

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COPY

LEROY STEWART

APPELLANT

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SUPREME COURT
COURT OF APPEALS

V.

NO. 2007-KA-1358-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

NO ORAL ARGUMENT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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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 justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Leroy Stewart, Appellant
3. Honorable Alexander C. Martin, District Attorney
4. Honorable Lamar Pickard, Circuit Court Judge

This the 3rd day of December, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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STATEMENT OF THE CASE

Leroy Stewart was indicted by a Jefferson County Grand Jury for willfully, unlawfully, feloniously and knowingly having in his possession 19 grams of marihuana, a controlled substance, at the Jefferson Franklin Correctional Facility, contrary to and in violation of Section 47-5-198 of the Mississippi Code of 1972. Mr. Stewart was indicted as an habitual offender in violation of Section 99-19-83 of the Mississippi Code of 1972, having previously been convicted in the Circuit Court of Warren County, Mississippi, to the crime of Robbery, a crime of violence and a felony under the laws of the State of Mississippi and was sentenced by the Court to serve a term of ten years in the custody of the Mississippi Department of Corrections. He also had been convicted of the crime of Sale of Cocaine, a felony under the laws of the State of Mississippi and was sentenced by the Court to serve a term of thirty years in the custody of the Mississippi Department of Corrections. After a jury trial, Mr. Stewart was convicted of Possession of Marihuana in a Jail Facility and sentenced to serve seven (7) years with the Mississippi State Department of Corrections with said sentence to run consecutive to the sentence he currently was serving.

STATEMENT OF FACTS

While an inmate at the Jefferson County Correctional Facility, Leroy Stewart was charged with being in possession of marihuana in a jail facility, after seeing his family in visitation.

During trial, the State called five witnesses in its case in chief. Jethrell Thomas Knight was the first witness called. He was an inmate at the Jefferson County Correctional Facility serving time for a three (3) month violation on a previous charge. He was violated because he was arrested and charged with possession of cocaine in Warren County. T. 38-42. He was

waiting to be discharged to the Warren County Sheriff's Department to be held on a charge there. The dispute as to who had the marijuana involves Mr. Knight and Mr. Stewart. Mr. Knight testified that he saw Mr. Stewart come out of a door and does not know where he came from. Mr. Stewart came to the table with a brown bag and tried to put the brown bag in his arm. He opened his arm and the brown bag fell to the floor. The guard picked the bag up off the floor and questioned him. They left and came back and asked him, "Do you know what you're getting yourself in"? He asked, "What do you mean?" He then say he was told that the bag had marijuana in it. He told them that it was not his and that Mr. Stewart tried to put it in his arm and he let it hit the floor and the guard picked it up. T. 38-39. He also testified that he was waiting in lock down to be transported and cannot remember if he was searched before he was moved from C zone to lock down. T. 45.

Officer Terry Robinson, who is a Correctional Officer at Jefferson/Franklin Correctional Facility in Fayette, Mississippi, testified that after Leroy Stewart was coming back from visitation he came around to shake him down and he saw him with a brown paper bag trying to push it down in his pants. His job is to searched the inmates after they come from visitation. When Mr. Stewart saw him coming toward him, he went to another inmate and dropped the paper bag on the inmate's lap. He took the bag off the inmate's lap, and Mr. Stewart came behind him and tried to snatch the bag out of his hand. T. 56. He then went into control one and called *Captain Kaho* and told him he found marijuana on Leroy Stewart. T. 58.

The next witness called by the state was Captain Clifton Kaho, Sr., who is chief of security at the Jefferson/Franklin Correctional Facility and was assisting with visitation with Sargent Shirley Green. He witnessed Leroy's brother and two other gentlemen come through to visit him and were not pat searched. They went through metal detector, but wasn't pat searched.

T. 72. After visitation that day, he was informed by Officer Robinson that he had recovered a small amount of marijuana off inmate Leroy Stewart. T. 67. He also testified that Mr. Stewart's brother was not charged with anything, but was banned from visiting facilities all over the State. T. 76.

Art Thomas, agent with the Bureau of Narcotics, transported the narcotics to the Mississippi Crime Lab for analysis.

