

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**COPY**

**ALSTON KING**

**APPELLANT**

**VS.**

**FILED**

**NO. 2004-KP-0688**

**DEC 20 2007**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

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### **ISSUES**

- I. The Trial Court correctly denied King's Motion to Suppress the metal box found in King's home. Statement's made by King to police were correctly admitted into evidence.
- II. The state proved the elements of possession with intent to distribute and the trial court correctly denied King's motion for a Directed Verdict at the close of the State's case.
- III. The overwhelming weight of the evidence supported the jury's verdict and the trial court correctly denied King's Motion for JNOV or in the alternative for a new trial.

### **STATEMENT OF THE FACTS**

In Count I of the indictment against him, Alston King was charged with possession of 155 grams of marijuana, a Schedule I controlled substance, with the intent to distribute. Count II charged him with possession of 291.7 grams of cocaine with the intent to transfer it to another. In both counts, King was also in possession of a sawed-off shotgun.

On January 28, 2003, the Moorhead Fire Department was called to 1370 Church Street, Moorhead, Mississippi. Joe Johnson, a volunteer fire fighter responded to the page sometime close to 10:00 p.m., and was the first one on the scene. There were ten to fifteen people in the street and around the house when he arrived. Several where "hollering" and asked what had taken the fire department to arrive. A few people were standing around with water hoses spraying water on the house. The fire truck arrived three to five minutes after Johnson arrived. Law enforcement and other firefighters arrived. The home was an older home and was fully

involved. There were not many firemen on the scene, so they determined to control the fire until they could get it "knocked down." The fire was "knocked down" and the firefighters were able to continue inside after about 30 minutes. About 15 minutes into their attack on the fire, Johnson and Cokie Viner, another volunteer, heard two to three gunshots go off inside the house, which is typical if there is any ammunition in the house. About 45 minutes to an hour after Johnson arrived on the scene they were able to enter the house and knock down any remaining fire. The firefighters then proceeded through overhaul and went through the house to check for any remaining hot spots and fires before they left the scene, so that the house would not re-kindle.

Johnson testified that hotspots are areas that have either been burned or heated to the point of combustion by a fire that was burning in another areas and could start another fire. Johnson looked in the bedroom moving furniture and moving the bed and clothes that were on the floor in order to make sure all the fire was out. When Johnson moved a chest of drawers in the bedroom, he found two small weight scales underneath the chest of drawers.

Johnson testified that the scales were suspicious to him because he did not see many scales of that nature in common house fires, and he knew that they could be used to weigh illegal drugs for sales. Johnson collected the scales and reported them to the fire chief on the scene. The law enforcement officer was called to see the scales and they were turned over to law enforcement. Johnson identified the scales and also the shotgun that was found in the living room under the burned couch. After turning over the scales to law enforcement, Johnson returned to his work in the bedroom area where he moved piles of clothes in the closet to look for hot spots. There were two metal boxes in the closet. One was opened and contained papers, a few shotgun shells and a few other bullets, none of which had fired. The other box was solid

metal enclosed and had a round door on the front with two padlocks.

Johnson testified that he was not looking for anything other than hotspots, and was serving in his capacity as a fireman for the Moorhead Fire Department. Johnson testified that the house contained substantial damage. The bedroom was gutted and the kitchen and living room had a good bit of fire damage. There was a lot of water and smoke damage to the entire house. The outside of the physical structure was still standing, but the inside was pretty much gutted. The windows and doors were burned, so it was not possible to secure the structure.

Johnson testified that the procedure in cases where the premises cannot be secured, items of substantial value are turned over to the property owner, but if the property owner is not present, they are turned over to law enforcement. Pursuant to this policy, the locked metal box was turned over to law enforcement on the scene, Officer Fuller, Assistant Police Chief of the Moorehead Police Department. The box was still locked when it was turned over to law enforcement.

Assistant Police Chief Bobby Fuller testified that on January 27, 2003, he got a call to respond to 1307 Church Street. Fuller learned later that this house belonged to Alston King. When Fuller arrived people were trying to put the fire out with hoses and guns were going off. Fuller went back to pick up Office Willie McGuire. When they got back to the scene, the fire crew was there putting the fire out. Fuller testified that he heard gunshots twice and that people on the scene told him that they heard bullets going off. Fuller testified that he advised the fire fighters to look out due to live rounds going off in the house. Fuller told a firefighter that there might be a gun inside the house and if they ran across a gun to let him know. Fuller then stood back to watch and stayed until most of the fire was out. The fire chief called him back to the

scene and gave him a safe, a sawed off shotgun and two weigh scales. Fuller testified that Alston King was not present at the house when the fire chief gave him the items from inside the house. Fuller testified that Alston King had been present when he first arrived on the scene, but that when he returned, King and the others who had been helping him try to put out the fire were gone. Fuller returned to the police station and they put the items in a plastic bag and put them in Officer McGuire's locker until the next day.

