IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES LAMAR JOHNSON — APPELLANT

VS. — NO. 2007-CA-2018-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES LAMAR JOHNSON **APPELLANT**

VS. **NO. 2007-CA-2018-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

I. THE TRIAL COURT PROPERLY DENIED JOHNSON'S MOTION TO SUPPRESS.

II. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

STATEMENTS OF FACTS

On February 21, 2005 at approximately 11:30 p.m. in Magee, Wendy's restaurant manager, Heather Yates, heard a buzzer indicating that someone sought entrance at the back door. T. 150. Yates peered through the peep hole and saw employee Kary Ellis. T. 151. Yates let Ellis in and began walking back toward the front of the restaurant. T. 151. When Yates did not hear the back door shut behind her, she turned and saw a masked man with a gun holding Ellis by the neck. T. 152. The masked man ordered Yates to turn off all the lights and unplug the phones. T. 152. He then ordered all of the employees to get down on the ground, and warned that if anyone tried to telephone the police that he would shoot them. T. 152. After confiscating the store's cordless phone and Yates' and another employee's cell phones, the robber put a gun to Yates' head and demanded

that she place all of the money from the drive-through cash register and the store's safe into a black duffel bag. T. 153-156. Before leaving, the robber put his gun to each employee's head as he searched for money and cell phones. T. 158. The robber then took Yates' keys and fled the scene in her black Chevy Blazer. T. 158. The robber had taken approximately $856 from the cash register and safe, as well as two cell phones and Ellis's denim wallet decorated with an "OK" sticker. T. 160, 161.

A store employee called 911, and dispatch alerted all officers on duty of the robbery and to be on the lookout for a dark-colored Blazer. T. 182, 9. Dispatch also advised that the robber was in possession of a black duffel bag which contained the stolen money. T. 10.

Smith County Sheriff's Deputy James Grimes was advised of the Wendy's robbery, and positioned himself at an intersection in nearby Taylorsville to lookout for the dark-colored Blazer. T. 5. While on lookout, Grimes observed a maroon Crown Victoria run a stop sign. T. 5. Grimes initiated his blue lights and stopped the vehicle. T. 5. When Grimes approached, the nervous driver tendered a driver's license belonging to Navarre Rogers of Laurel. T. 11. During this encounter, Grimes observed in plain view a black duffel bag with rolled coins on the floorboard. T. 10. Grimes of course became suspicious, as he had been advised that a black duffel bag had been used to carry away the money in the Wendy's robbery. T. 10. Grimes ran the tendered license and discovered that it was suspended. T. 11. Grimes then called for backup, and Taylorsville Police Department Officer Gabe Horn arrived momentarily. T. 11. Grimes handcuffed the driver, who was later identified as Charles Lamar Johnson, and advised him that he was under arrest for running the stop sign and that he was being issued a ticket for driving on a suspended license. T. 12. Grimes searched Johnson's person and found in his pants pocket $759 in one, five, ten, and twenty dollar bills and a Wendy's merchant's copy receipt from a credit card transaction. T. 108-112. Grimes then contacted Magee

Police Department Investigator Wesley Garner to advise him of the individual in custody. T. 13.

Johnson was handcuffed and standing outside his vehicle when Officer Garner arrived at the scene. T. 34. Garner stated that when he approached Johnson's vehicle, the black duffel bag with rolled coins, a denim wallet with an "OK" sticker, blue ski mask, and brown cotton gloves were all in plain view. T. 31-32. Garner had already spoken with the Wendy's employees and knew that robber has worn a blue ski mask and brown cotton gloves during the robbery. T. 33. The employees also advised Garner that the robber wore a tan shirt and gave a description of his shoes. T. 33. Johnson was wearing a tan shirt and the shoes described by the employees. T. 33. As Garner began collecting evidence of the robbery from Johnson's car, Johnson attempted to escape on foot, but was quickly apprehended. T. 35.

Johnson was ultimately convicted by a Simpson County Circuit Court jury for two counts of armed robbery and one count of felon in possession of a firearm.

