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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPEAL NO. 2007-CA-02032

KENDRICK COWAN,

FILED

APPELLANT,

VS.

APR 23 2008

MISSISSIPPI BUREAU OF NARCOTICS

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLEE.

BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

NO ORAL ARGUMENT IS REQUESTED

LUCIUS EDWARDS, BAR NO. [REDACTED]

ATTORNEY AT LAW

DRAWER 313

HERNANDO, MS 38632

662-429-5786

662-429-2268 (TELEFAX)

ATTORNEY FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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 judges of this Court may evaluate possible disqualifications or recusal:

Lucius Edwards, Attorney for Kendrick Cowan, Appellant

Thomas Welch, Jr., Attorney for Appellee

Kendrick Cowan, Appellee

Calvin Mangum, Mississippi Bureau of Narcotics

Mike Foreman, Mississippi Bureau of Narcotics

Jeff Medlin, Mississippi Bureau of Narcotics

SO CERTIFIED THIS THE 23RD DAY OF APRIL, 2008



LUCIUS EDWARDS, NO [REDACTED]
P.O. DRAWER 313
HERNANDO, MS 38632
662-429-5786 AND 662-429-2268 (F)
ATTORNEY FOR APPELLANT

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APPELLEE.

STATEMENT OF THE ISSUES

1. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT KENDRICK COWAN'S MOTION FOR SUMMARY JUDGMENT.
2. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF AGENT MIKE FOREMAN AS TO THE RESULTS OF HIS ANALYSIS OF THE CARPET FRESH CAN CONTENTS, IDENTIFIED AS STATE EXHIBIT 4, AND ADMITTING SAME INTO EVIDENCE, OVER APPELLANT'S OBJECTIONS..
3. WHETHER THE COURT'S RULING WAS AGAINST THE WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This is an appeal by Kendrick Cowan from a Final Order of the Union County Circuit Court, the Hon. Judge Lackey, presiding, dated October 4 2007, which denied his Motion for Summary Judgment and ruled in favor of the Mississippi Bureau of Narcotics for forfeiture of certain funds belonging to the appellant Cowan in the amount of \$13,474.54.

STATEMENT OF THE FACTS

On March 29, 2006, the appellant, Kendrick Cowan, was riding as a passenger in a vehicle operated by his brother, Roderick Cowan, headed in an easterly direction on State Highway No. 78 in the City of New Albany, Mississippi when the vehicle was stopped by state troopers for speeding. Alvin Wiseman, another passenger, was seated on the front passenger side. Appellant was seated in the rear compartment behind Alvin Wiseman (R.E., p. 6). The parties were headed to Atlanta so that appellant could purchase a vehicle he had seen for sale over the Internet at a bargain price.

The officers claimed that they detected an odor of marijuana emanating from the vehicle upon approach of the driver and front passenger, and immediately pulled the parties from the vehicle and commenced full non-consenting searches of them and their vehicle (T. pp 58, 59), which revealed the presence of a small misdemeanor quantity of marijuana on the person of Alvin Wiseman. Another misdemeanor quantity of marijuana was found in the possession of Roderick Cowan later at the station. No controlled substances or unlawful material were found in the possession of appellant, Kendrick Cowan (T., p 59 and R.E. pp. 35-41). However, the officers located a sum of money on the person of each of the parties during the initial search at the scene, including a small amount on appellant's person. Another \$ 9,474.54 was located in a jacket coat belonging to appellant after appellant advised them of the money's presence. It was located beside appellant on the rear seat (T., p 59 and R.E. pp 35-41) . An empty false bottomed carpet fresher can ("spray can") belonging to Roderick Cowan, containing no traces of controlled substances, was found on the rear seat floor behind Roderick Cowan (R.E. pp 35-41 and T. p 60). Roderick's wife had leased the vehicle for the trip.

