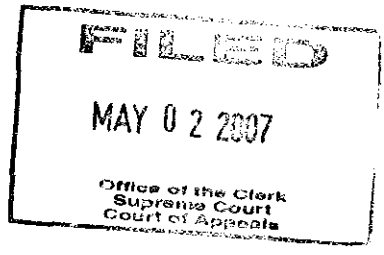
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT LEE ROBINSON — APPELLANT



VS. — NO. 2006-KA-1446-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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ROBERT LEE ROBINSON **APPELLANT**

VS. **NO. 2006-KA-1446-COA**

STATE OF MISSISSIPPI **APPELLEE**

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STATEMENT OF THE CASE

It took a jury of the defendant's peers only eighteen (18) minutes to find Robert Lee Robinson guilty, as a second and subsequent offender, of the felonious possession, constructively, if not actually, of ecstasy (Count I), cocaine (Count II), marijuana (Count III), and alprazolam (Count IV). (R. 226-27)

Following a routine traffic stop, the drugs were found inside the trunk of an automobile Robinson, as owner and sole occupant, was operating at the time of the stop, search, and seizure by a state trooper.

On a day subsequent, the defendant was found guilty of recidivism as well. *See* Miss.Code Ann. §99-19-81. (R. 245-46)

Robinson was sentenced to serve a total of thirty (30) years in the custody of the MDOC. His individual sentences of thirty (30) years, eight (8) years, three (3) years, and one (1) year are to be served concurrently without the benefit of probation, parole, or early release. (R. 250-51; C.P. at 47-58)

Robinson was also fined one million dollars. (R. 251)

ROBERT LEE ROBINSON prosecutes a criminal appeal from his convictions of possession of controlled substances as a second and subsequent offender and recidivism returned in the Circuit Court of Bolivar County, Charles E. Webster, Circuit Judge, presiding.

Following an indictment returned on March 22, 2006, for possession, as a second and subsequent offender, of ecstasy (Count I), possession of cocaine (Count II), possession of marijuana (Count III), and possession of alprazolam (Count IV), and after an amendment adding a charge of recidivism (C.P. at 20-23, 25-27) and a bifurcated trial by jury and judge conducted on May 12th and July 28th, 2006, respectively, Robinson was convicted of possession as a second and subsequent offender on all four counts as well as recidivism brought under Miss.Code Ann. §99-19-81. (C.P. at 47-58)

Sentencing took place on July 28, 2006, at which time the court, following its review of Robinson's prior convictions and a pre-sentence investigation report, adjudicated Robinson an habitual offender and sentenced him to serve thirty (30) years, eight (8) years, three (3) years, and one (1) year in the custody of the MDOC to run concurrently and without the benefit of probation, parole, or early release. (R. 249-251; C.P. at 47-58)

Robinson, who testified in his own behalf and denied having knowledge of the dope in the trunk, invites this Court to reverse and remand " . . . to the trial court for further appropriate proceedings." (Brief of Appellant at 13)

Mr. Robinson's indictment, omitting its formal parts, alleged that

> " . . . on or about March 2, 2005, [he] did unlawfully, wilfully, and feloniously, and without authority of law, have in his possession [Count I] a certain controlled substance, to wit: ecstasy . . . in an amount greater than 40 dosage units . . . [Count II] cocaine . . . in an amount greater than .1 gram but less than 2 grams . . . [Count III]

> marijuana . . . in an amount greater than 30 grams but less than 250 grams . . . and [Count IV] Alprazolam . . . in an amount less than 100 dosage units." (C.P. at 1-2)

Robinson was charged with possession as a second or subsequent offender. He was later charged as well with recidivism brought under Miss. Code Ann. §99-19-81. (C.P. at 20-23, 25-27)

Following trial by jury conducted on May 12, 2006, the jury returned four (4) handwritten verdicts finding Robinson guilty on all four (4) counts of possession of controlled substances. (C.P. at 29-32)

After the separate sentence-enhancement proceeding conducted on July 28, 2006, Judge Webster adjudicated Robinson an habitual offender and sentenced him to serve a total of thirty (30) years in the custody of the MDOC to be served without the benefit of probation, parole, or early release. (R. 250-51)

Only one (1) issue is raised on appeal to this Court:

Whether the trial court erroneously failed to grant a judgment notwithstanding the jury verdict of guilty of possession of controlled substances, i.e., the sufficiency of the evidence. (Brief of Appellant at i, iii, 9-13)

STATEMENT OF FACTS

On the morning of March 2, 2005, Robert Lee Robinson, a married father of three (R. 179), drove his privately owned vehicle, a white Oldsmobile Cutlass, from his residence in Memphis, Tennessee, to Cleveland, Mississippi, where he received the sum of $2,400 in cash from Joe Moore, an alleged business partner.

