

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ALSTON KING

APPELLANT

VS:

NO. 2004-KA-00688

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

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**CERTIFICATE OF INTERESTED PARTIES
PURSUANT TO RULE 28(a)(1)
MISSISSIPPI RULES OF APPELLATE COURT PROCEDURE**

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 disqualifications of recusal.

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT ERRED IN OVERRULING KING'S MOTION TO SUPPRESS THE EVIDENCE SEIZED DURING THE ILLEGAL SEARCH OF HIS RESIDENCE AND TO SUPPRESS STATEMENTS MADE BY KING DURING HIS INTERROGATION.**
- II. THE TRIAL COURT ERRED IN REFUSING TO GRANT KING'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND IN REFUSING TO GRANT KING'S REQUESTED PEREMPTORY INSTRUCTION.**
- III. THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

STATEMENT OF THE CASE

This case arises from the conviction and sentence of Alston King for possession of marijuana with intent to distribute and possession of cocaine with intent to distribute. On September 4, 2003, Alston King was indicted by the Grand Jury of Sunflower County, Mississippi. Said two-count indictment alleged that Alston King did wilfully, unlawfully, feloniously and knowingly have and possess 155 grams of marijuana and 291.7 grams of cocaine with the intent to sell, barter, transfer or deliver same to another at a time when he was in possession of a firearm, to-wit: a sawed-off shotgun.(RE 10) February 24, 2004, the case was tried by a jury and at the conclusion of the trial Alston was found guilty of possession of marijuana and possession of cocaine with the intent to sell, barter, transfer or deliver same to another without the gun enhancement. (RE 19-23) On February 27, 2004, King was sentenced to thirty (30) years in the custody of the Mississippi Department of Corrections on Count I - the possession of cocaine with intent count and ten (10) years on Count II (the possession of marijuana with intent) consecutive to the thirty year sentence imposed in Count I; the execution of the ten (10) year sentence was suspended and King was sentenced to serve five (5) years on post-release supervision; a \$5,000 fine; \$600 in attorney's fees; court costs and state assessments; \$250 Crime Victims Compensation Fee (RE 24-5) On March 17, 2004, Honorable Aelicia Thomas, King's trial counsel, informed the Court that Honorable George T. Kelly had been retained to represent King on his appeal and a Notice of Appeal and Designation of the Record was filed the same day, thus beginning King's appeal process. A briefing schedule was issued in this cause; the appeal was subsequently dismissed for failure to timely file King's brief.

On April 10, 2007, this Court issued an order recalling its previous mandate dismissing the appeal in this cause and reinstating the appeal. By Order dated June 14, 2007, the Circuit Court of Sunflower County, Mississippi appointed Whitman D. Mounger to represent King for purposes of his appeal.

STATEMENT OF THE FACTS

On January 28, 2003, a house fire was reported at 1370 Church Street, Moorhead, Sunflower County, Mississippi. When firemen arrived, a small crowd of bystanders was attempting to put the fire out with a hose. Shortly thereafter, shots went off from within the burning house. After the fire was out, firemen went through the house to check for hot spots and found, among other items, a set of scales, a sawed-off shotgun and a safe with two padlocks on it. These items were turned over to law enforcement and the safe was eventually opened and what appeared to be a quantity of drugs was retrieved from inside. King was subsequently arrested and charged with possession of marijuana and cocaine with intent, enhanced by possession of a firearm.

The State's first witness, **Joe H. Johnson, III**, a phlebotanist at the Oktibehha County Hospital in Starkville, Mississippi, was a volunteer firefighter for the Moorhead Fire Department, in 2005, when he responded to a page concerning the house fire in question. (T 96-97)

Johnson was first to arrive at the scene and he testified that ten to fifteen people were there, but he did not know any of the bystanders. He stated that the fire truck arrived about five minutes later. (T 97-98) Johnson testified that, after about fifteen minutes, he and another volunteer, Cokie Viner, heard two to three gun shots go off inside the house. (T 99)

Johnson testified that it took about forty-five minutes to one hour to put the fire out. (T 99) After getting the fire knocked down, they proceeded to do what firefighters refer to as an overhaul, i.e., they go through the house to check for remaining hot spots and to make sure that everything is out before they leave the scene. (T 99)