The last witness called by the state was Chris Wise, Forensic Scientist with the Mississippi Crime Laboratory specializing in controlled substance identification who testified the substance was 19.0 grams marijuana. T. 89.

The defense called four witnesses to testify in its case in chief. The first witness called was Orlando Luckett who was an inmate at the Jefferson County Correctional Facility, on the day Leroy Stewart was charged with having the marijuana in his possession. T. 96. He testified that he knew something was going on, however, he did not actually witness anything, but had an occasion to have a conversation with Officer Robinson. T. 106. Mr. Luckett said that he was in visitation visiting with his mother and his sister and Captain Kaho came through with the marijuana. He saw Officer Robinson when he was headed back to the zone and asked him what happened. T. 108. He testified that Officer Robinson pointed to Mr. Knight and said he caught Knight with some marijuana and he was assuming that Stewart gave it to him. He did not see Stewart give it to him, but he assumed that he did. T. 109.

Sammy Stewart, Leroy Stewart's brother testified that he did visit his brother that day, however, he not bring marijuana into the facility. He said he went through the metal detector and he was pat searched by an officer down his hands, up his shirt, between his chest and belly, down

below, between his ankles and his back side. He also said that they searched his brother and nephew the same as they did him. T. 114.

The next witness called by the defense was Jerome Banks who was incarcerated at Parchman Penitentiary during trial, but was incarcerated at Jefferson County Correctional Facility on the day Leroy Stewart was charged with being in possession of the marijuana. T. 131. He remembers that day because his fiancée had pneumonia and could not visit him. He was housed in lock down with Jethrell Knight and when he went to get coffee, Knight approached him and started a conversation with him. He told him about old fines and traffic tickets and that Warren County was coming to pick him up etc... T. 133. Then he said Knight told him he had marijuana that he was trying to get up off of him. He saw him go in his pants and come out with a brown paper bag. He did not see the marijuana, only the brown paper bag that he said had marijuana in it. T. 134. He says he hollered, "Let me go get my coffee." He stated he gave him just the brush-off move because he did not have but 120 days and he was not going to get caught up in that. T. 134. The day he testified he had only 22 days left.

Leroy Stewart was the last witness called by the defense. He testified that he did not give Knight anything. He did not have the marijuana. Officer Robinson got that bag from Knight. T.

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STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR DIRECTED VERDICT, IN DENYING HIS REQUEST FOR A PEREMPTORY INSTRUCTION OF NOT GUILTY AND IN DENYING HIS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS THE SUFFICIENCY OF THE EVIDENCE DID NOT SUPPORT A CONVICTION OF POSSESSION OF MARIHUANA IN A JAIL FACILITY?

SUMMARY OF THE ARGUMENT

I. LEGAL SUFFICIENCY OF THE EVIDENCE.

Mr. Stewart contends that the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict. A motion for judgment of acquittal notwithstanding the verdict tests the legal sufficiency of the evidence supporting the verdict of guilty. It is a renewal of the defendant's request for a peremptory instruction made at the close of all the evidence. It asks the court to hold, as a matter of law, that the verdict may not stand. McClain v. State, 625 So.2d 774, 778 (Miss. 1993); Tait v. State, 669 So.2d 85 (Miss. 1996) citing May v. State, 460 So.2d 778, 780-81 (Miss. 1984).

Where a defendant has moved for J.N.O.V., the trial court must consider all of the evidence, not just the evidence which supports the state's case, in light most favorable to state; state must be given benefit of all favorable inferences that may be reasonably drawn from the evidence. Tait v. State, 669 So.2d at 88 citing May v. State, 460 So.2d at 781. If the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence 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, the motion should be denied and the jury's verdict allowed to stand. Wetz v. State, 503 So.2d 803, 808 (Miss. 1987); Tait v. State, 669 So.2d at 88 citing May v. State, 460 So.2d 778, 781 (Miss. 1984).

The standard for reviewing a denial of a directed verdict and a peremptory instruction is the same as that for a denial of a judgment notwithstanding the verdict. Tait v. State, 669 So.2d at 88 citing Alford v. State, 656 So.2d 1186, 1189 (Miss. 1995). On appeal, this Court reviews the lower court's ruling when the legal sufficiency of the evidence was last challenged. Tait v. State, 669 So.2d at 88 citing Smith v. State, 646 So.2d 538, 542 (Miss. 1994) (quoting Wetz v. State, 503 So.2d 803, 807-08, n. 3 (Miss. 1987)).

