

**IN THE COURT OF APPEALS 01/14/97**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-KA-01114 COA**

**JOHN ROGERS A/K/A JOHN B. ROGERS A/K/A BILLY JOE**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B**

**TRIAL JUDGE: HON. LEE J. HOWARD**

**COURT FROM WHICH APPEALED: CIRCUIT COURT OF OKTIBBEHA COUNTY**

**ATTORNEY FOR APPELLANT:**

**KELLY HARDWICK**

**ATTORNEY FOR APPELLEE:**

**OFFICE OF THE ATTORNEY GENERAL**

**BY: W. GLENN WATTS**

**DISTRICT ATTORNEY: SCOTT ROGILLIO**

**NATURE OF THE CASE: CRIMINAL - POSSESSION OF CONTROLLED SUBSTANCE WITH  
INTENT TO DISTRIBUTE**

**TRIAL COURT DISPOSITION: CONVICTION - SENTENCE OF 25 YEARS IN THE  
CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS**

BEFORE BRIDGES, P.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

John Rogers was indicted and convicted of possession of a controlled substance with intent to distribute. Rogers was sentenced to serve a term of twenty-five years in the custody of the Mississippi Department of Corrections. On appeal, Rogers asserts the following points as reversible error:

I. IT IS AN ABUSE OF DISCRETION BY THE TRIAL COURT TO NOT ALLOW THE DEFENDANT TO PROPERLY CONFRONT THE TESTIMONY OF THE CHIEF PROSECUTION WITNESS BY USE OF EXTRINSIC REBUTTAL EVIDENCE WHEN SUCH WITNESS WAS THE ONLY PERSON THAT CONNECTED THE DEFENDANT WITH A CRIME AND WHEN THERE WAS EVIDENCE OF MOTIVE AND INTENT BY THE CHIEF PROSECUTION WITNESS AGAINST THE DEFENDANT.

II. IT IS UNLAWFUL TO USE INFORMATION FROM AN UNRELIABLE JUVENILE WHO HAS ADMITTED TO A FELONY AND SUCH INFORMATION GIVEN BY THE JUVENILE WAS COMMON KNOWLEDGE TO OBTAIN AN ARREST WARRANT FOR A PERSON.

III. CONTRABAND RECOVERED AS A RESULT OF A SEARCH AND/OR SEIZURE IS "FRUIT OF THE POISONOUS TREE" WHEN THE SEARCH AND/OR SEIZURE WAS BASED ON AN INVALID ARREST WARRANT.

#### FACTS

John Rogers, a/k/a Billy Joe Rogers, was arrested by Starkville, Mississippi police officers in March of 1994 after a warrant for his arrest had been issued. While attempting to execute the warrant, Officer Dennis Rogers observed Billy Joe and two other individuals standing near the edge of a city street. As Officer Rogers proceeded toward the group of men, Billy Joe turned and began to walk away. Officer Rogers observed Billy Joe throw a small white object into the underbrush. Officer Rogers then called out Billy Joe's name, to which Billy Joe responded by turning around and walking toward Officer Rogers. Based on the outstanding warrant, Officer Rogers arrested Billy Joe with the assistance of Officer Mike Smith. After apprehending Billy Joe, Officer Rogers proceeded to search for the white object that he had seen Billy Joe throw into the bushes. Officer Rogers located the object, a white napkin with a rubber band around it, and as he was coming out of the bushes, was met by Detective Brett Watson. The officers opened the white napkin revealing approximate one hundred pieces of material resembling crack cocaine. Billy Joe was taken to the Oktibbeha County Jail for processing. A laboratory analysis of the material contained in the napkin identified the substance as crack cocaine.

#### ANALYSIS

I. IT IS AN ABUSE OF DISCRETION BY THE TRIAL COURT TO NOT ALLOW THE DEFENDANT TO PROPERLY CONFRONT THE TESTIMONY OF THE CHIEF

PROSECUTION WITNESS BY USE OF EXTRINSIC REBUTTAL EVIDENCE  
WHEN SUCH WITNESS WAS THE ONLY PERSON THAT CONNECTED THE  
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DEFENDANT.

