm by a convicted felon, which occurred on or about October 16, 2008, in Coahoma County, Mississippi. The Appellant was arraigned on or about February 13, 2009. (R.E. 2) A trial was had on or about May 18, 2009. (R.E. 3-7). A jury was empaneled and a verdict returned in finding the Defendant guilty of possession of a firearm by a convicted felon. (R.E. 3-7) The Appellant was sentenced to serve a term of 5 years in the custody of Mississippi Department of Corrections followed by one and one-half years of post release supervision. (R.E. 3-7) The Defendant filed a Motion for Judgment Non Obstante Verdicto Or Alternatively For A New Trial which was denied on or about August 3, 2009. (R.E. 8-11). It is from this conviction and denial of a new trial that the Defendant, Appellant herein, brings her timely appeal.

The State presented proof that at 12:00 midnight on October 15, 2008 Officer Milton Williams and Officer Will Gerald responded to shots fired in the area of Chapel Hill Heights. (R. 68-69). The State also presented proof that two individuals were seen near the scene and approached by both officers. (R. 68-69) There was proof presented that Mr. Terrance Conner fled and Officer Williams began chase. (R. 68-69) Officer Williams gave testimony that Mr. Conner appeared to be holding something on his waistline while running. (R.69) Officer Williams gave testimony that Mr. Conner pulled something out of his pocket and threw it to the ground and continued to run. (R. 69). The State presented proof that the officer Williams wrestled Mr. Conner to the ground, handcuffed him and returned to the spot where Mr. Conner appeared to throw something to the ground. (R. 69). Officer Williams testified that a solid black .22 caliber pistol was recovered from this spot. (R. 70-71, 80-81). Officer Williams testified that the nearest street light was 50 to 100 yards from Mr.

Conner as Mr. Conner ran by Officer Williams. ®. 76-77) Officer Williams testified that at the time Mr. Conner ran in front of his car, the time was around 12:00 midnight and dark out with street lights 50 to 100 feet away. (R. 76, 80-81) . Officer Williams testified that he did not see a weapon on Mr. Conner as Mr. Conner ran in front of his car. (R. 80-81) The State presented proof that Officer Ulyda Johnson handled the investigation of the weapon allegedly recovered from Mr. Conner. (R. 84-85). Officer Johnson testified that she requested fingerprint analysis from the crime lab which resulted in no fingerprints found.(R. 85-86). Over the objection of Defense Counsel, Officer Johnson testified that the surface of a gun is a factor that can affect retrieving fingerprints on a gun. ®. 90-92) Officer Johnson testified that a smooth, dry surface is the best for getting fingerprints. ®. 90-93) Officer Johnson testified that typically the handle (handgrip) is where fingerprints will be found. ®. 90-93) Officer Johnson testified that the handgrip on the .22 caliber pistol recovered had this ideal smooth surface. ®. 93-96)

SUMMARY OF THE ARGUMENT

Appellant contends that the verdict was against the overwhelming weight of the evidence. (R.E. 8). Officer Milton Williams testified that at the time Terrence Conner ran in front of his car, the time was around 12:00 midnight with street lights 50 to 100 feet away. (R. 80-81) . Officer Williams testified that he did not see a weapon on Mr. Conner as Mr. Conner ran in front of his car. (R. 80-81) Officer Williams gave testimony that Mr. Conner pulled something out of his pocket and threw it to the ground and continued to run. ®. 69). The Appellant argues that due to the poor lighting conditions in the pitch black dark at 12:00 midnight that Officer Williams cannot be certain that the solid black .22 caliber pistol found at the scene was thrown on the ground by Mr. Conner. Officer Ulyda Johnson testified that she handled the investigation of the weapon allegedly recovered