Robinson, who testified in his own behalf, freely admitted he had owned the car about a year and a half. The vehicle had a Tennessee license tag. (R. 157-58; Brief of Appellant at 5)

After leaving Cleveland for the return trip to Memphis, and while traveling north on Highway 61, Robinson was stopped for speeding by Dan Rawlinson, a state trooper, near Shelby in Bolivar County. (R. 103)

According to Rawlinson,

> "I explained to him why I stopped him and, while standing there talking to him at the window of his vehicle, I smelled what I believed to be the odor of raw marijuana coming from the vehicle." (R. 104)

Rawlinson observed that the vehicle had no inspection sticker, and there was some dark tint on the side windows. (R. 103)

Rawlinson asked Robinson, who produced a valid Mississippi driver's license, if he had anything illegal in the car at which time Robinson stated he did not. According to Rawlinson, he obtained Robinson's consent to search the interior of the vehicle " . . . and no illegal contraband was found in the interior of the vehicle[,] [h]owever, a fairly large sum of cash was located in the console of the vehicle." (R. 105)

In addition, Rawlinson continued to detect the smell of raw marijuana from inside the vehicle while Robinson claimed at trial he smelled nothing at all. (R. 182)

> "I asked Mr. Robinson if it was okay if I looked in the trunk [and] he stated, "If you have a warrant." (R. 105)

Rawlinson thereafter requested backup assistance from the sheriff's office as well as the presence of a canine officer from the state highway patrol. (R. 105) Upon returning to Robinson's motor vehicle, Rawlinson noticed that the VIN did not appear to be "fastened correctly on the dashboard." Moreover, the VIN on the inside of the driver's side door had been stripped off the door. (R. 106)

Although Robinson claimed to be the owner of the car, the Oldsmobile was registered to a

Howard Covington in Memphis. (R. 106)

Jacob Lott, a canine officer, arrived with his dope sniffing dog, Masai. The dog twice alerted on the vehicle, first on the driver's side door area and then on the passenger's side door area. (R. 121)

We quote:

> Q. [BY PROSECUTOR FLINT:] Okay. And he alerted in a way that informed you that - - what does it inform you of?
>
> A. That there's drugs present, the odor of drugs.
>
> Q. Does it tell you where the drugs are?
>
> A. No, it doesn't give me a pinpoint positioning of where the drugs might be. It just indicated that the dog has alerted to that certain, which vehicle, saying that there are - - the odor is present on that vehicle.
>
> Q. After the dog alerted on the vehicle, did y'all proceed to search the vehicle further?
>
> A. Trooper Rawlinson proceeded.
>
> Q. Okay. And what did you observe him do?
>
> A. He opened the trunk and he observed a black bag, overnight bag, and opened it up and found, appeared to be cocaine, marijuana, ecstasy, and also it appeared to be Xanax in the bag. (R. 122)

Officer Rawlinson described his observations of the trunk's contents as follows:

> Q. So when you had opened the trunk would you tell us what you observed inside the trunk?
>
> A. There were several items within the trunk. There was a black overnight kit or a shaving kit on the right side of the trunk which I opened and looked in. It contained several bottles, pill bottles. Also it had several packages, nine packages, clear plastic, containing a green leafy substance which I believed to be marijuana. There was also some pill bottles that contained several tablets and a

white plastic - - a white powder within clear plastic wrap that I believed to be cocaine. The tablets believed at the time to be ecstasy. And one tablet we believed to be Xanax.