Billy Joe contends that the trial court violated his sixth amendment right to confront the witnesses against him by not allowing him to introduce extrinsic evidence of Officer Rogers' alleged history of illegal drug use. While acknowledging the applicability of Mississippi Rule of Evidence 608(b) to the issue, Billy Joe asserts that the Rule does not exclude the admission of extrinsic evidence offered "to prove that the witness's testimony is simply not true . . . ." Billy Joe argues that the extrinsic evidence was "not to be used to attack the 'credibility' of Officer Rogers, but to attack his testimony that he had never used illicit drugs." Billy Joe contends that he should have been allowed to put on witnesses who would testify that they had observed Officer Rogers using illegal drugs, contrary to Officer Rogers' prior testimony at trial. The State argues that evidence of Officer Rogers' alleged use of illegal drugs was not relevant to the issues presented at trial, and even if it had been, the use of extrinsic evidence to impeach Officer Rogers' denial of illegal drug use would be barred by Rule 608(b) of the Mississippi Rules of Evidence.

In reviewing the trial court's decision to exclude the extrinsic evidence offered by Billy Joe, this Court must first address the issue of whether the proposed testimony was relevant to the matters at issue in the trial. Rule 402 of the Mississippi Rules of Evidence provides that "evidence which is not relevant is not admissible." Miss. R. Evid. 402. In determining if evidence is relevant, the key issue is whether the evidence offered would have "any tendency to make the existence of any fact that is *of consequence* to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401 (emphasis added). After having been demonstrated as relevant by its proponent, the evidence sought to be admitted must still pass the "unfair prejudice" hurdle of Mississippi Rule of Evidence 403. *See Foster v. State*, 508 So. 2d 1111, 1117 (Miss. 1987) (holding that admissibility inquiry does not stop with test for relevancy; relevant evidence must still pass through Rule 403 filter).

In the case at bar, Officer Rogers was not on trial and his alleged use of illegal drugs was not a fact of consequence to the court. Looking to the relevancy of the evidence Billy Joe desired to introduce, would the fact that Officer Rogers *could have* used illegal drugs in the past have *any* tendency to make it more probable or less probable that the crack cocaine recovered from the underbrush belonged to Billy Joe? This court is of the opinion that the answer is clearly "no." However, assuming this evidence were somehow relevant to the issues at trial, it further appears that such evidence would be barred by Rule 403 considerations. *See* Miss. R. Evid. 403 (stating that when probative value of evidence is *substantially* outweighed by danger of unfair prejudice or confusion of issues, such evidence may be excluded) (emphasis added). Certainly the presentation of extrinsic evidence to impeach the arresting officer's denial that he was a drug user would tend to cause confusion among the jurors, or at minimum, cause undue delay and be a waste of judicial resources.

Even if this Court were to accept that the evidence offered by Billy Joe was relevant and its probative value not substantially outweighed by unfair prejudice or confusion of the issues, the evidence would be prohibited by Rule 608(b) of the Mississippi Rules of Evidence. Rule 608(b) prohibits the use of

extrinsic evidence, other than certain criminal convictions, to prove specific instances of conduct of a witness. *Ball v. Sloan*, 569 So. 2d 1177, 1179 (Miss. 1990); *see also Jackson v. State*, 645 So. 2d 921, 924 (Miss. 1994) (holding that attempts at impeachment via use of extrinsic evidence of specific acts of conduct are "clearly forbidden by Rule 608(b)"). Although Rule 608(b) allows for the limited questioning of a witness regarding specific instances of conduct, on cross-examination, such inquiry must stop if the witness denies having committed the specific act at issue. *See Pinson v. State*, 518 So. 2d 1220, 1223 (Miss. 1988) (holding that once witness denies specific act, questioning "may go no further"). In his brief Billy Joe admits that he wanted to use the extrinsic evidence "to attack [Officer Rogers'] testimony that he never used illicit drugs." This is precisely the type of confrontation that is prohibited by Rule 608(b). Accordingly, this assignment of error is without merit.