Johnson testified that he concentrated on the bedroom, moving furniture and clothes and stuff to make sure everything was out. (T 100) Johnson found two small weigh scales underneath a chest of drawers and they were introduced into evidence. Johnson testified that the scales seemed suspicious because he knows that they are sometimes used to weigh illegal substances. (T 101) He reported the scales to the Fire Chief, who then contacted law enforcement to whom the scales were turned over. (T 101)

Another item introduced into evidence was what Johnson stated appeared to be a shotgun that was found underneath a burned couch in the living room of the house. (T 102) He testified that he also found two metal boxes under several piles of clothes in opposite corners of a closet in the bedroom - one open with papers and a few shotgun shells inside, the other solid metal closed with two padlocks securing it. (T 103) He called the Fire Chief, reported what he had found, and turned the padlocked metal box over to law enforcement. (T 104)

Johnson testified that substantial damage had been done to the house - the bedroom was gutted and the kitchen had a good bit of fire damage. Additionally, the living room and remainder of the house had a lot of smoke and water damage, however the outside frame of the house was intact. (T 104)

Johnson stated that they couldn't safely secure the house as its doors and windows were burned. Johnson testified that fire department procedure was to turn over valuables to the homeowner if he is present.. If the homeowner is not present, firefighters are trained to turn over valuables to law enforcement. (T 105) Johnson testified that he turned the box with two padlocks over to Officer Fuller of the Moorhead Police Department, as well as the burned scales. (T 105)

On cross-examination, Johnson testified that he couldn't determine the cause of the fire. (T 106) Johnson stated that when he and Cokie Viner were spraying water on the back of the house and heard gunshots, Officer Fuller approached them and stated that "if we found anything inside that he needed to know about, to let him know." (T 107)

Johnson testified that he didn't have a clue as to when the objects he found were placed in the house or how long they had been there. (T 108)

Johnson testified that a shotgun would have a locking device that allows the loading of a bullet on it, but that the shotgun found in the house didn't have one. He stated that this locking device was necessary in order to operate the weapon - it's what holds the bullet in it. (T 110-112)

The State's next witness was **Bobby Fuller**, Assistant Chief of the Moorhead Police Department. Fuller testified that he got a call about a house fire at 1307 Church Street. Upon arrival, he realized that Alston King, the Defendant, lived there. (T 116-117)

He testified that after hearing gunfire, he advised the firemen that there could be a gun in the house and if they found a gun or anything in the house to advise him. (T 118) Fuller testified that he was called back to the scene by the fire chief who turned over to him a safe, a sawed-off shotgun and two weigh-scales that were retrieved by firefighters from the burned house. (T 118) He testified that he did not see Alston King around when he was called back to the scene. At this point, Fuller identified the above-described objects and they were admitted into evidence. Fuller testified that they were given to him by the firemen. He stated that no changes or alterations had been made to the sawed-off shotgun. He testified that there were two padlocks on the safe when it was given to him. (T 120-21)

Fuller testified that he told Officer McGuire to have Alston King come in and talk to him. McGuire saw him the next day and King came in to see him. He testified that King was not under arrest at that time and that King came in a car belonging to a co-worker. (T 121)

Fuller testified that he tape-recorded the conversation that he had with King. Fuller testified that King said on several occasions that the safe wasn't his and to do with it what he wanted. (T 123) He stated that on one occasion King said "If you want me to say what's in there, you might hang me, anyway." (T 123) Fuller stated that when the safe was opened he found five bags inside.

At this point, Trial Counsel renewed her outstanding motion to suppress the evidence found at the house. (RE 11) Outside the presence of the jury, Trial Counsel questioned Fuller about the issue of the ownership of the safe and other items. Fuller stated, in response to questioning by Trial Counsel, that he didn't believe King when he denied ownership. Further, Fuller stated that, in his opinion, King's statement indicated his ownership of the safe and knowledge of the contents. (T 127-29) Fuller further stated that King was not under arrest and was free to leave at anytime. (T 129)

The Court then denied the Motion To Suppress. (RE 14)

Fuller then resumed his direct testimony. He stated that he sent the bags of drugs to the Crime Lab for analysis. (T 131) He also requested fingerprint analysis on the items sent and that no fingerprints were found (T 131)

On cross-examination Fuller admitted that he did not know if King stayed at the house all day or every night. (T 133) He further testified that there was no water or regular electricity hooked up to the house and that it was a "raggedy" house. (T 134)

Fuller testified that when he arrived on the scene he saw the Conrods, notorious drug boys in the community and noted so on the complaint form he filled out at the time. (T 135)

He further testified that, in his opinion, King had a serious drug habit. (T 138) He also stated that drug addicts can use up to \$5,000 of drugs a week. (T 137) However, he testified that the amount found was substantially more than this.