from Mr. Conner. (R. 84-85). Officer Johnson testified that she requested fingerprint analysis from the crime lab which resulted in no fingerprints found.(R. 85-86). Over the objection of Defense Counsel, Officer Ulyda Johnson testified that the surface of a gun is a factor that can affect retrieving fingerprints on a gun. ®. 90-92) Officer Johnson testified that a smooth, dry surface is the best for getting fingerprints. ®. 90-93) Officer Johnson testified that typically the handle (handgrip) is where fingerprints will be found. ®. 90-93) Officer Johnson testified that the handgrip on the .22 caliber pistol recovered had this ideal smooth surface. ®. 93-96) Appellant contends that fingerprints were not found on the .22 caliber pistol with the smooth surface handgrip that was ideal for recovering prints. The Appellant contends that if the Appellant handled the weapon as argued by the State that fingerprints should have been present on the handgrip and were not. The Appellant also contends that the Appellant did not throw a .22 caliber pistol or any weapon to the ground as argued by the State at trial. Officer Johnson was allowed to give testimony derived from specialized knowledge gained by education or experience. Testimony derived from specialized knowledge gained by education or experience is not lay opinion testimony. (See Rule 701 and 702 Mississippi Rules of Evidence) Appellant asks that the jury's guilty verdict be reversed on grounds related to the weight of evidence. Appellant contends his conviction should be reversed and he be granted a new trial.

ARGUMENT

I. APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AND SUBSEQUENT MOTION FOR JUDGMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A NEW TRIAL SINCE THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

Appellant contends that the verdict is against the overwhelming weight of the evidence.

Taking the testimony of all the witnesses as a whole, Appellant asserts that his Motion For Directed Verdict and Subsequent Motion for Judgment Non Obstante Verdicto should have been sustained because in taking all the evidence into light, the most favorable to the State, the State has failed to meet his burden of proof in this case. The basic standard of review of the sufficiency of evidence to support a criminal conviction is set out in **Jackson v. Virginia**, 443 U.S. 307, 99 Supreme Court 2781, 61 Lawyers Ed. Second 560 (1979).

Based on **Jackson v. Virginia**, the critical inquiry is not simply whether the jury was properly instructed, but also whether the record of evidence can reasonably support a finding of guilt beyond a reasonable doubt. This inquiry does not, in preserving the fact finder's role as a weigher of evidence, require a Court to ask itself whether it believes that the evidence in trial establishes guilt beyond a reasonable doubt. The relevant question, as pointed out in this case, is whether after reviewing all the evidence in light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

It is Appellant's contention that the Judge, at the Lower Court level, must require acquittal by sustaining a Motion For Directed Verdict or at least requiring a new trial if reasonable jurors would necessarily have reasonable doubt as to his guilt in this case.

This Court pointed out in **May v. State**, 460 So.2d 778 (Mississippi 1984) as follows:

> In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the Defendant be discharged short of a conclusion on our part, that given the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror, could find a reasonable doubt that the Defendant was guilty **Pearson v State**, 428 So.2d 1361, 1364 (Miss., 1983).

The Motion for New Trial is a different animal. While the Motion for Judgement of Acquittal Not Withstanding A Verdict presents to the trial court a pure question of

law, the Motion For A New Trial is addressed to the Trial Court's sound discretion **Neal vs. State**, 451 So.2d 743, 760, (Miss. 1984) when he moves for a new trial, a Defendant in a criminal case necessarily invokes **Rule 10.05** of our **Circuit and County Court Rules** which in pertinent part provides:

The Court on written notice of the Defendant may grant a new trial on any of the following grounds:

(1) If required in the interest of justice;
(2) If the verdict is contrary to law or the weight of the evidence;...

As distinguished from the J.N.O.V. Motion, here the Defendant is not seeking final discharge. He is asking that the jury's guilty verdict be vacated on grounds related to the weight of the evidence, not it's sufficiency, and may be retired consistent with the double jeopardy clause, **Tibbs v. Florida**, 457 U.S. 31,39, 102 S.Ct. 2211, 2217, 72 L. Ed. 2d. 652, 659-60 (1982).