II. IT IS UNLAWFUL TO USE INFORMATION FROM AN UNRELIABLE JUVENILE WHO HAS ADMITTED TO A FELONY AND SUCH INFORMATION GIVEN BY THE JUVENILE WAS COMMON KNOWLEDGE TO OBTAIN AN ARREST WARRANT FOR A PERSON.

Billy Joe asserts that the arrest warrant Officer Rogers was attempting to serve on him was invalid for lack of probable cause. The arrest warrant in question was for the distribution of crack cocaine and had been issued a few days prior to the incident from which the case at bar arose. The arrest warrant was based primarily on information supplied by Reginald Calmes to Officer Derek Holland, alleging that Billy Joe was a drug dealer who had supplied Calmes with crack cocaine. Calmes, a minor, had been taken into custody after he volunteered to the police that a bottle of crack cocaine hidden outside of his school belonged to him. Although Calmes told Officer Holland that he could not remember the drug dealer's last name, he recalled that the dealer went by the name "Billy Joe." Calmes also described to Officer Holland some of the automobiles that he had observed the drug dealer using. These automobiles were of the same type as Officer Holland had seen at Billy Joe Rogers' residence. Officer Holland also knew, independently of Calmes' allegations, that Billy Joe Rogers had been mentioned by other informants as a drug dealer and that Billy Joe Rogers lived in the same neighborhood as Calmes. Officer Holland presented this information in a affidavit submitted to a municipal court judge who issued a warrant for Billy Joe's arrest.

In order for an arrest warrant or search warrant to be constitutionally valid, it must have been supported by probable cause at the time it was issued by a detached and neutral magistrate. *See Ormond v. State*, 599 So. 2d 951, 958 (Miss. 1992) (holding valid warrant must be issued by neutral and detached magistrate). Probable cause, for both search warrants and arrest warrants, is judged under a "totality of the circumstances" approach. *See Alexander v. State*, 503 So. 2d 235, 239 (Miss. 1987) (holding approach is essentially same for both types of warrants). The Mississippi Supreme Court has stated:

Probable cause is a practical, non-technical concept, based on the conventional considerations of every day life on which reasonable and prudent men, not legal technicians, act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonable trustworthy information, are sufficient to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.

*Strode v. State*, 231 So. 2d 779, 782 (Miss. 1970). Assuming that the officer has: "(1) reasonable cause to believe a felony has been committed; and (2) reasonable cause to believe that the person proposed to be arrested is the one who committed it," the arrest will be deemed constitutionally valid. *Henry v. State*, 486 So. 2d 1209, 1212 (Miss. 1986).

In the case at bar, the arrest warrant was adequately supported by probable cause derived from the information provided to the municipal court judge by Officer Holland. Despite Billy Joe's objections that Calmes was unable to provide the drug dealer's last name and that Officer Holland did not show Calmes a photograph of Billy Joe to confirm the identification, the facts known to Officer Holland were sufficient to raise more than a mere suspicion that Billy Joe had committed a felony. *See Wilson v. State*, 574 So. 2d 1324, 1330 (Miss. 1990) (holding that probable cause requires more than mere suspicion but less proof than that required to establish guilt at trial). Accordingly, we hold that the trial court was correct in finding that the arrest warrant for Billy Joe Rogers was valid. This issue is without merit.

**III. CONTRABAND RECOVERED AS A RESULT OF A SEARCH AND/OR SEIZURE IS "FRUIT OF THE POISONOUS TREE" WHEN THE SEARCH AND/OR SEIZURE WAS BASED ON AN INVALID ARREST WARRANT.**

As discussed in the preceding section, the trial court was correct in finding that the arrest warrant relied upon by Officer Rogers was supported by probable cause to arrest Billy Joe. Accordingly, the contraband discovered by the police Officers while making this lawful arrest need not have been excluded from evidence as the product of an invalid seizure. This assignment of error is without merit.

**THE JUDGMENT OF THE OKTIBBEHA COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE AND SENTENCE OF 25 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF \$20,000.00 IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**