Fuller testified that he did not know if the scales that were found at the house were operable. He stated that there was a battery in one of the scales at the time they were turned over to him, but the battery had disappeared. (T 139-40)

Sharon Patton, a drug analyst at the Mississippi Crime Lab, was the State's next witness. She identified the packages of drugs turned over to her for analysis as marijuana and cocaine and identified their respective weights as 291.7 grams of cocaine and 155 grams of marijuana. (T 150-51)

The State's next witness was Willie McGuire, a Moorhead police officer, who testified that Officer Fuller picked him up and took him to the scene of the fire. (T 158) He was with Fuller when the evidence (the scales, shotgun and metal box) was turned over to him. (T 158-59)

McGuire testified he saw King the day after the fire and told him Fuller wanted to talk to him. He followed King to the police station to make sure that he complied. (T 159)

McGuire testified that, during King's questioning, he retrieved the safe from his locker where he had placed it the night of the fire during King's questioning. McGuire testified that Fuller kept asking King what was in it and King kept saying he didn't know. Finally, King said "Whatever you find in there, you're probably going to hang me with it anyway." (T 160) McGuire stated that King finally said "do what you want with it." Pursuant to Fuller's

instructions, McGuire then found Cokie Viner, who had bolt cutters and they cut off the two padlocks on the safe. After opening the safe, they looked inside and found what appeared to be a lot of drugs. (T 160) McGuire stated that it was at this point that King was arrested. (T 161)

On cross-examination, McGuire said that although he saw King at the house almost daily, he did not know if he slept there. (T 161) He further stated that he didn't know how the retrieved items got in the house or how long they had been there prior to the fire. (T 162)

Deborah Stephens, Chief of Police of Moorhead was the State's final witness. She testified that, to her knowledge, King lived at the house on Church Street. (T 165)

In response to questioning by the State, she estimated the value of the drugs at \$50,000 plus. (T 165) She stated that people do not normally have this quantity of drugs for personal use. (T 166)

On cross-examination, Stephens testified that she believed King to be an addict. She stated that she did not know what his daily consumption was. (T 166) She stated that she did not know how the items got in the house and how long they were in the house prior to the fire. (T 169) She also testified that King had brothers and sisters and that he had a sister living in Moorhead and that she did not know how often he stayed with his sister. (T 169)

At this point, the State rested. The Defense moved for a directed verdict as the State had failed to prove both possession and "intent" to sell on the part of King. (RE 15) Furthermore, the Defense argued that the shotgun retrieved from the house had belonged to King's father and was, as admitted by the State's witnesses, inoperable. The Trial Court denied this motion. (RE 17) The Defense rested.

SUMMARY OF THE ARGUMENT

The Trial Court erred in denying King's Motion To Suppress the evidence seized by law enforcement from his residence without his consent or without a search warrant. Additionally, the statements made by King during his interrogation at the Moorhead Police Department should likewise have been suppressed. Further, law enforcement failed to Mirandize King prior to his interrogation and any statements made by him should be suppressed for this reason.

The Trial Court erred in denying King's motion for a directed verdict at the close of the State's case and his peremptory instruction, as the State failed to meet the burden of proving both *possession* and *intent*, both essential elements of the crime of possession of a controlled substance with intent to distribute charged against King.

The verdict of the jury was against the overwhelming weight of the evidence, as the State failed to establish that the safe containing the drugs was in the dominion and control of King and that he was in possession of the drugs with the *intent* to sell or distribute same.