Fuller told Officer McGuire that if he saw King, to bring him to the police station to talk to Fuller. McGuire saw King and told him that Fuller wanted to see him. King then drove to the police station to see Fuller. King was not under arrest at this time. Fuller and McGuire called in Chief Stephens and Cokie Viner. Fuller turned on the tape recorder and asked King about the safe. King said that it was not his safe, that it could be Fuller's and that as far as he was concerned Fuller had planted it in the house. Fuller asked him what was in the safe, and King said that it wasn't his safe. King continued to deny that the safe was his and stated that he did not have any keys to the safe. He told Fuller that if he told what was in it, Fuller might hang him anyway. King was not under arrest and was free to leave at that time. Fuller asked King if he could open the safe. King told Fuller "do what you want with it". Fuller then asked Cokie Viner to open the safe with bolt cutters. Fuller then removed the contents of the safe, which were five bags.

Fuller then sent the bags to the lab to be tested. There were no fingerprints found on the bags. Fuller testified that the amount of drugs in the bags would be more than you would expect a person to have for personal use. Scales such as those found in the house are typically used for weighing drugs for sale. One of the scales did not have a battery and the bolt action to the sawed

off shotgun was not on the gun when it was found. Officer Fuller went back to the house the day after the fire, but the house was completely torn apart and everything was laying out in the yard. There was nothing left in the house.

Sharon Patton, a drug analyst at the Mississippi Crime Laboratory in Jackson testified that she analyzed the bags from the locked safe and that the packages contained 155.0 grams of marijuana and 291.7 grams of cocaine.

Officer Willie McGuire testified that Alston King lived in the wood house on Church Avenue in January of 2003 when it burned. McGuire testified that King was at the house daily during the time before it burned. McGuire was with Fuller when the fire department turned over the scales, shotgun and safe to Officer Fuller. The following day he saw King traveling east on Washington Avenue. McGuire pulled behind him and pulled him over. He told him that Officer Fuller wanted to speak with him at the police station. King drove to the police station and McGuire followed him in the police car. The safe was taken out of the locker and placed on the floor while Fuller talked with King. King told them that he did not know what was in the safe and that whatever it was, they were probably going to hang him with it anyway. When asked whether or not they could open the safe, King told them to do what they wanted with it. Viner then cut the bolts off and there was what appeared to be drugs inside the safe. After the safe was opened, King was arrested.

Deborah Stephans testified that she had been the chief of police in Moorhead and had lived in Moorhead for seven years. She testified that Alston King had lived in the house on Church Street as long as she had been in Moorhead. She estimated the street value of the drugs taken from the safe to be at least \$50,000. Stephans testified that Alston does not work and that



the quantity of drugs found in the safe was more than a person would have on hand for normal use. Stephans testified that King told them that he did not have a key to the safe, that it wasn't his safe and he did not care what they did with it.

The State closed its case in chief and Alston's counsel moved for a directed verdict in favor of the defendant and argued that the state had not met its burden of proving a prima facie case of possession with intent and that the state had not proved the element of possession of a shotgun since the bolt was not on the gun when it was found. The trial court held that the State had made its prima facie case. The defense then rested its case. The jury then found King guilty to possession with intent to distribute without a firearm as to both counts of the indictment.

On February 27, 2004, King was sentenced for Possession of Cocaine with intent to distribute for a term of thirty (30) years in the custody of the Mississippi Department of Corrections, and for Possession of Marijuana with intent to a sentence of ten (10) years suspended with five years on post release supervision, a five thousand dollar (\$5,000.00) fine, six hundred dollars (\$600.00) in attorneys fees all court costs and state assessments and two hundred and fifty dollars to the Crime Victims Compensation Fund. King filed a Notice of Appeal on March 17, 2004 and the instant appeal ensued.