Q. And were there any items of clothing or such in the trunk that you observed?

A. There were two shoe boxes within the trunk containing some women's high-heeled clear plastic shoes.

Q. Did Mr. Robinson state anything at that time?

A. Uh, I don't remember him stating anything at that time.

Q. Did he give any explanation for the women's shoes?

A. Later he stated that he sold stripper clothes.

Q. And on the interior of the vehicle you found this sum of cash?

A. Yes.

Q. What had he given you as an explanation for the sum of cash inside the car?

A. That it was money from his job. (R. 107)

The defendant testified in his own behalf and denied having knowledge the black bag containing contraband was inside the trunk of his privately owned automobile. (R. 161)

Also testifying on Robinson's behalf was his seventeen (17) year old nephew, William Wilson, who claimed he found the black bag laying in some bushes while playing basketball the previous day. (R. 185-86) After observing its contents and recognizing the marijuana, Wilson placed the bag inside the trunk of his uncle's car with the intent to keep the contraband and sell it. (R. 183-99) When he attempted to retrieve it the following morning, the car was gone.

The State produced four witnesses during its case-in-chief. (R. 102-143)

Dan Rawlinson, a state trooper with the Mississippi Highway Safety Patrol, testified he

removed the shaving kit from the trunk of Robinson's Oldsmobile. Upon opening the double-zippered bag with handle (R. 160), Rawlinson observed with his own eyes pill bottles and pills and what appeared to Rawlinson to be marijuana and cocaine. (R. 107)

Rawlinson also testified that "a rather large sum of cash was located in the console of the vehicle." (R. 105)

Jacob Lott, a canine officer with the Mississippi Highway Patrol, testified he and Masai, Lott's dope sniffing canine, conducted " . . . an exterior sniff of Robinson's vehicle. (R. 121)

> Q. [BY PROSECUTOR:] What if anything did that result in?
>
> A. Um, it resulted in a positive alert. "Alert" meaning that - - there's two kinds of alerts: passive and aggressive alert. Either the dog will sit and alert like that or he will scratch where he smells an odor of drugs coming from, in this case the vehicle. And in that case he started at the front of the vehicle, went around the driver's side, he alerted on the driver's side door area, continued around, and he alerted on the passenger's side door area.
>
> Q. So how many times did he alert on the vehicle?
>
> A. Twice.
>
> Q. Okay, And he alerted in a way that informed you that - - what does it inform you of?
>
> A. That there's drugs present, the odor of drugs.
>
> Q. Does it tell you where the drugs are?
>
> A. No, it doesn't give me a pinpoint positioning of where the drugs might be. It just indicates that the dog has alerted to that certain, which vehicle, saying that there are - - the odor is present on that vehicle. (R. 121-22)

Jeff Overstreet, an agent with the Mississippi Bureau of Narcotics, testified he collected the contraband from Trooper Rawlinson at the sheriff's office and delivered the drugs to the Mississippi State Crime Laboratory, presumably the regional laboratory in Batesville. (R. 129)

The marijuana was packaged individually, and the .6 grams of cocaine was worth around "eighty bucks." (R. 131)

The shaving kit removed from the trunk had a handle and double zippers. (R. 132)

Eric Frazure, a forensic scientist specializing in "forensic drug analysis," testified the evidence submitted to the regional laboratory in Batesville for identification consisted of 0.6 grams of cocaine; more than forty (40) dosage units of ecstasy; one (1) dosage unit of alprazolam, and 58.6 grams of marijuana. (R. 139-41)

Ecstasy and marijuana are Schedule I controlled substances; cocaine is a Schedule II drug, and alprazolam is a Schedule IV drug. (R. 142)

At the close of the State's case-in-chief, Robinson made a motion for a directed verdict of acquittal on the ground " . . . the State has failed to prove exclusive ownership or constructive ownership - - or possession[;] rather, constructive possession or actual possession of the shaving bag or stadium bag or whatever the black bag was that was in the trunk of his Oldsmobile vehicle on March 2nd, 2005." (R. 143-44)

The motion was overruled with the following observations:

> By THE COURT: While the State accepts the motion of the Defense - - I mean the Court does, the Court notes that there has been testimony today essentially to the effect that the defendant was driving the vehicle in which the drugs were found, that there was no other passenger in the vehicle other than the defendant. Certainly there's evidence that the drugs that were found in the vehicle were such that would be subject to criminal prosecution if the jury were to determine that they in fact were in his possession, whether it be actual possession or constructive possession. The Court feels that the State has presented sufficient evidence to put forth a *prima facie* case in this matter and thus will deny the Defense motion at this time. (R. 144)

