

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO.2006-KA-01446-COA

ROBERT LEE ROBINSON

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

AN APPEAL OF THE CONVICTION FOR FOUR COUNTS OF POSSESSION OF A CONTROLLED SUBSTANCE AS AN HABITUAL AND SECOND AND SUBSEQUENT OFFENDER UNDER SECTIONS 99-19-81 AND 41-29-147 MISSISSIPPI CODE ANNOTATED 1972 AS AMENDED AND A SENTENCE TO A TOTAL OF FORTY-FIVE YEARS WITHIN THE CUSTODY AND CONTROL OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WHICH SHALL NOT BE REDUCED OR SUSPENDED NOR IS THE DEFENDANT ELIGIBLE FOR PROBATION OR PAROLE

APPELLANT IS CURRENTLY INCARCERATED

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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 or recusal.

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30th day of MARCH, 2007



Johnnie E. Walls, Jr.

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STATEMENT OF THE ISSUE

THE TRIAL COURT ERRONEOUSLY FAILED TO GRANT A JUDGMENT NOTWITHSTANDING THE JURY VERDICT OF GUILTY OF POSSESSION OF CONTROLLED SUBSTANCES ALTHOUGH THE VERDICTS WAS CONTRARY TO THE FACTS AND THE LAW IN THAT THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT ON THE CHARGE OF ILLEGAL POSSESSION OF CONTROLLED SUBSTANCES.

STATEMENT OF THE CASE

The Appellant, Robert Lee Robinson, was indicted on March 22, 2006 before a grand jury in Second Judicial District of Bolivar County, Mississippi for possession of controlled substances on March 2, 2005: in Count I, ecstasy or methylenedioxymethamphetamine (MDMA), a Schedule I controlled substance as listed in Section 41-29-113 (c) (4) of the Mississippi Code of 1972 Annotated, as amended, in an amount greater than 40 dosage units; in Count II, cocaine, a Schedule II controlled substance as listed in Section 41-20-115 (A) (a) ((4) of the Mississippi Code Annotated 1972, as amended, in an amount greater that .1 gram but less than 2 grams; in Count III, marijuana, a Schedule I controlled substance as listed in Section 41-29-113 (c) (14) of the Mississippi Code Annotated 1972, as amended, in an amount greater that 30 gram but less than 250 grams; and in Count IV, Alprazolam, a Schedule IV controlled substance as listed in Section 41-29-119 (b) (1) of the Mississippi Code Annotated 1972, as amended, in an amount less than 100 dosage units(R. 1-2) (RE 5-6) The State on the eve of trial on May 10, 2006 made a Motion to amend the indictment to charge the Appellant as an habitual offender as provided in Section 99-19-81 of the Mississippi Code Annotated, as amended and it was granted. (R. 20-23)(RE 23-26)

The Appellant filed a Motion to Suppress, through trial counsel, Boyd Atkinson, the evidence seized as a violation of the guaranteed to the Appellant's by the Fourth and Fourteenth Amendment of the

United States Constitution and Section 23 of the Constitution of the State of Mississippi because of the unreasonable manner in which the search and seizure of Appellant's automobile was conducted by Mississippi State Troopers which precipitated the indictment. (R. 10-11) (RE 14-15) A pretrial suppression hearing was conducted by the Court on May 4, 2006. (Tr. 2-30) (RE 76-104) Following the hearing the Court issued a written opinion and order denying the Motion To Suppress on May 4, 2006. (R.14-19) (RE 18-22)

On May 11, 2006 the appellant filed via his counsel a Motion For a Continuance of the trial set to commence on May 12, 2006. (R.33-34) (RE 36-37) The appellant asserted that he desired to call a witness that was material to his defense. A witness who could corroborate his assertion about the amount of currency found by the State Troopers when his vehicle was stopped. The witness was out of the United States and could not be served with a subpoena. The Motion for a continuance was denied on the day the trial commenced. (RE 111) (Tr.38)

The trial commenced on May 12, 2006 and ended with a jury verdict of guilty on all four counts of the indictment on the same day. (R.29-32) (RE 32-35, 215-216) (Tr.226-227) The State called the arresting officer, the canine officer who brought the dog to search the car of Appellant, an officer of the Mississippi Bureau of Narcotics who retrieved the alleged drugs found in the vehicle of Appellant and transported them to the Mississippi Crime Laboratory,

and a drug analyst from the Mississippi Crime Laboratory as its witnesses in chief. After the State rested, the Appellant moved the Court for a directed verdict which was overruled. (R. 151-152) (Tr. 143-144)

The Appellant proceeded to present his case. (TR 153-182)(RE 159-188) The Appellant chose to testify in his defense and also called his nephew, William Wilson. After the testimony of Wilson was completed, the Appellant rested. The State declined to present any rebuttal proof.