That, as a matter of law, the motion for judgment of acquittal, not withstanding the verdict, must be overruled and denied and in no way affects and little informs the trial judge regarding his disposition of the motion for new trial. Cases are hardly unfamiliar wherein the Court holds that the evidence is sufficient so that one party or the other was not entitled to judgment not withstanding the verdict but, nevertheless, that a new trial in the interest of justice should be ordered. **Hux v. State** 234 So.2d 50, 51(Miss. 1970), **Quarles v. State** 199 So.2d 58, 61 (Miss. 1967); **Mister v. State** 190 So.2d 869, 871 (Miss. 1966); **Yelverton v. State** 191 So.2d 393,394 (Miss. 1966); **Heflin v. State** 178 So.2d 594 (Miss. 1938); **Conway v. State**, 177 MS. 461, 469, 171 So. 16, 17 (1936).

A greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial as distinguished from a motion for J.N.O.V. Under our established case law, the trial judge should set aside a jury's verdict only when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence **Pearson v. State** 428 So.2d at 1364.

Appellant contends that the verdict was against the overwhelming weight of the evidence. (R.E. 8). Officer Milton Williams testified that at the time Terrence Conner ran in front of his car, the time was around 12:00 midnight with street lights 50 to 100 feet away. (R. 80-81) . Officer Williams testified that he did not see a weapon on Mr. Conner as Mr. Conner ran in front of his car.

(R. 80-81) Officer Williams gave testimony that Mr. Conner pulled something out of his pocket and threw it to the ground and continued to run. ®. 69). The Appellant argues that due to the poor lighting conditions in the pitch black dark at 12:00 midnight that Officer Williams cannot be certain that the solid black .22 caliber pistol found at the scene was thrown on the ground by Mr. Conner. Officer Ulyda Johnson testified that she handled the investigation of the weapon allegedly recovered from Mr. Conner. (R. 84-85). Officer Johnson testified that she requested fingerprint analysis from the crime lab which resulted in no fingerprints found.(R. 85-86). Officer Ulyda Johnson testified that the surface of a gun is a factor that can affect retrieving fingerprints on a gun. ®. 90-92) Officer Johnson testified that a smooth, dry surface is the best for getting fingerprints. ®. 90-93) Officer Johnson testified that typically the handle (handgrip) is where fingerprints will be found. ®. 90-93) Officer Johnson testified that the handgrip on the .22 caliber pistol recovered had this ideal smooth surface. ®. 93-96) Appellant contends that fingerprints were not found on the .22 caliber pistol with the smooth surface handgrip that was ideal for recovering prints. The Appellant contends that if the Appellant handled the weapon as argued by the State that fingerprints should have been present on the handgrip and were not. The Appellant also contends that the Appellant did not throw a .22 caliber pistol or any weapon to the ground as argued by the State at trial.

When testing the legal sufficiency of the State's evidence, the standard of review is as follows: "the court must review the evidence in the light most favorable to the State, accept as true all the evidence supporting the guilty verdict and give the prosecution the benefit of all favorable influences that may reasonably be drawn from the evidence." See **McClain vs. State**, ***625 So.2d 774, 778 (Miss. 1993)***. The court will only reverse when fair-minded jurors could find the accused not guilty. **Weltz vs. State**, ***503 So.2d 803, 808 (Miss. 1987)***. It has long been a rule that the jury

"may give consideration to all inferences flowing from the testimony." **Magnum vs. State**, *762 So.2d 337 (Miss. 2000)*. In reviewing the proof as alleged above, Appellant should be granted a new trial.

II. APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO ALLOW THE STATE'S WITNESS TO GIVE TESTIMONY DERIVED FROM SPECIALIZED KNOWLEDGE WITHOUT QUALIFYING SAID WITNESS AS AN EXPERT.