The Trial Court apparently ruled that, since King denied ownership of the locked metal box found at his residence, he did not have standing to object to the introduction of the box and its contents. King asserts that this logic fails, as the search of the residence was illegal and that, therefore, any denial or other statement concerning the ownership of one metal box seized during this illegal search is immaterial as to his standing to object to the search. If one is to follow this logic to its conclusion, then anytime an illegal search of a residence is conducted and ownership of a container that holds illegal substances is denied by the owner of the residence, the owner then lacks standing to object to the illegal search of his residence and the introduction of this illegally obtained evidence at trial. King submits that this issue is not that of standing to object to the search of the locked box, but of standing to object to the search of King's residence in which the box was located and seized.

The residence that burned, and was searched without a warrant or consent, had belonged to King's parents, and, following their deaths, belonged to King. In fact, the State never argued that the residence did not belong to King. Rather, the State went to great lengths to establish that the residence was, in fact, King's. Therefore, King had standing to object to its search without a warrant or his consent, and to thereby object to the introduction at trial of any evidence seized therein.

It is not disputed by King that firemen have the authority, without warrant or consent, to enter a burned or burning residence in order to extinguish the fire, determine the origin of the fire, and guard against the rekindling of the fire. However, the entry of King's home and the search for "hot spots" does not extend to a further search by firefighters to discover criminal activity, particularly criminal activity that does not relate to the cause of the fire.

The case *sub judice* involves an alleged search for "hot spots" by Joe H. Johnson, III, a volunteer fireman with the Moorhead Fire Department (T 96), and other members of the Moorhead Fire Department. In this regard, Johnson testified that he was told by Fuller, the Assistant Police Chief, "if we found anything inside that he needed to know about to let him know." (T 107) Although Johnson testified that it was standard procedure to turn over anything of value to law enforcement if the homeowner cannot be found (T 109), he testified that he turned over only two items to law enforcement, a set of burned up scales and a padlocked metal box.

During direct examination, Johnson was asked why the burned up scales he retrieved from within the home were of interest to him. Johnson replied: "...they seemed to be suspicious to me, because I know that they can be used to weigh illegal substances, such as drugs, to be sold." (T 101) As to the metal box, Johnson stated that he turned it over to law enforcement because he considered it something of value. However, when asked by Defense Counsel if Johnson considered burned up scales "something of value", Johnson replied "Well, that doesn't come under actually value. We also receive training as fire fighters to recognize certain objects that may be used for illegal activities..." (T 109) Defense Counsel then continued: "Okay. So now it's not just things of substantial value, but it's things that look like it could be used in illegal activity." (T 109) Johnson replied: "Correct." (T 109) By Johnson's own admission, he was searching for evidence of illegal activity, such as drugs, by both training and at the instance of the Moorhead Police Department. As he only turned over two items from the home, the burned up scales and the one padlocked metal box, nothing else must have seemed of value to him. Rather, King submits, Johnson knew that nothing else was of value to the police.

Furthermore, it should be pointed out that Johnson testified on direct examination that he had to move a chest of drawers in order to find the scales, and the two metal boxes were located by him in opposite corners of a closet "after moving several piles of clothes." (T 100- 103)

In an attempt to get to the real motivation behind the extensive search by firefighters of King's residence, Defense Counsel questioned Fuller about his motivations. Defense Counsel stated: "But you felt like they were going to find something, didn't you?" (T 136) Fuller admitted: "When they finally put it out, yes, ma'am." (T 136) Clearly, Fuller suspected drug activity and instructed firefighters to act on his suspicions.

King submits that this is a case where law enforcement took advantage of the circumstances presented by the fire in order to procure evidence that they would not have been able to obtain otherwise. Law enforcement did not have a legally issued search warrant and they did not have the consent of the home owner. King asserts that there were no facts or circumstances that would have given rise to the issuance of such a search warrant by an objective magistrate. King also submits that there were no exigent circumstances that would authorize a search of the residence without a warrant or consent, such as the pursuit of a fleeing felon. Additionally, law enforcement did not have the legal authority to seize items found in the home without a warrant and without consent. Law enforcement used another governmental agency to do for them what they were unable to do lawfully themselves.