The jury retired to deliberate at 5:37 P.M. and returned into open court with verdicts of guilty on each of the four counts at 5:55 P.M. after only 18 minutes of deliberation. (TR. 226)(RE. 215) Following a sentencing hearing Appellant was sentenced by the Judge as a habitual offender to a total of 45 years with fines. (R.47-58)(RE. 48-59) Sentencing Orders were entered by the Court May 22, 2005. (R.42-46)(RE 45-27) The sentences of the Court were for a total term of Forty-five (45) Years within the custody and control of the Mississippi Department of Corrections which shall not be reduced or suspended nor shall he be eligible for probation or parole and the sentence is to run consecutive to any sentence previously imposed. (R. 42-58) (RE 45-59)

The motion for JNOV or in the Alternative New Trial was filed and denied. (R. 59-60,61) (RE.60-61,62) Present counsel timely filed a Notice of Appeal for Appellant. (R.62-63) (RE 63-64)

Present counsel filed the Notice Of Appeal and Motion for Reasonable Bond Pending Appeal which was denied. No further orders are apparent from the record.

STATEMENT OF FACTS

The Appellant who lived at 4729 Lofton in Memphis, Tennessee and who also lives at 1100 College Street, Cleveland, Mississippi. He also lives with his business partner, Joe Moore, at 1100 College, Cleveland, Mississippi. Joe Moore works for Texaco Oil and works six (6) weeks in Nigeria, Africa and six (6) weeks in Cleveland, alternately.

Appellant and Joe Moore were business partners in a Soul Food Restaurant that they were opening at 5181 Winchester, Memphis, Tennessee. The business was to be called "Mercie's Soul Food And More."

On the morning of March 2, 2005 Appellant left Memphis in his White Oldsmobile alone to travel to Cleveland, Mississippi to meet Joe Moore to explain the format of the Restaurant and to pick up Joe Moore's part of the money for the restaurant. (TR.156) (RE. 162)

After Appellant arrived in Cleveland, he received Twenty-four Hundred Dollars in cash from Joe Moore and when he left Cleveland, he put the money in the glove compartment of the white Oldsmobile he was driving. Appellant had owned he car about a year and a half, and he had Tennessee license plates on it.

Appellant stayed in Cleveland about 45 minutes, and left for the return trip to Memphis, driving north on U.S. Highway 61. Slightly south of Shelby and just north of Winstonville, Appellant was stopped by State Trooper Dan Rawlinson. Radar indicated that he was

traveling 73 mile per hour. Trooper Rawlinson told him that he was speeding, driving in excess of the posted speed limit of 65. Rawlinson observed that there was no inspection sticker on the vehicle and there was dark tint on the windows. The Trooper asked Appellant for his drivers license and insurance card, and he complied. He had a valid Mississippi drivers license. The license reflects Appellant's address as 1100 College Street, Cleveland, Mississippi. While Rawlinson was standing next to the vehicle and talking to Appellant, he later testified that he smell what he "believed to be the odor of raw marijuana coming from the vehicle." Rawlinson then asked Appellant if he had anything illegal in the vehicle, and Appellant stated that he did not. Rawlinson said Appellant verbally gave him permission to search the vehicle. Appellant was then asked to step out of the vehicle and to stand in front of the vehicle, and Rawlinson searched interior of the vehicle and no illegal contraband was found. He located a large sum of money in the console. Rawlinson then asked Appellant if he could search the trunk and Appellant replied "If you have a warrant." (Tr.104-105) (RE. 113-114)

Appellant disputes that he made any such statements, but did not give permission for Rawlinson to search his vehicle, neither interior nor trunk.