Robert Lee Robinson thereafter testified in his own behalf and admitted the automobile he

was driving with Tennessee license plates was owned by him. (R. 157) He denied having knowledge the black bag containing controlled substances was inside the trunk of his automobile. (R. 161) Robinson claimed the $2,400 found by Trooper Rawlinson in the console (R. 105), as opposed to the glove compartment (R. 157), was received from his business partner, Joseph Moore, who was working for Texaco in Nigeria at the time of Robinson's trial. (R. 154, 174) The two men had planned to open a Soul Food Restaurant in Memphis. (R. 155-56) Robinson testified he placed the $2,400 received from Moore inside the glove compartment of his white Oldsmobile. (R. 157) Rawlinson, on the other hand, testified he found the money inside the console. (R. 105)

During the return trip to Memphis, Robinson was stopped for speeding by Trooper Rawlinson. (R. 158-59)

> Q. [BY DEFENSE COUNSEL:] Prior to Officer Rawlinson approaching his vehicle with you in the rear of it on March the 2nd, 2005, after stopping you for speeding, had you ever seen that bag before?
>
> A. No, sir.
>
> Q. Did you know that bag was in the trunk of your car?
>
> A. No, sir. (R. 161)

William Wilson, Robinson's 17-year-old nephew (R. 184), testified he had been living with Robinson and his (Wilson's) aunt for over one year. (R. 190) Wilson testified he saw the black bag in some bushes while playing basketball the day before Robinson drove to Memphis. Wilson retrieved the bag, opened it, and observed some pill bottles and marijuana. (R. 186) After returning to Robinson's house, Wilson placed the black bag inside the trunk of his uncle's white Oldsmobile which, according to Wilson, his uncle never used. (R. 186-87) Wilson testified he planned to sell the marijuana for $5.00. (R. 191) When he awoke the following day, the car was gone. (R. 186-

87)

Asked to describe the bag he found in the bushes, young Wilson testified it had one zipper and no handle. (R. 191-92)

At the close of all the evidence, Robinson's renewed motion for a directed verdict made on the ground " . . . the State has failed to either prove actual exclusive possession or constructive possession on the part of the defendant" was denied. (R. 200)

The jury retired to deliberate at 5:37 p.m. (R. 226) and returned eighteen (18) minutes later at 5:55 p.m. with four individual verdicts finding Robinson guilty of possession on all four counts. (R. 226-27)

A poll of the jury reflected the verdict was unanimous. (R. 227)

Sentencing was deferred until July 28, 2006, at which time Judge Webster, following his review of a pre-sentence investigation report, adjudicated Robinson an habitual offender and sentenced him to serve a total of thirty (30) years in the custody of the MDOC without the benefit of probation, parole, or early release. (R. 250-51; C.P. at 47-58)

On August 7, 2006, Robinson filed a motion for new trial or, in the alternative, motion for judgment notwithstanding the verdict. He alleged, *inter alia,* the verdict of the jury was against the overwhelming weight of the evidence. (C.P. at 59-60)

The motion for JNOV and for a new trial was overruled on August 18, 2006. (C.P. at 61)

Boyd Atkinson, a practicing attorney in Cleveland, rendered effective assistance during Robinson's trial for possession of controlled substances.

Johnnie E. Walls, Jr., a practicing attorney in Greenville, has been substituted on appeal. Mr. Wall's representation on appeal has been equally effective.

SUMMARY OF THE ARGUMENT

The trial judge did not err in overruling Robinson's motion for a directed verdict, peremptory instruction or for JNOV. This is not a case where reasonable and fairminded jurors could only have found the defendant not guilty.

A reasonable and fairminded juror could have found from the testimony and evidence that the black bag containing four different controlled substances was constructively in the possession of Robinson who owned the automobile and was its sole occupant.