SUMMARY OF ARGUMENT

The warrantless search of Johnson's automobile was legally justified under the automobile, plain view, and search incident to arrest exceptions to the warrant requirement. Johnson's ineffective assistance of counsel claim must fail on direct appeal because the record does not affirmatively show deficiency of constitutional proportions, nor does the State stipulate that the record is adequate to support Johnson's claim. Furthermore, he has failed to show *Strickland* prejudice in light of the overwhelming evidence of guilt.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED JOHNSON'S MOTION TO SUPPRESS.

The standard of review for the admission or exclusion of evidence is abuse of discretion. *Harrison v. McMillan*, 828 So.2d 756, 765 (Miss. 2002). In reviewing the denial of a motion to suppress evidence, the reviewing courts determine whether the trial court's decision, considering the totality of the circumstances, was supported by substantial credible evidence. *Evans v. State,* 823 So.2d 617, 621 (Miss. Ct. App. 2002). Where supported by substantial credible evidence, the reviewing court must not disturb those findings. *Id.* (citing *Price v. State*, 752 So.2d 1070 (Miss. Ct. App.1999)).

Johnson claims that the warrantless search of his vehicle violated his Fourth Amendment right against unreasonable search and seizure. However, any one of the following exceptions to the warrant requirement legally justify the search of Johnson's vehicle.

Automobile Exception

An officer may seize evidence without a warrant from an automobile if the officer has probable cause to believe that the automobile contains contraband or evidence of a crime. *Roche v. State*, 913 So.2d 306, 313 (¶22) (Miss. 2005) (citing *Maryland v. Dyson*, 527 U.S. 465, 466 (1999)). A probable cause determination is based on the totality of the circumstances. *Jim v. State*, 911 So.2d 658, 660 (¶12) (Miss. Ct. App. 2005). While some Mississippi cases state that probable cause and exigent circumstances must exist for the automobile exception to apply, the *Roche* court, citing the United States Supreme Court, stated that "the automobile exception does not have a separate exigency requirement." *Roche* at 313(¶22). Further, "the 'automobile exception' applies even where the vehicle has been immobilized or is unmovable." *Moore v. State*, 787 So.2d 1282, 1288 -1289 (¶19) (Miss. 2001) (citing *Franklin v. State*, 587 So.2d 905, 907 (Miss.1991).

In the case *sub judice*, based on the totality of the circumstances, Officers Grimes and Garner certainly had probable cause to believe that Johnson's vehicle contained evidence of a crime. Johnson was pulled over for running the stop sign approximately thirty minutes after the Wendy's robbery. The officers were aware that the robber had used a black duffel bag to carry away the stolen money, including rolled coins. The officers were also advised by the Wendy's employees that the robber wore a blue ski mask and brown cotton gloves. All of these items were in plain view when Johnson's vehicle was stopped. Accordingly, the officers had probable cause to search Johnson's vehicle, and the automobile exception justified the search of Johnson's vehicle.

Plain View Exception

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant," *McNeil v. State*, 813 So.2d 767, 771 (¶26) (Miss. Ct. App. 2002)(quoting *Arizona v. Hicks*, 480 U.S. 321, 326 (1987)). So long as the officer has the legal right to be in a position to view the object, and the incriminating character of the object is immediately apparent, the officer is entitled to seize the object without obtaining a warrant. *Walker v. State*, 881 So.2d 820, 827 (Miss.2004) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)). In the present case, the officers certainly had the legal right to be standing near Johnson's vehicle, which had been pulled over for running a stop sign. The incriminating character of the black duffel bag was obvious as dispatch informed that a black duffel bag had been used in the robbery which occurred approximately thirty minutes prior to the stop. Also, as mentioned previously, the incriminating character of the blue ski mask and brown cotton gloves was immediately apparent, due to the Wendy's employees' description of the robber.