The officers later charged Roderick Cowan and Alvin Wiseman with possession of marijuana and charged appellant with possession of paraphernalia, mis-characterizing the carpet fresher can as "paraphernalia" and wrongfully attributing ownership to appellant (R.E. pp. 35-41) All funds found were confiscated and notice of seizures and intent to seek forfeiture papers were served.

On April 25, 2006, the appellant Kendrick Cowan filed a Petition to Contest Forfeiture against the Mississippi Bureau of Narcotics (hereinafter, "Bureau") for recovery of his money taken, together with his discovery request. With their Answer to the petition, the respondents served responses to appellant's Request for Admissions admitting to offence reports prepared by the officers indicating that no drugs or paraphernalia were found on the person of the appellant and, further, indicating that the carpet fresher can was found on the floor behind Rodney Cowan (R.E., p 29). The appellee Bureau also admitted to forfeiture papers served upon Cowan wherein "possession of marijuana" is the sole basis for forfeiture of his money, when in their report, it is not alleged that he was in possession of any drugs (R.E.p. 29-30 and pp. 35-41).

Appellant Kendrick Cowan filed his Motion for Summary Judgment on August 29, 2007 (R.E. p. 6), to which the respondents failed to file a response, and failed to request additional time in which to do so. In his motion, Cowan attached a copy of the verified affidavit of Rodney Cowan (R.E. pp 10-11) wherein Rodney admitted to ownership of the carpet fresher can, denied it was contraband or used for unlawful purposes, denied it had traces of any unlawful or controlled substances, and admitted that Kendrick Cowan, the appellant, had no knowledge of the can and had no knowledge of the presence of controlled substances in the vehicle. Also attached to the motion was appellant's personal affidavit (R.E. pp. 12-13) to that effect and denying that his funds were used or were intended to be used for unlawful purposes, and the

Bureau's responses to Cowan's Request for Admissions and Interrogatories served. Appellant Cowan contended that the motion and attachments showed no genuine issue of material fact with respect to his petition for recovery of his property, indicating no use or intent to use his funds for the purpose of engaging in drug trafficking.

At hearing of the Summary Judgment Motion on September 4, 2007, the Court denied the motion and went forth with hearing on the petition to contest forfeiture and counter-petition. The Court gave no valid reason for denial of the motion (T. pp. 19-20). It is the Court's denial of the summary judgment motion that forms one of the basis for Kendrick Cowan's appeal.

SUMMARY OF THE ARGUMENT

The Court erred in denying the appellant's Motion for Summary Judgment in light of the fact that appellant's Motion with attached personal affidavits of appellant and Roderick Cowans, and appellee's Responses to Request for Admissions and Interrogatories wherein the appellee admitted to the reports compiled by the arresting officers indicating no presence of drugs and unlawful material in the possession of the appellant indicated that appellant funds were not subject to forfeiture as used or intended to be used in the traffic of controlled substances, and in light of the fact that the Bureau did not respond to the motion and did not request or move for a continuance for time in which to do so.

That assuming that the court was correct in denying appellant's Motion for Summary Judgment and proceeding on with hearing on the merits of the petition and counter-petition, the court erred in awarding judgment in favor of the appellees since there was insufficient credible and admissible evidence for the Bureau to meet its burden by a preponderance of the evidence, and the court erred in admitting and considering certain evidence and testimony over

appellant's counsel's objections.

ARGUMENT

Denial of Summary Judgment

Rule 56 of the Mississippi Rules of Civil Procedure provides in relevant part that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” The U.S. Supreme Court has held that this language “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an essential element to that party’s case, and on which that party will bear the burden of proof at trial (Emphasis supplied).” See **Celotex Corp. v. Catrett**, 477 U.S. 317, 322 (1986). See also **Moore v. Mississippi Valley State University**, 871 F. 2d. 545 (5th Cir. 1989) and **Washington v. Armstrong World Indus.**, 839 F.2d 1121, 1122 (5th Cir. 1988). Failure to respond therefore is tantamount to concession.