A presumption of constructive possession arose based upon Robinson's ownership of the automobile in which the contraband was found. **Hamburg v. State,** 248 So.2d 430, 432 (Miss. 1971). *See also* **Fultz v. State,** 573 So.2d 689 (Miss. 1990); **Fuente v. State,** 744 So.2d 284 (Ct.App.Miss. 1999). *Cf.* **Boches v. State,** 506 So.2d 254 (Miss. 1987).

A reasonable, hypothetical juror could have found that Robinson possessed, constructively, if not actually, the controlled substances contained in the black bag found inside the trunk of Robinson's automobile.

We agree with Judge Webster that Robinson's guilt or innocence was a jury issue. (R. 144, 200) The presumption of possession plus other incriminating circumstances were sufficient to warrant a jury in finding that Robinson exercised dominion and control over the contraband, was aware of the presence and character of the contraband, and was intentionally and consciously in possession of the contraband.

In short, there was enough evidence, which if true, was sufficient to prove that Robinson both "knowingly" and "intentionally" possessed the controlled substances.

ARGUMENT

THE TRIAL JUDGE DID NOT ERR IN OVERRULING ROBINSON'S MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT.

In a case involving controlled substances found in schedules, I, II, and IV, the possession of which is prohibited by Miss.Code Ann. §41-29-139 (c), Robert Lee Robinson claims "[t]he state absolutely failed to present any evidence, certainly insufficient evidence, on the issue of possession [and] [t]he jury was left to speculate as to whether he had constructive knowledge of the presence and character of the drugs." (Brief of Appellant at 13)

He claims the State failed to prove beyond a reasonable doubt he possessed, either actually or constructively, drugs and controlled substances contained in the double zippered shaving kit found inside the trunk of Robinson's automobile following a routine traffic stop for speeding. (Brief of Appellant at iii, 9-13)

In short, Robinson argues the verdict returned by the jury was based on insufficient evidence. He assails the sufficiency, as opposed to the weight, of the evidence used to convict him.

Robinson claims the State failed to prove he was aware of the presence and character of the cocaine and was intentionally and consciously in possession of it.

We submit, on the other hand, there was ample testimony from which a reasonable, fairminded, hypothetical juror could find that Robinson was in constructive, if not actual, possession of the contraband found inside the trunk of his automobile.

Robinson was both the owner and the sole occupant of the automobile in which the drugs were found. He had traveled from Memphis to Cleveland and was en-route back to Memphis when he was stopped for speeding.

"[O]ne who is the owner in possession of the premises, or the vehicle in which contraband

is kept or transported, is presumed to be in constructive possession of the articles found in or on the property possessed." **Hamburg v. State,** 248 So.2d 430, 432 (Miss. 1971), and the many cases cited therein.

Although this presumption is rebuttable, there are insufficient facts in the record that would cause the presumption to give way.

Aside from the fact that Robinson, as both owner and sole occupant, had *exclusive possession and control of the automobile,* i.e., "dominion and control," there were other incriminating factors.

1. The odor of marijuana detected by Rawlinson but not by Robinson.

2. The $2400 found in the console. (R. 105)

3. The VIN discrepancies. (R. 105-06)

4. The absence of an inspection sticker and the tinted side windows. (R. 103)

5. The permission to search the trunk but *only* with a warrant. (R. 105)

6. The Oldsmobile was registered to Howard Covington. (R. 106)

7. The testimony from Robinson the $2400 was given to him by his business partner versus what Robinson told Rawlinson, viz., "it was money from his job." (R. 107)

8. The Mississippi driver's license although Robinson lived in Memphis and drove a car with a Tennessee tag. (R. 105, 153, 158, 170)

9. The testimony from Wilson the black bag had a single zipper and no handle (R. 191-92) versus the acknowledgment from Robinson the bag had two zippers and a handle. (R. 160)

10. The female shoes and other clothing found inside the trunk together with the black bag. Robinson testified he placed the shoes inside the trunk and admitted that he sold clothing. (R. 176)

This is not clearly not a case where the facts show actual possession to be in another.

The jury was instructed, *inter alia*, that in order to find Robinson guilty of possession, " . . . there must be sufficient facts to warrant a finding that Robert Lee Robinson was aware of the presence of drugs in the trunk of his car and was intentionally and consciously in possession of those drugs." (R. 207; C.P. at 24)

There were, and he was.