#### **SUMMARY OF THE ARGUMENT**

King had no standing to object to the search of the safe because he denied ownership of the safe. Whether the items seized during the volunteer fire department's activities in putting out the fire and searching for hot spots in order to prevent the blaze from reigniting were seized due to their apparent value or due to their possible evidentiary value is not relevant to the inquiry,

since the entry and inspection of the premises to prevent potential rekindling of the fire was constitutional. Pursuant to *Rose*, the seizure was constitutional since if "a warrantless entry to extinguish a fire and determine its origin is constitutional, then the warrantless seizure of evidence while inspecting the premises for these purposes is likewise constitutional."

The Trial Court correctly refused to grant King's Motion for a Directed Verdict of Acquittal at the close of the State's case since the State clearly proved the elements of possession and intent. The jury's verdict was supported by the overwhelming weight of the evidence. The verdict of the Sunflower County jury was supported by sufficient, substantial, and credible evidence, and was not against the overwhelming weight of the evidence. Accordingly, King's conviction and sentence should be affirmed.

### **ARGUMENT**

#### **I. King had no standing to object to the search of the safe because he denied ownership of the safe.**

It has long been the law in this state that if a person denies ownership or possession of property, he later has no standing to complain that the search of it was unlawful. *Waldrop v. State*, 544 So.2d 834 (Miss.1989) (citing, *Watkins v. State*, 262 So.2d 422, 423, 424 (Miss.1972), *Ball v. State*, 194 So.2d 502, 503 (Miss.1967)).

Mingo argues that his statement to police before his arrest is inadmissible because he was not properly given his Miranda warnings. The threshold question in a Miranda rights analysis is whether the defendant was in custody and being interrogated when the statement in question was made. *Drake v. State*, 800 So.2d 508, 513 (Miss.2001). A person is "in custody" if a reasonable person would feel that they were going to jail and not just being temporarily detained. *Godbold v. State*, 731 So.2d 1184, 1187 (Miss.1999). Whether a reasonable person would feel that she was

“in custody” depends on the totality of the circumstances, and may include factors such as: (a) the place of interrogation; (b) the time of interrogation; (c) the people present; (d) the amount of force or physical restraint used by the officers; (e) the length and form of the questions; (f) whether the defendant comes to the authorities voluntarily; and (g) what the defendant is told about the situation. *Hunt v. State*, 687 So.2d 1154, 1160 (Miss.1996). If a person is determined not to be in custody and is not being interrogated, the Miranda protections do not attach. Voluntary statements made by a defendant do not trigger the requirements of Miranda. *Drake*, 800 So.2d at 513

As noted above, Mingo voluntarily went to the police station, was told about the victim's accusations, and agreed to give a statement to police. He was not placed under arrest before questioning, and the officers emphasized that he was free to end his questioning at any time. Given these circumstances, Mingo was not “in custody” and, therefore, was not entitled to the Miranda protections.

*Mingo v. State*, 944 So.2d 18 (Miss. 2006)

Just as in *Mingo*, King went voluntarily to the police station to speak with Fuller. He drove his own car and was not under arrest. When he arrived, he denied ownership of the safe and told the officers that he did not care what they did with it.

King complains that the “search and seizure” of the safe and scales by the Moorhead volunteer fire department was illegal.

First and foremost, a burning building presents an exigency of compelling gravity making a warrantless entry reasonable. *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1950, 56 L.Ed.2d 486 (1978). Once in the building, firefighters may seize evidence of arson which is in plain view. *Tyler*, 436 U.S. at 509, 98 S.Ct. at 1950. Firefighters are charged with the responsibility of determining a fire's origin in addition to extinguishing the blaze itself. *Id.* at 510, 98 S.Ct. at 1950. Once inside a building to fight a fire, officials may remain on the premises for a “reasonable time” to investigate the cause of the fire. *Id.* at 511, 98 S.Ct. at 1951.

Prompt action in determining the fire's origin is essential in ensuring there will be no rekindling of the blaze. Therefore, it follows that if a warrantless entry to extinguish a fire and determine its

origin is constitutional, then the warrantless seizure of evidence while inspecting the premises for these purposes is likewise constitutional. *Id.* at 510, 98 S.Ct. at 1950.

*Rose v. State*, 586 So.2d 746 (Miss. 1991).