In order to successfully oppose a motion for summary judgment, the non-moving party is required to offer specific, probative evidence demonstrating that triable issues of material fact exist. **Smith v. Sanders**, 485 So. 2d. 1051, 1054 (Miss. 1986), quoting **Brown v. Credit Center, Inc.**, 444 So.2d. 358, 363 (Miss. 1983). The moving party is entitled to rely on an absence of evidence to support the plaintiffs’ claims. **Fontenot v. Upjohn Co.**, 780 F.2d.1190, 1195, (5th Cir.1986). “If the moving party’s attachments to its motion set forth facts indicating the non-existence of material facts, the non-moving party must then set forth specific facts that demonstrate a genuine issue of material fact that merits trial....” **Richmond v. Benchmark**

Construction Corp., 692 So.2d. 60, 61 (Miss. 1997).

Failure to respond at all and to move for additional time to respond under the reasoning of these cases is tantamount to concession of the motion. Here the Bureau failed to respond at all and failed to request additional time. Summary Judgment should have been awarded to the appellant Kendrick Cowan.

Courts' Decision After Hearing was Against the Weight of Evidence

Among other items, Mississippi Code Section 41-29-153 provides for forfeiture of money used or intended for use to facilitate a violation of the statute. However, under Section 41-29-179, the burden is on the agency seeking forfeiture to prove violation and right to forfeiture by a preponderance of the evidence. **Evans v. City of Aberdeen**, 925 So.2d. 850 (Miss. Ct. App., 2005), 926 So.2d.181 (Miss. Sup. Ct., 2006), (where upheld Court of Appeals on cert., but rejected the "currency contamination theory" adopted by that Court). Also see the following cases cited by the Court: **City of Meridian v. Hodge**, 632 So. 2d 1309, 1311 (Miss.1994); **Saik v. State ex rel. Miss. Bureau of Narcotics**, 473 So.2d 188, 191 (Miss. 1985); and **Hickman v. State**, 592 So.2d. 44 (Miss. 1991).

"The appropriate standard of review [by this Court] in forfeiture cases is the familiar 'substantial evidence/clearly erroneous' test." **Gallaway v. City of New Albany**, 735 So.2d 407, 410(Miss. 1999) and **City of Meridian v. Hodge**, *supra*. Money may be forfeited under the statute if found in "close proximity" to drugs or drug paraphernalia. However, the "drug paraphernalia" must be properly identified as such and must be connected in some way to the property sought to be forfeited and its owner. **Evans v. City of Aberdeen**, *supra*, (where the

court distinguished the facts in **Evans** from those in **United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars in U.S. Currency**, 661 F.2d 319 (5th Cir., Unit B, 1981), where \$364,000 in cash, along with cocaine, hashish, guns, a scale, and five bags containing cocaine residue were found. The Fifth Circuit held that “[f]rom the sheer quantity of currency seized under the circumstances, a court may permissibly infer a connection with illegal narcotics trafficking.” In **Evans** the officers found \$7600 in U.S. Currency in defendant’s bedroom, along with a brillo pad, ashes, residue about and in a cigarette pack, tin foil with holes in it and some plastic bags. However, no drugs were found in Evans’s room and in spite of the officer’s testimony as to the use of the “paraphernalia” found in the drug trade, The Court refused to uphold the forfeiture, finding that there was insufficient evidence to identify the objects found as paraphernalia and, even assuming so, that it was connected with the money found. As in this case, the Court in **Evans** said that it was very important that none of the alleged “paraphernalia” objects found and the residue was sent to a crime lab for testing. Therefore, it found “there was no evidence whatsoever of the presence of illegal drugs in any form including residue.”