Possession of a controlled substance may be either actual, constructive, individual or joint. **Wolf v. State,** 260 So.2d 425, 432 (Miss. 1972).

"Constructive possession allows the prosecution to establish possession of contraband when evidence of actual possession is absent." **Fuente v. State,** 734 So.2d 284, 288 (Ct.App.Miss. 1999), quoting from **Roberson v. State,** 595 So.2d 1310, 1319 (Miss. 1992).

We submit the identity of Robinson, as either actual or constructive possessor of contraband, was supplied by reasonable inferences drawn from all the evidence and from incriminating circumstances, including ownership, occupancy, and the proximity factor.

A jury could have inferred that Robinson was well aware of the presence and character of the drugs found inside a black bag located inside the trunk together with female clothing sold by Robinson and that he consciously and intentionally possessed it.

Judge Webster applied the correct legal standard in denying Robinson's motion and renewed motion for a directed verdict. (R. 143-44, 200)

"When sufficiency of the evidence is challenged on appeal this Court properly should review the Circuit Court's ruling on the last occasion when the sufficiency of the evidence was challenged before the trial court." **Wetz v. State,** 503 So.2d 803, 808, note 3 (Miss. 1987). In the case *sub judice*, the circuit court's ruling on the last occasion when the sufficiency of the evidence was assailed was the motion for judgment notwithstanding the verdict (C.P. at 59) but, if not, the motion

for directed verdict made at the close of all the evidence. (R. 220)

Both were properly denied. Indeed, there can be no question about it.

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, 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. **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,** 667 So.2d 599, 612 (Miss. 1995); **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). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["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."]

This includes the testimony of Robinson who denied possession and the testimony of Wilson who claimed he placed the bag inside the trunk.

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict, request for peremptory instruction or motion for JNOV should be overruled. **Brown v. State,** 556 So.2d 338 (Miss. 1990); **Davis v. State,** 530 So.2d 694 (Miss. 1988).

A finding the evidence is insufficient results in a discharge of the defendant. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

The evidence, together with all reasonable inferences to be drawn therefrom, was, in our opinion, legally sufficient to support Robinson's conviction of possession.

One has constructive possession of a controlled substance when it is subject to his dominion and control. **Williams v. State,** 892 So.2d 272 Ct.App.Miss. 2004) reh denied, cert denied 901 So.2d 1273. Robinson, as stated previously, was the sole occupant and the owner of the vehicle where the dope was found.

The ground rules governing constructive possession are applicable here. The burden is upon the State of Mississippi to prove the defendant had knowledge of the character of the contraband and that he was either in actual or constructive possession of same. These elements may be proved by circumstantial evidence. **Martin v. State,** 413 So.2d 730, 732 (Miss. 1982). *See also* **United States v. Pigrum,** 922 F.2d 249 (5th Cir. 1991).

This Court has often said that a substance is within one's constructive possession when it is subject to his dominion or control. **Keys v. State,** 478 So.2d 266, 268 (Miss. 1985).

In **Curry v. State,** 249 So.2d 414, 416 (Miss. 1971), a prosecution for the possession of marijuana, this Court defined the contours of the constructive possession rule as follows:

> What constitutes a sufficient external relationship between the defendant and the narcotic property to complete the concept of "possession" is a question which is not susceptible of a specific rule. However, there must be sufficient facts to warrant a finding that defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the drug was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of *other incriminating circumstances.* In the instant case, all of the circumstances and these criteria were sufficient to warrant the jury in finding that appellant was in possession of the marijuana. [citations omitted; emphasis ours]

Additional incriminating facts, i.e., "other incriminating circumstances," available for the jury's consideration have been stated elsewhere in our response.