According to Mississippi Rule of Evidence 701, a lay witness may testify in the form of opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of testimony or the determination of a fact in issue, and © not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. **Christian vs. State**, *859 So.2d 1068 (Miss. 2003)*. The Supreme Court has held that it is possible for an expert in an area of knowledge to give a lay opinion, but not if the witness is operating in his professional capacity. **O'Neal vs. State**, *977 So.2d 1252 (Miss. 2008)*. Where a witness is to give testimony derived from specialized knowledge gained by education or experience, the testimony is not lay opinion testimony. ***Id.*** The Supreme Court has stressed the importance that we not blur the line between Rules 701 and 702 so that the responding party has sufficient notice and an opportunity to prepare a rebuttal. ***Id.*** Rule 701 opinions are by definition lay opinions and thus require no specialized knowledge, however obtained. **Mississippi State Highway Com'n vs. Gilich**, *609 So.2d 367 (Miss. 1992)*. In **Goodson v. State**, *566 So.2d 1142 (Miss. 1990)*, the Court explained that while there are occasions when a person who by profession possesses expertise may offer a lay opinion, this is not so where the witness is proceeding in his professional capacity. ***(Quoting Mississippi State Highway Com'n vs. Gilich)*** In other words, where a witness is to give testimony

derived from specialized knowledge gained by education or experience, the testimony is not lay opinion testimony. *Id.* Where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Miss. R. Evid. 702 opinion and not a Rule 701 opinion. **Sample vs. State**, ***643 So.2d 524 (Miss. 1994)***. Here, Officer Johnson was allowed to testify regarding external factors that affect whether or not fingerprints can be found on guns, not as an expert, but according to her work, training and experience. (R. 90-92) This is exactly the type of testimony that is derived from specialized knowledge gained by education or experience. This testimony was clearly not lay opinion testimony under Rule 701 and therefore, Officer Johnson testimony could only be allowed under Rule 702.

CONCLUSION

Appellant argues that due to the poor lighting conditions in the pitch black dark at 12:00 midnight that Officer Williams cannot be certain that the solid black .22 caliber pistol found at the scene was thrown on the ground by Mr. Conner and that fingerprints were not found on the .22 caliber pistol with the smooth surface handgrip that was ideal for recovering prints. The Appellant contends that if the Appellant handled the weapon as argued by the State that fingerprints should have been present on the handgrip and were not. The State's case should not have been allowed to withstand a Motion For New Trial as distinguished from a Motion For J.N.O.V., under our established case law. (R.E. 8-10). The Trial Judge should have set aside the jury's verdict in this case when considering all the evidence. The Court in exercising his sound discretion, and in the interest of justice, should have ruled that the verdict was contrary to the weight of the evidence. (R.E. 11). **Pearson v. State** 428 So.2d 1364, Miss. 1983).

As stated in **Hawthorne vs. State**, ***835 So.2d 14 at 21 (Miss. 2003)*** the standard for review

of a Motion for a J.N.O.V., as well as a motion for a directed verdict and a request for peremptory instructions is all the same in that it challenges the legal sufficiency of the evidence. As stated in **Hawthorne, 835 So.2d at 21 ¶31 (citing McClain vs. State, 625 So.2d 774, 778 (Miss. 1993)**, on the issue of legal sufficiency, reversal can only occur when evidence of one or more of the elements of the charged offense is such that reasonable and fairminded jurors could only find the accused not guilty. Here, that element is that the .22 caliber pistol found by Officer Williams was not in the possession of the Appellant.

Also, Officer Johnson was allowed to testify regarding external factors that affect whether or not fingerprints can be found on guns, not as an expert, but according to her work, training and experience. (R. 90-92) Appellant argues that this is exactly the type of testimony that is derived from specialized knowledge gained by education or experience. This testimony was clearly not lay opinion testimony under Rule 701 and therefore, Officer Johnson testimony could only be allowed under Rule 702.

There is reasonable doubt as to whether the Appellant was in possession of the .22 caliber pistol found by Officer Williams and therefore reasonable doubt that the Appellant committed this crime.

Appellant beseeches this Court, after a thorough review of the record, to conclude that the Appellant should be granted this new trial in the interest of justice.

CERTIFICATE OF SERVICE

I, Richard B. Lewis, Attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following persons:

Hon. Chet Kirkham
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Hon. Kenneth L. Thomas
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Hon. Jim Hood
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This the 21 day of January, 2010.

RICHARD B. LEWIS