Moorhead volunteer fireman Johnson testified that while he was looking for hotspots where the fire might kindle or reignite, he found two scales hidden under a dresser. Because of the necessity of determining with certainty that a fire will not reignite, Johnson was taking prompt action to ensure that there would be no rekindling of the fire. It was therefore constitutional for him to seize the scales and safe he found on the premises during the exercise of that necessary precaution. There is nothing in the evidence to suggest that Johnson was looking for drugs or equipment used in the sale of drugs. The evidence is clear that during the course of “knocking down” the fire outside and inside the house and then ensuring that there would be no rekindling, Johnson came upon these items. Johnson’s testimony was clear that he was required to move things in the house in order to check for hotspots, and that moving the dresser or the clothes in the closet was done to ensure that the house would not reignite and was not done for the purpose of searching for illegal drugs. There is no evidence that Johnson at any time searched for drugs rather than looking for hotspots or that he remained on the premises after the fire was extinguished to conduct a search. Whether Fuller thought there might be something illegal in the house is irrelevant to Johnson’s actions in putting out the fire and ensuring that it did not rekindle. Johnson’s testimony reveals that he did not exceed what he was required to do in putting out the fire and protecting the premises. It is clear from the record that the exploding ammunition in the house during the fire made the law enforcement officers and firefighters more wary due to the danger it imposed on them, but there is no evidence that the firefighters went

beyond what was required to extinguish the blaze and ensure that the premises would not reignite after they left. During the course of these limited activities, Johnson found the scales, the locked safe and the gun which he seized. Whether the items were seized due to their apparent value or due to their possible evidentiary value is not relevant to the inquiry, since the entry and inspection of the premises to prevent potential rekindling of the fire was constitutional. Pursuant to *Rose*, this seizure was constitutional since if “a warrantless entry to extinguish a fire and determine its origin is constitutional, then the warrantless seizure of evidence while inspecting the premises for these purposes is likewise constitutional.”

**II. The Trial Court correctly refused to grant King’s Motion for a Directed Verdict of Acquittal at the close of the State’s case since the State clearly proved the elements of possession and intent.**

A Motion for Directed Verdict or request for peremptory instruction tests the sufficiency of the evidence and the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. *Noe v. State*, 616 So.2d 298, 302 (Miss. 1993) (citing, *Clemons v. State*, 460 So.2d 835 (Miss. 1984); *Forbes v. State*, 437 So.2d 59 (Miss. 1983); *Bullock v. State*, 391 So.2d 601 (Miss. 1980)). If, under this standard, sufficient evidence to support the jury’s verdict of guilty exists, the motion for directed verdict and request for peremptory instruction should be overruled. *Noe* (citing, *Brown v. State*, 556 So.2d 338 (Miss. 1990); *Davis v. State*, 530 So.2d 694 (Miss. 1988)).

To evaluate whether the evidence given is sufficient, this Court must determine if any evidence may “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.” *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985) (citing *May v. State*, 460 So.2d 778, 781 (Miss.1984)) (emphasis added). If reasonable jurors could have reached different conclusions with respect to every element of the offense, the evidence will be considered sufficient. *Bush v. State*, 895 So.2d 836, 843 (Miss.2005) (citing *Edwards*, 469 So.2d at 70). The prosecution receives the benefit of all “favorable inferences that may be reasonably drawn from the evidence” when determining if the evidence presented was sufficient to support the verdict. *Smith v. State*, 839 So.2d 489, 495 (Miss.2003).

*Stingley v. State*, 966 So.2d 1269 (Miss.Ct.App.,2007)

King was convicted under Section 41-29-139(a)(1) of the Mississippi Code. That statute makes it “unlawful for any person knowingly or intentionally ... [t]o sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance.” Miss.Code Ann. § 41-29-139(a)(1) (Rev.2001).

Where the defendant is not in actual possession of the controlled substance, constructive possession may be established where the evidence, considered under the totality of the circumstances, shows that the defendant “conscientiously exercised control over the contraband.” *Dixon v. State*, 953 So.2d 1108, 1112 (Miss.2007) (citing *Berry v. State*, 652 So.2d 745, 750-51 (Miss.1995)). “Constructive possession may be shown by establishing that the drug involved was subject to [the defendant's] dominion or control.” *Curry v. State*, 249 So.2d 414, 416 (Miss.1971). The defendant's close physical proximity to the contraband is usually required, but is not in and of itself sufficient to establish constructive possession unless “other incriminating circumstances” are present. *Id.* at 416.