Rawlinson then went back to his car to write a ticket, and while he was running a check on Appellant's driver's license and tag

number, he called for assistance from the Sheriff's Department as well as a Highway Patrol Canine Officer. The driver's license showed no history and the tag came back as being on a blue Oldsmobile Cutlass, yet Appellant was driving a white Oldsmobile Cutlass. He then went back to see if the information he received matched and he noticed that the VIN number was not correctly fastened to the dashboard. He opened the door and noticed that the identification number had been striped off the door. The dog then arrived and began sniffing the car. The dog "alerted" on the car, but not on the trunk, he without consent of Appellant opened and began to search the trunk.

Trooper Rawlinson found some items of clothing, a pair of women's shoes and a small bag that appeared to be a shaving kit or overnight bag. Upon opening the bag, he observed a what appeared to be marijuana, pill bottles that contained some pills and what appeared to be cocaine, ecstasy and xanax. Appellant was placed under arrest and later charged with possession of controlled substance.

Jeff Overstreet, an agent with the Mississippi Bureau of Narcotics arrived on the scene. He retrieved the alleged drugs and delivered them to the Mississippi Crime Laboratory for analysis.

Eric Frazure a forensic scientist received the alleged drugs in the Mississippi Crime Laboratory and weighed them and preformed tests for purposes of identifying them. He later testified to their

identity, weight, and controlled substances classification.

Appellant denied having any knowledge of the presence of the drugs. Appellant had not driven the car regularly and did not look into the trunk prior to leaving Memphis. He was surprised when the Trooper Rawlinson showed him the bag and told him of its contents.

At trial William Wilson, the teenaged nephew of Appellant testified that he had found the bag the evening prior to Appellant's trip to Cleveland, while playing basketball-he observed the bag laying in some bushes, he retrieved it, opened it and recognized the marijuana and decided to keep it and sell it.

Wilson lived with Appellant and his wife. Appellant is his uncle. He testified that he declined to take the bag in his aunt's home, because she would ask a lot of questions. He decided to put the bag in his uncle's White Oldsmobile that was sitting in the yard until the next morning because his Uncle hardly ever drove the white Oldsmobile. The car was not locked so he simply opened the door, opened the glove compartment, pushed the trunk release button, and put the bag in the car, expecting to get it the next morning, March 2, 2005. When he awoken the next morning after having slept late, the Car was gone. He came forward to prevent his uncle from being convicted for something that he did not know about. (TR. 183-199) (RE. 189-205)

SUMMARY OF THE ARGUMENT

Appellant contends that the trial court abused its discretion in denying Appellant's motion for a judgment notwithstanding the jury verdict or in alternative a new trial when the jury returned a verdict finding the Appellant guilty of four counts of possession of controlled substances when the state offered no proof to establish the necessary elements of the crime of illegal possession of a controlled substance, i.e, there was insufficient evidence presented to sustain a verdict of guilty of the actual or constructive illegal possession of controlled substances.

ARGUMENT

THE TRIAL COURT ERRONEOUSLY FAILED TO GRANT A JUDGMENT NOTWITHSTANDING THE JURY VERDICT OF GUILTY OF POSSESSION OF CONTROLLED SUBSTANCES ALTHOUGH THE VERDICT WAS CONTRARY TO THE FACTS AND THE LAW IN THAT THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT ON THE CHARGE OF ILLEGAL POSSESSION OF CONTROLLED SUBSTANCES.

The Appellant contends and asserts here, as in his Motion For Judgement Notwithstanding The Jury Verdict, that the verdicts of "guilty" on the four charge of possession of controlled substances in Counts I, II, III, and IV of the indictment were contrary to the evidence as a matter of law. As set forth herein, supra, the pivotal issue in this case was whether the Appellant had actual or constructive knowledge of the presence of the contraband drugs found by Trooper Rawlinson in the trunk of his car.

The indictment charged that the defendant "did unlawfully, wilfully and feloniously, have in his possession a certain controlled substance....[.] The jury was instructed in jury instruction D-1 :

Possession, as that term is used in this case, may be actual or constructive. A person has actual possession when he or she knowingly has direct, immediate and exclusive physical control over the thing or object. A person has constructive possession when he or she lacks actual possession of something but knowingly has both the power and intention at a given time to exercise control or dominion over the thing or through another person. For there to be constructive 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.
[Emphasis Added] (R.24)(RE.27)

In **Curry v. State**, 249 So.2d 414 (Miss. 1971) the Mississippi Supreme Court defined possession:

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 involved 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.