In Rose v. State, 586 So.2d 746 (Miss. 1991), this Court took up the issue of whether a search by firefighters, in particular a volunteer firefighter, constituted an illegal search of a residence. This Court held that "Volunteer firemen in Mississippi are subject to the Fourth Amendment of the United States Constitution and Article III, Section 23 of the Mississippi

Constitution.” (**Rose**, at 755)

In **Rose** at page 751, this Court held “The Fourth Amendment safeguards the privacy interests of individuals against arbitrary invasion by governmental authorities.” (Citing **Camara v. Municipal Court**, U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967)). The **Rose** Court held:

We begin by noting that a fireman cloaked with governmental authority who is present at fire-damaged premises for the purpose of ascertaining the origin of a fire or looking for evidence of a crime is subject to Fourth Amendment standards. “[T]here is no diminution in a person’s reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman....” (Citing **Michigan v. Tyler**, 436 U.S. 499, 506, 98 S.Ct. 1942, 1948, 56 L.Ed. 2d 486 (1978))

The **Rose** Court held that “a burning building presents an exigency of compelling gravity making a warrantless entry reasonable. (Citing **Michigan v. Tyler**, at 509) The **Rose** Court also held that “Because determining the cause and origin of a fire serves a compelling public interest, the warrant requirement does not apply in such cases.” (Citing **Michigan v. Clifford**, 464 U.S. 287, 293, 104 S.Ct. 641, 647, 78 L.Ed.2d 477 (1984)) But, the **Rose** Court went on to add “However, the scope of the search must be limited to its objective.” (Citing **Michigan v. Clifford**, at 293 n.4) “In other words, such a search cannot ‘grow’ into a fishing expedition or curiosity adventure with its object being the discovery of criminal activity.” **Rose** at 753.

In **Rose**, firefighters suspected arson as the cause of the fire and their search of the home extended to opening a chest of drawers and a looking into a dishwasher in order to determine if the home was, in fact, lived in. The **Rose** Court held that their search extended beyond their original objective and had become “a curiosity adventure which might lead to the discovery of

criminal activity.” (Rose at 754) The criminal activity in Rose was arson, which at least had a connection to one of the stated objectives of firefighters, i.e. to ascertain the cause of the fire. In the case *sub judice* the criminal activity that firefighters were looking for was evidence of the possession of illegal drugs. This is not one of the legitimate objectives of firefighters! Johnson’s own testimony indicated that he was indeed looking for evidence of other criminal activity (drugs) not related to the fire and stated that he was trained to do so. (T 109) We have the additional testimony by Johnson and Fuller that law enforcement (Fuller) requested that the firefighters look for evidence of other criminal activity and bring any such evidence to him. (T 107) The home was inhabited at the time of the fire and furnishings and personal items remained intact. “Therefore, strong privacy interests remained in the dwelling thereby subjecting post fire investigations to warrant requirements.” Rose at 753 citing Michigan v. Clifford at 295. In fact, Fuller testified that the next day, he went back to the home and everything from the home was out in the yard, indicating that the home had been ransacked, valuables from the home had been taken, and the remainder had been thrown out on the lawn. (T 145) So much for protecting the belongings of the homeowner!

Therefore, the search of the home was unlawful and the evidence seized therein by law enforcement’s surrogates (firefighters) should be suppressed. “The ‘fruit of the poisonous tree’ doctrine-also known as the exclusionary rule-prohibits introduction into evidence of tangible materials seized during an unlawful search.” Daniels v. State, 584 So.2d 437, 438 (Miss. 1991) citing Murray v. United States, 487 U.S. 533, 536, 108 S.Ct. 2529, 2532, 101 L.Ed.2d. 472, 480 (1988) (citing Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). “The doctrine prohibits ‘testimony concerning knowledge acquired during an unlawful search.’ “

Id. (citing **Silverman v. United States**, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed. 2d 734 (1961) The **Daniels** Court went on to state “Of critical import to this case, the doctrine ‘prohibits the introduction of *derivative evidence*, both tangible and testimonial, that is, the product of the primary evidence, or that is otherwise acquired as a result of the unlawful search...” **Id.** Consequently, any statements made by King, following the unlawful search of his home and seizure of certain items from it, should be suppressed.

Furthermore, King’s constitutional rights were violated when he was brought in for questioning and Officer Fuller conducted an interrogation without reading King his rights. “The ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966) comes into play during custodial interrogations, defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action to any significant way.” **Compton v. State**, 460 So.2d 847, 849 (Miss. 1984). In the case *sub judice*, King was told to go in for questioning by Officer McGuire. McGuire followed him to the police station to make sure he complied. Once inside, Fuller testified that he gathered the Chief and another officer present at the time into the room, turned on the tape recorder, and proceeded to question King. Although Fuller may have felt that King was free to leave or refuse to answer questions, he did not so advise King, and, clearly King didn’t feel free to leave, nor would any other reasonable person finding himself in like conditions. King’s questioning was a custodial interrogation and, as such, Fuller should have properly advised King of his rights pursuant to **Miranda**. Consequently, although the statements made by King did not constitute a confession, but rather were simply an indictment on the tactics of the police, the statements made by King should nevertheless have been suppressed.