The State proved possession and intent through testimony that Alston King had lived in

the house at 1380 Church Street where the safe and scales were found for at least seven years prior to the fire on January 28, 2003. The testimony of two witnesses makes it quite clear that King lived at the house at 1380 Church Street. Officer McGuire testified that he saw King at the home daily. Police Chief Stephans testified that King had lived in the home with his parents and then lived there alone after his parents were deceased. Testimony elicited by defense counsel from Officer Fuller also revealed that King was charged with stealing electricity for that residence. King was there on the property the day of the fire when police arrived on the scene. Testimony of multiple witnesses proved that the Moorhead Fire Department found the scales, the sawed off shotgun and the safe containing approximately \$50,000 worth of cocaine and marijuana in Alston's home at 1380 Church Street at the time of the fire. This evidence was sufficient to prove beyond a reasonable doubt that King lived in the house. There was no evidence presented at trial that anyone else lived in the home.

Further, the evidence included the two scales that were also found in the house where King lived. The scales were not in the kitchen to measure food, but rather hidden under a dresser in the bedroom. The safe containing the drugs was found in the closet of the same bedroom where the scales were found. The presence of the scales in King's home plus their proximity to the drugs leads to the unavoidable inference that the scales were related to the drugs and were indeed used to measure the drugs for sale. Testimony established that the quantity of drugs found in King's house was large enough to support the inference that they were for sale and not for personal use. Further, evidence showed that King did not have a job, a source of income, and had a drug habit. From this evidence it is reasonable to infer that King needed the income from the sale of the drugs found in his home in order to support his own habit. The items were hidden

in his home under his dresser and under his clothes in his closet. The evidence clearly supports the jury's conclusion that the drugs were in King's possession. The State is entitled to the benefit of all reasonable inferences of this evidence in the analysis of King's motion for directed verdict. Thus, the evidence along with the reasonable inferences supports the jury's verdict that King was in possession of the drugs with intent to sell, barter, transfer or

Juries are allowed to make reasonable inferences based on the evidence. The State is entitled to the benefit of all favorable testimony and reasonable inferences to support the verdict in this case. It is certainly a reasonable inference that since evidence clearly proved that King lived in the house and was seen there every day, was attempting to steal electricity for the house and was present at the time the fire department came on the scene of the fire, that King was in control of items found in the house. When reviewing a case for sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush v. State*, 895 So.2d 836, 843 (Miss.2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The evidence must show "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Bush*, 895 So.2d at 843 (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). Keeping in mind the reasonable doubt standard, if "reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Bush*, 895 So.2d at 843 (quoting *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985)).



Accepting as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom,” there was “sufficient evidence” to support the jury's verdict that King was in possession of the 155 grams of marijuana and 291.7 grams of cocaine found in his house with intent to sell, barter, transfer or deliver the drugs to another. *Noe*, 616 So.2d at 302. Accordingly, the circuit court did not err in denying King's motion for directed verdict and the jury's verdict in this case should not be disturbed.

### **III. The Jury's Verdict was Supported by the Overwhelming Weight of the Evidence.**

The testimony presented by the witnesses must be weighed by the jury. “Absent some indication that there has been a substantial miscarriage of justice, once the jury has spoken on what credibility and weight it will assign to the witnesses, the trial court, and this Court on appeal, may not intercede.” *Little v. State*, 744 So.2d 339, 342-43 (Miss.Ct.App.1999) (citing *Allison v. State*, 724 So.2d 1014, 1019 (Miss.Ct.App.1998)). As the jury has weighed the credibility, of the state's witnesses, it is beyond the authority of the Court of Appeals to disturb the finding. The jury's verdict is supported by the record which shows that King was the only person who lived in the home where the scales and the safe containing the marijuana and cocaine were found. The evidence showed that the marijuana and cocaine were present in amounts which would have been for the transfer of the drug rather than for personal use, and that King needed the income. It cannot be stated that an unconscionable injustice has occurred, nor can it be stated that the trial judge abused his discretion in failing to grant King's motion for a new trial, as the verdict was not against the overwhelming weight of the evidence. Therefore, this issue is without merit and the jury's verdict should be upheld.

The verdict of the Sunflower County jury was supported by sufficient, substantial, and

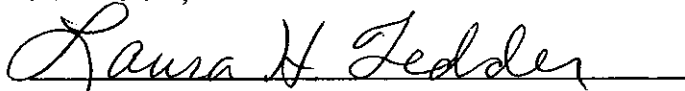
credible evidence, and was not against the overwhelming weight of the evidence. Accordingly, King's conviction and sentence should be affirmed.

### CONCLUSION

The issues raised by the Appellant are without merit and the jury's verdict and the trial court's rulings should be upheld.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

A handwritten signature in cursive script, reading "Laura H. Tedder", written over a horizontal line.

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### CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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