Appellant asserted that he had no knowledge that the controlled substances were in his car. His nephew asserted and testified that he, rather than Appellant had put the bag containing the drugs in the trunk of the car the night immediately prior to Appellant's driving from Memphis, Tennessee to Cleveland, Mississippi on the morning of March 2, 2005. If that assertion and testimony of the Appellant and his nephew was true, then Appellant is innocent and should not have been found guilty by the jury.

The jury did, however, find Appellant guilty of illegal possession of drugs. Given the instructions charged to the jury by the Court and the law governing the definition of illegal possession, then those verdicts had to have been supported by evidence, not speculation. What could that evidence have been?

The state presented the following:

1. Robert Lee Robinson owned and was driving the car where illegal drugs were found in a bag in the trunk.

2. There were no illegal drugs found either on the person of Robert Lee Robinson or in the interior of the Car.

3. There was \$2400.00 found in the console of the car.

4. The substances found in the trunk were in fact controlled substances within the meaning of Mississippi Law.

Could a reasonable person or reasonable juror conclude from the forgoing facts that Appellant was knowingly, wilfully, and

unlawfully in possession of the drugs found? He definitely was in actual possession, but is that enough to find him guilty of unlawful possession of controlled substances under the circumstances surrounding his arrest?

The state did not present any evidence to show that he put the drugs in the car or handled the drugs in any way. Did the state by and through any means which were certainly available to it, determine whether or not the Appellant ever handled or touched the drugs? Did the state check the pill bottles for fingerprints or any other identifying agent? Did the Appellant engage in any suspicious activity which would have given the Troopers who testified at trial any indication that he was aware of the presence of the contraband drugs? No.

We must concede that Appellant, the owner of the vehicle in question, exercised dominion and control over the vehicle he was driving, but that clearly does not mean he exercised dominion and control over the drugs. He would have to have knowledge of their presence. Although a presumption of constructive possession arises against the person(s) who exercises exclusive dominion and control over the vehicle which contraband or controlled substances are found, that presumption is rebuttable. **Pool v. State**, 483 So.2d 331 (Miss. 1986)

Appellant further urges this Court to compare the facts in his case at bar to the finding and holding in **Fultz v. State**, 573

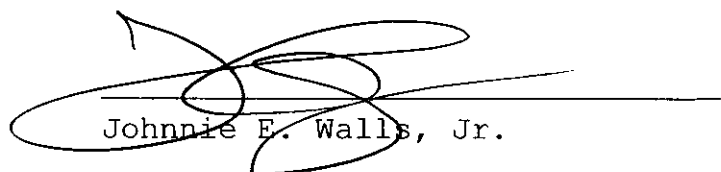
So.2d 689 (Miss. 1990). There the defendant, the sole occupant of a vehicle, was stopped by a law enforcement officer, who found marijuana in the vehicle, but found only a small amount of marijuana on the person of Fultz, yet the Court reversed his conviction, finding insufficient evidence. Here, the Appellant had now contraband on him, neither was there any found in the interior of the car. The contraband found was all in a bag that the nephew of the Appellant testified that he had found and put into the trunk.

The state absolutely failed to present any evidence, certainly insufficient evidence, on the issue of possession. The jury was left to speculate as to whether he had constructive knowledge of the presence and character of the drugs. Based upon the evidence presented and not presented in this case, Appellant's convictions should be reversed.

CONCLUSION

For the above stated reasons Robert Lee Robinson, Appellant herein, respectfully requests that this Honorable Court reverse his convictions herein, and/or remand his case to the trial court for further appropriate proceedings.

Respectfully submitted,



Johnnie E. Walls, Jr.

CERTIFICATE OF SERVICE

I, Johnnie E. Walls, Jr., attorney of record for Appellant, hereby certify that I have this day caused to be mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to:

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Marshal Co. Corr. Fac.
Holly Springs, MS

This the 30th day of March, 2006.



JOHNNIE E. WALLS, JR.

Attorney for Appellant