II. THE TRIAL COURT ERRED IN REFUSING TO GRANT KING'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND IN REFUSING TO GRANT KING'S REQUESTED PEREMPTORY INSTRUCTION.

At the close of the State's case, Defense Counsel moved for a directed verdict of acquittal on the charge of possession with *intent* against King. (RE 15) Trial Counsel argued that the State had failed to make a prima facie case as to either possession or possession *with intent*. (RE 15) The Trial Court denied this motion. (RE 17) This motion was renewed at the end of all of the evidence by King's request for a peremptory instruction. (RE 18)

The standard of review for a trial court's denial of a motion for directed verdict or peremptory instruction is identical. Hawthorne v. State, 835 So. 2d 14, 21 (Miss. 2003) citing Coleman v. State, 697 So. 2d 777, 787 (Miss. 1997). These motions challenge the legal sufficiency of the evidence. Hawthorne at 21 (citing McClain v. State, 625 So. 2d 774, 778 (Miss. 1993)).

In Wetz v. State, this Court stated: "Our concern here is whether the evidence in the record is sufficient to sustain a finding adverse to Wetz on each element of the offense of murder." Wetz v. State, 503 So. 2d 803, 808 (Miss. 1981). The Court continued "...we must with respect to each element of the offense consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict." (citing Harveston v. State, 493 So. 2d 365, 370 (Miss. 1986). This Court concluded that "We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." Wetz at 808.

Notwithstanding these high standards, King nonetheless argues that the State's proof failed to establish sufficient evidence to legally support the verdict. That is, the evidence presented at trial failed to establish one or more of the necessary elements of the statutory crime of possession of a controlled substance *with intent* to distribute or sell under which King was indicted, Miss. Code Ann. §41-29-139(a)(1). (RE 10) The element of *with intent* to distribute or sell cannot be proven by weight alone. Jowers v. State, 593 So.2d 46, 47 (Miss. 1992)

King acknowledges that "Intent to distribute or dispense controlled substances may be established by circumstantial evidence." Hicks v. State, 580 So.2d 1302, 1305 (Miss. 1991). However, in the case *sub judice* none of the normal elements used to prove *intent* existed. There was no evidence presented at trial that King had ever sold drugs on a prior occasion, or, for that matter, that drugs were sold from his residence. There was no testimony regarding earlier surveillance of controlled buys as is the usual case in the vast majority of cases of possession *with intent*. Additionally, there was no evidence of packaging which would support a finding of *intent* such as that found in Dixon v. State, 953 So.2d 1108, 1111 (Miss. 2007) and other cases.

Furthermore, there was no evidence that tied King to the metal box in which the drugs were found, other than the location of the twice padlocked box in King's home. The testimony by the State indicated that King was a drug addict without sufficient means to purchase an amount of drugs as large as that discovered in the metal box. King did not even have sufficient funds with which to pay for electricity or water at his residence. There was no evidence that King had the keys to the two padlocks on the metal box. King was arrested at the time of his interrogation, and presumably searched prior to placing him in the jail, as is standard procedure. He did not have time to hide or otherwise dispose of the keys, as he did not know that he was

going to be brought in for questioning at the time that McGuire instructed him go in to the police station. Furthermore, McGuire testified that he followed King in to the police station to make sure that he complied. If King had thrown anything out of the vehicle's window, McGuire would certainly have seen it.

King asserts that there was not sufficient evidence to support a finding of possession *with intent*, much less a finding of possession at all. Therefore, it is King's contention that the essential element of *intent* was not supported by the evidence and it was the State's burden to prove this element beyond a reasonable doubt. Therefore, King asserts that reasonable and fair-minded jurors could only have found King not guilty and that this cause should be reversed and rendered accordingly.

III. THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

King asserts that the verdict of the jury was against the overwhelming weight of the evidence. This Court has established the following standard of review:

In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. **Baker v. State**, 802 So. 2d 77, 81 (Miss. 2001) (quoting **Dudley v. State**, 719 So. 2d 180, 182 (Miss. 1998)).

While acknowledging that the jury is the judge of the weight and credibility of the testimony, King asserts that the evidence in this case is not of sufficient weight to support the jury's finding. Additionally, the State must prove beyond a reasonable doubt that King had the *intent* to sell or

distribute the marijuana and cocaine found in the metal box seized from his residence. In this regard, King requests that this Court consider the argument contained in Issue II of his Brief, as much of it relates to King's argument concerning the weight of the evidence contained in this Issue, said overwhelming weight being necessary to prove the element of *with intent*.

The evidence offered at trial only established that someone placed a heavily padlocked metal box in King's residence. There was no evidence that King sold drugs or that anyone else had sold drugs from the residence. The evidence also established that King was an impoverished drug addict who would very likely have smoked up all of the drugs contained in the box had he had access to the box. King did not have the keys to the locked box and he disavowed ownership of the box unlawfully seized from his home. There was no credible evidence that King possessed the drugs in the metal box or that he intended to sell or distribute these drugs or any others.

Based on all of these facts, King asserts that the evidence offered against him was not of sufficient weight necessary to prove guilt beyond a reasonable doubt, even after viewing the evidence in the light most favorable to the State. Consequently, the proof against King was so lacking as to be against the overwhelming weight of the evidence and to let this guilty verdict stand would be to sanction an unconscionable injustice.

CONCLUSION

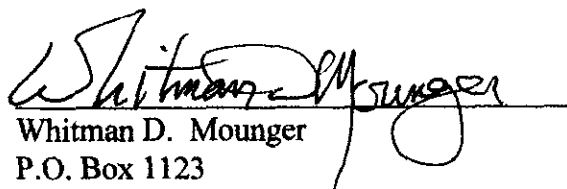
King asserts that the Trial Court erred in overruling King's motion to suppress the evidence seized during the illegal search of his residence and to suppress the statements made by King during his interrogation. The evidence taken from King's residence was seized by a member of the Moorhead Fire Department during an alleged sweep for "hot spots" following extinguishing the fire at King's residence, without either a search warrant or consent by King. This unlawful search and the seizure of the evidence obtained therefrom was in violation of the Fourth Amendment of the United States Constitution and Article III, Section 23 of the Mississippi Constitution. In fact, firefighters were acting as surrogates for the Moorhead Police Department in attempting to locate evidence of illegal drug activity or other crimes, clearly exceeding their lawful objectives and beyond the parameters of their official duties.

King contends that the Trial Court erred in refusing to grant his Motion For A Directed Verdict and Peremptory Instruction D-1 as such verdict was contrary to law. King asserts that the State failed to prove beyond a reasonable doubt that he possessed marijuana and cocaine *with intent* to sell or distribute, an essential and required element of Section 41-29-139 (a)(1) of the Mississippi Code of 1972 as annotated and amended. There was no evidence that indicated that King possessed the drugs found in a padlocked metal box in his residence, or that there was any *intent* on King's part to sell or distribute these drugs.

Lastly, the Appellant submits that the verdict of the jury was contrary to and against the overwhelming weight of the evidence and to allow this verdict to stand would constitute an unconscionable injustice.

Thus, the Appellant requests that, as to Issue I, II and III, this Court reverse and render this case and discharge the Appellant.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Whitman D. Mounger", is written over a horizontal line.

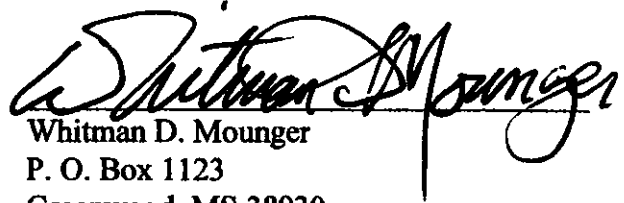
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Thus, the Appellant requests that, as to Issue I, II and III, this Court reverse and render this case and discharge the Appellant.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the above and foregoing copy of Brief of Appellant by hand-delivery or United States mail, postage prepaid, to the persons named below.

This the 17th day of September, 2007.



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