Johnson claims that the incriminating character of the black duffel bag was not immediately apparent and that its contents were not in plain view. The latter assertion, however, is contrary to

the record. Both Officers Grimes and Horn testified that the rolled coins in the duffel bag were in plain view. T. 10, 24. As to the former assertion, viewed in isolation, a black duffel bag is not an immediately apparent piece of incriminating evidence. However, when a black duffel bag containing rolled coins is spotted in vehicle which also contains a blue ski mask and brown cotton gloves, all in plain view, thirty minutes after an armed robbery in which the robber possessed these very specific objects, the bag's incriminating character becomes immediately apparent. As such, the search of Johnson's vehicle also meets the plain view exception to the warrant requirement.

Search Incident to Arrest

Officers are permitted to conduct a warrantless search of a person under lawful custodial arrest. *Rankin v. State*, 636 So.2d 652, 657 (Miss. 1994). "The area within the arrestee's immediate control, from which he might obtain a weapon or where he may conceal evidence, may also be searched, consistent with the Fourth Amendment." *Id.* (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)).

Johnson claims that the search incident to arrest exception does not apply because he "was cuffed in the back of the patrol car," and therefore unable to destroy evidence. Appellant's brief at 7.[1] However, the same argument was made and rejected by this honorable court in *Townsend v. State*, 681 So.2d 497, 503 (Miss. 1996). In *Townsend*, the appellant argued that because he was handcuffed and placed in the back of the squad car at the time the officers searched his vehicle, the search incident to arrest exception did not apply because there was no danger that evidence would be destroyed or removed. *Id.* The *Townsend* court relied on *N.Y. v. Belton*, 453 U.S. 454 (1981) in finding that the search of the vehicle was a proper search incident to arrest, despite the fact that

[1]The record indicates that Johnson was handcuffed at the time of the search, but not in the back of the patrol car. Rather, he was standing outside of the vehicle. T. 14, 34.

Townsend was cuffed and in the back of the squad car. In *Belton*, the United States Supreme Court found that the search of a jacket inside an automobile was a proper search incident to arrest and that the jacket was in the defendant's immediate control, despite the fact that the owner of the jacket had been arrested and was standing outside of the vehicle during the search. Other Mississippi cases have also relied on *Belton* in finding that vehicles were properly searched incident to a lawful arrest where the arrestee was outside of the vehicle during the search. See *Phinizee v. State*, No. 2006-KA-00846-COA (¶¶13-16) (Miss. Ct. App. 2007); *Sanders v. State*, 403 So.2d 1288, 1290-91 (Miss.1981).

Accordingly, the search of Johnson's person and vehicle was proper under the search incident to arrest exception to the warrant requirement. The trial court's denial of Johnson's motion to suppress was supported by substantial credible evidence and should not be disturbed on appeal.

II. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

Johnson' argues on direct appeal that defense counsel rendered constitutionally deficient performance in failing to request a circumstantial evidence instruction. However, the record does not show ineffectiveness of constitutional dimensions, nor does the State stipulate that the record is adequate to support Johnson's claim on direct appeal. See *Read v. State*, 430 So.2d 832, 841 (Miss. 1983). Furthermore, Johnson simply cannot show prejudice under the *Strickland* test. Although this was a circumstantial evidence case, the State presented overwhelming proof of guilt. Johnson was caught red-handed with the exact amount of money stolen from Wendy's, a pocket full of merchant's copy receipts from Wendy's, and an employee's wallet. He also had the exact mask and gloves worn by the robber, down to the fabric type and color. Even his shoes were identified by a Wendy's employee, and the treads matched a footprint left at the scene. Accordingly, Johnson's second assignment of error must fail.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Johnson's convictions and sentences.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: La Donna C. Holland

LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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 Robert G. Evans
Circuit Court Judge
Post Office Box 545
Raleigh, MS 39153

Honorable Eddie H. Bowen
District Attorney
100 Court Avenue, Suite 4
Mendenhall, MS 39114

George T. Holmes, Esquire
Attorney At Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 6th day of May, 2008.

LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680