In **Fultz v. State,** 573 So.2d 689, 690 (Miss. 1990), we find the following language describing the contours of constructive possession:

> The doctrine of constructive possession is a legal fiction used by courts when actual possession cannot be proven. Relying on *Curry v. State*, 249 So.2d 414 (Miss. 1971), commentators Whitebread and Stevens classified Mississippi among the jurisdictions in which "proximity" coupled with any other scintilla of evidence of possession established constructive possession. *See, generally*, C. Whitebread & R. Stevens, Constructive Possession, 58 Va.L.Rev. 751, n. 26 (1972). In that case, this Court adopted the fiction and articulated the test to be applied to the proof as follows:
>
> > there must be sufficient facts to warrant a finding that defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession. Constructive possession may be shown by establishing that the drug involved was subjected to his *dominion or control.* Proximity is usually an essential element, *but by itself is not adequate in the absence of other incriminating circumstances. Curry v. State*, 249 So.2d 414, 416 (Miss. 1971). (Emphasis added)

In **Fultz** evidence that marijuana was found inside the trunk of the automobile being driven, but not owned, by Fultz and that the defendant had a small amount of marijuana in his wallet was not sufficient to establish that Fultz constructively possessed the marijuana found inside the trunk of the vehicle.

Not so in the case at bar where Robinson was both the owner of the vehicle and its sole occupant. *See also* **Hamburg v. State,** *supra,* 248 So.2d 430, 432 (Miss. 1971); **Fuente v. State,** *supra,* 744 So.2d 284 (Ct.App.Miss. 1999). *Cf.* **Boches v. State,** *supra,* 506 So.2d 254 (Miss. 1987).

What standards are applied by a reviewing court in reviewing the often raised questions involving the legal sufficiency of the evidence?

In **Bush v. State,** 895 So.2d 836 (Miss. 2005), the Supreme Court re-articulated the standards

applied by a reviewing Court in reviewing the sufficiency of the evidence. "If a review of the evidence reveals that it is of such quality and weight that, 'having in mind the beyond a reasonable doubt burden of proof standard, reasonable 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 v. State,** *supra,* 895 So.2d at 843.

Our position on this issue can be summarized in only three (3) words: "classic jury issue." Judge Webster said as much. (R.144)

CONCLUSION

A reasonable and fairminded juror could have found from the evidence that Robert Lee Robinson, owner and sole occupant of the motor vehicle in which the drugs were found, constructively, if not actually, possessed the contraband found inside the trunk.

The jury was certainly not bound to accept the testimony of young Wilson who claimed he found the bag in the bushes and placed it inside the trunk of Robinson's vehicle.

A reasonable and fairminded juror could have found that at the time Trooper Rawlinson discovered the drugs they were possessed constructively, if not actually, by Robinson who was aware of their presence and character and was intentionally and consciously in possession of them.

Contrary to Robinson's position, there were additional incriminating circumstances connecting Robinson with the contraband.

Appellee respectfully submits no reversible error took place during the trial of this cause. Accordingly, the judgments of conviction of four counts of possession, as an habitual offender, of controlled substances, together with the thirty (30) sentence without the benefit of probation or parole imposed by the trial judge, should be affirmed. (R. 250-51)

Respectfully submitted,

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CERTIFICATE OF SERVICE

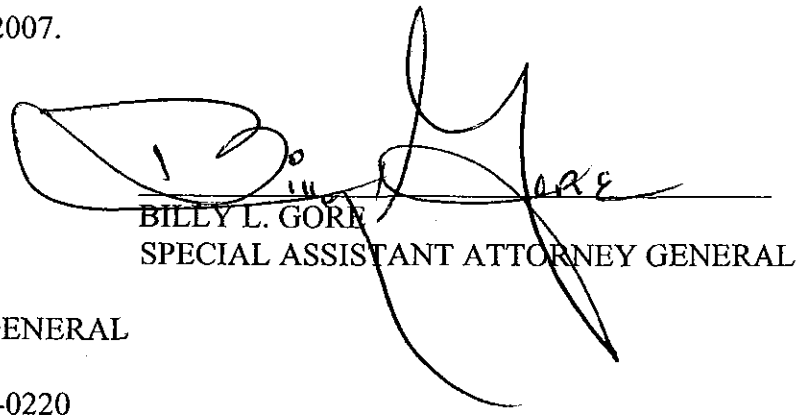
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Charles E. Webster
Circuit Court Judge, District 11
Post Office Drawer 998
Clarksdale, MS 38614

Honorable Laurence Y. Mellen
District Attorney, District 11
Post Office Box 848
Cleveland, MS 38732

Johnnie E. Walls, Jr., Esquire
Attorney At Law
Post Office Box 634
Greenville, MS 38702

This the 2nd day of May, 2007.



BILLY L. GORE
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