Mr. Stewart was indicted and convicted with wilfully, unlawfully, feloniously and knowingly having in his possession 19 grams of marihuana, a controlled substance, at the Jefferson Franklin Correctional facility. He contends that the evidence was insufficient for the jury to reach a guilty verdict because the facts of his case and the inferences drawn from his case point in favor of him with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty. Tait v. State, 669 So.2d at 88 (citing May v. State, 460 So.2d at 781). He offers a summary of the following arguments of witnesses who's testimony was in opposition to each other and then he offers their testimony straight from the transcript in support of his argument.

First, he compares the testimony of Jethrell Knight and Jerome Banks to aid in his position that reasonable men could not have found beyond a reasonable doubt that he was guilty. Jehtrrell Knight testified that he was incarcerated for violation of his probation for picking up an additional charge of possession of cocaine. He had served his time and was moved from C Zone to lock down to wait on Warren County Sheriff's Department to transport him to their facility. T. 42. He does not remember if the Officer that moved him from C Zone to lock down searched him prior to moving him. While he was waiting to be transported he remembers talking to a man from Jackson who's name he did not know. His conversation with this man was about being

picked up by Warren County. T. 44. Mr. Jerome Banks says he had a conversation with Mr. Knight while in lock down. He was housed in lock down because they needed the space, but was not locked down during that time. He says as he was going to get coffee, Knight stopped him and talked to him about a case he had in Warren County where he had made ERS and had violated in the process. Also, Knight talked about old traffic tickets and fines and about Warren County coming to pick him up. He further testified that while they were talking, Knight told him he had marijuana that he wanted to get off him. He said Knight went in his pants and came out with a brown paper bag. Knight told him marijuana was in the brown bag, however, he hurried away and did not see what was in it because he only had 122 days left and did not want to get caught up in that. T. 134. Mr. Knight denied having the brown bag and testified that Leroy Stewart came up to him and tried to place the brown bag with the marijuana in his arm while he was sitting waiting to be transported to Warren County.

Next, Mr. Stewart compares the testimony of Officer Terry Robinson to Orlando Luckett. Officer Robinson testified that he was going to search the inmates who were coming from visitation and he saw Leroy Stewart trying to push a brown paper bag into his pants. As he was coming toward him, he went to another inmate and dropped the paper on the inmate's lap. He got it off his lap, and Leroy Stewart came behind him trying to snatch the bag out of his hand. T. 56. Orlando Luckett was an inmate at Jefferson County Correctional Facility on the day Leroy Stewart was charged with possession of marijuana. He was coming from visitation and saw Captain Kaho come through visitation with the marijuana. He said he asked Robinson what happened? He said Robinson pointed to him and said, "You see that guy sitting right there?" He said, "I just caught him with some marijuana, and I'm assuming that Stewart gave it to him. I didn't see Stewart give it to him, but I assumed it." He said Robinson opened the door and

pointed Knight out to him. T. 109. Mr. Luckett says he went back to his zone and the first person he talked to was Stewart. He told him what Robinson had told him. He said he didn't know if Robinson was trying to pin it on him or what. He said he told two people in his zone what Robinson had just told him. He says he was being nosey and then gossiping. T. 111.

Finally, Mr. Stewart compares the testimony of Captain Clifton Kaho to Sammy Stewart. Captain Kaho was chief of security. He witnessed two of Leroy Stewart's brother and a nephew come through the metal detector but was not pat searched. After visitation he was called back to lock down where he discovered that Officer Robinson had confiscated some marijuana off Leroy Stewart. At that time, Leroy Stewart alleged that it was not his. Leroy Stewart put it on an offender to be released to Warren County. They talked with Knight and he admitted that Stewart threw the dope in his lap. Also, he said Leroy Stewart's brother has been banned from visiting any correctional facility across the state. T. 69. Sammy Stewart testified that he, his brother and nephew all went through the metal detector and were all pat searched. He said there was an Officer near them at all times and that he did not take anything in the prison. He would not risk Leroy's time nor his freedom. Mr. Stewart also testified that he was employed at Aroso Automobile in Vicksburg and was aware that he could get five years in prison for taking drugs into the facility. He has not been banned from any correctional facility and still visits his brother wherever he is housed. T. 117-118.