Also in **Evans**, the Court of Appeals cited **United States v. \$38,600 in U.S. Currency**, 784 F.2d 694 (5th Cir. 1986) in support of its decision. There agents found a bag located on the driver’s seat containing a pipe bearing marijuana residue, cigarette rolling papers, scissors, and a small metal box. The Fifth Circuit in holding that the money was not subject to forfeiture said:

There seems little question that this evidence, when considered collectively gives to a strong suspicion, perhaps even probable cause, of some illegal activity. It is not quite so apparent, however, that these facts give rise to a reasonable belief, supported by more than mere suspicion, that [the driver] furnished, intended to furnish or had received the money in exchange for drugs. (Emphasis original.)

With respect to the carpet fresh can, the appellees’ basis for seeking forfeiture of appellant’s funds, appellees have a twofold problem. First, there is no credible evidence in

support of their contention that the can was "drug paraphernalia." The officers do not claim that the can contained any substance appearing to be controlled substances, and the can was not submitted to the crime lab for testing. Over the appellant's objection, officer Mike Foreman, an officer with the Mississippi Bureau of Narcotics, gave testimony as to his personal examination of the can which revealed traces of cocaine. However, Foreman was not qualified as an expert capable of giving such testimony and was neither tendered nor accepted as an expert. His testimony was in clear violation of Rules 701 and 702 of the Mississippi Rules of Evidence and should not have been allowed by the Court. Secondly, there is absolutely no evidence contradicting appellant's sworn courtroom testimony and the sworn affidavits of appellant and Roderick Cowan denying ownership and knowledge of the can's presence on the part of appellant, and admitting ownership by Roderick Cowan.

The warrant-less search of appellant and seizure of his property were in violation of the 4th and 14th Amendments to the U.S. Constitution and was not within any exceptions. **United States v. United States District Court for Eastern District** (1972) 407 U.S. 297, 32 L Ed. 2d 752, 92 S.Ct. 2125, and the officers lacked probable cause or reasonable grounds to believe that the appellant or the occupants of the vehicle had committed or was about to commit a crime. See **Terry v. Ohio**, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); **Illinois v. Gates**, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed. 2d 527 (1983); **Michigan v. Long**, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1203 (1983); and **Delaware v. Prouse**, 440 U.S. 648, 440 S. Ct. 1391, 59 L. Ed 2d. 660 (1979). It is admitted by the officers that the search commenced immediately upon approach of the vehicle when they immediately pulled the occupants from the car, and then immediately began searching the vehicle afterward. This was a clear violation.

For this reason also appellant's property should be returned.

CONCLUSION

The Court committed error in denying appellant Kendrick Cowan's Motion for Summary Judgment because there was no genuine issue of material fact with respect to whether Cowan's property was subject to forfeiture considering the fact that the basis of the forfeiture was the alleged possession by Cowan of paraphernalia or marijuana. Cowan attached copies of the officers' reports (which were admitted to in discovery), wherein the officers admit that no drugs or paraphernalia were found in his possession, attached a copy of a sworn affidavit of another admitting to ownership of the can, denying that it was paraphernalia and denying knowledge on the part of appellant Cowan. Also, the officers admitted can was not tested and did not contain traces of controlled substances. And the Bureau did not respond at all to the motion and did not move or request for additional time to respond. No credible and admissible testimony was submitted at trial connecting any controlled substances or paraphernalia to appellant Kendrick Cowan. Therefore, the judgment of the Circuit Court should be reversed and judgment rendered by this Court for the appellant Kendrick Cowan.

CERTIFICATE OF SERVICE

Attorney does hereby certify that true and correct copies of the foregoing Brief of Appellant were mailed by postage prepaid U.S. Mail to: The Hon. Henry Lackey, Circuit Court Judge, P.O. Drawer T, Calhoun Ci The undersigned ty, MS 38916; Ms. Betty Sephton, Supreme Court Clerk, P.O. Box 117, Jackson, MS 39205; and to Thomas Welch, Jr., attorney for appellee, at P.O. Box 7459, Jackson, MS 39282-7459.

This the 23rd day of April, 2008.

A handwritten signature in cursive script, reading "Lucius Edwards", written over a horizontal line.

LUCIUS EDWARDS, NO [REDACTED]