The critical inquiry in deciding whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, is whether the evidence shows beyond a reasonable doubt that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed.

Ivy v. State, 949 So.2d 748, 751 (Miss. 2007). If the evidence fails to meet this test, it is insufficient to support a conviction. Id.

Mr. Stewart contends that persons who have knowledge of the criminal justice system are aware that narcotics are brought into our prisons by various means. Officers and other persons who work in our prisons have been known to bring in narcotics to sale to the inmates. Jethrell Knight was incarcerated for possession of cocaine. T. 42. Jethrell Knight was not searched prior to being brought from C Zone. T. 45. The state did not offer any evidence to rebut that Mr. Knight had not been searched. The defendant is not required to prove his innocence. Jones v. State, 962 So.2d 1263 (Miss. 2007). Jerome Banks and Orlando Lockett's testimony placed reasonable doubt that Mr. Stewart committed the act charged. Their testimony made it impossible for a reasonable juror not to have reasonable doubt as to Mr. Stewart's innocence and no reasonable doubt of Jethrell Knight's guilt as the person who had the marijuana. The evidence at this point fails to show beyond a reasonable doubt that Mr. Stewart was in possession of the narcotics. There was not any evidence presented by the state to show any connection between these two individuals whose testimony clearly substantiated the others. Jerome Banks saw Jethrell Knight with the brown paper bag and Orlando Lockett testified that Officer Robinson stated he did not know who had the drugs, but assumed they came from Leroy Stewart. This assumption was because Leroy Stewart had just left visitation with his brothers and nephew and Captain Kaho said the three were not pat searched. There was absolutely no evidence that Sammy Stewart, his brother or nephew brought drugs into Jefferson County Correctional Facility. This was the best way for the Officers to resolve this dilemma. It is very uncommon for visitors to bring drugs to our correctional facilities. It is usually some of the persons who work in these facilities who bring the narcotics.

Mr. Stewart cites the following transcript testimony to offer a more thorough understanding of his position.

JETHRELL KNIGHT -Direct T. 39

Q. Now, while you were waiting, what happened?

A. While I was waiting, at the time - - I forget the time, but Mr. Stewart came out of the visitation or wherever he came to the door. When he came to the table, I didn't know what was going on. He had a brown bag -tried to put a brown bag in my arm. I opened my arm and the brown bag fell to the floor. And at the process, the guard picked the bag off the floor, and they questioned me, and that's basically my story. That's what happened. What was in the bag, I didn't have no idea until they told me what was in the bag. They come back and told me, "Do you know what you're getting yourself in?" I said, "what you mean?" They say, "This bag have marijuana in it." I say, "It's not mine because Mr. Stewart tried to put it in my arm and I let it hit the floor and the guard picked it up."

T. 40

Q. And you say when he came - who was in the room with you before he came into the room off visitation?

A. It was a big ole opening. It was, I would say, 15 to 20 people. They were just scattered out walking around.

T. 42

Q. What did you do to violate?

A. I caught a charge, possession charge.

Q. Possession of what?

A. A controlled substance.

Q. What controlled substance?

A. Cocaine.

T. 43

Q. Where had you been before that? Where had you been housed?

A. In Jefferson County on C zone.

Q. So explain to me what C zone is. I don't understand what C zone is.

A. Well, in prison they got four zones. That's where I was housed at. They said I couldn't be held on zone because I had flat timed, so they took me back to lock down to wait on my ride, and they told me my ride didn't show up, that they were going to take me over to the sheriff's department and hold me there until my ride come. So finally my ride showed up.

Q. Okay. And about what time was it when you got to lock down?

A. About 8:30 that morning.

Q. Did you see anyone there that you knew?

A. Did I see anyone I knew?

Q. You said there was a bunch of people walking around.

A. No, ma'am.

Q. You didn't?

A. I didn't know any of them guys that was back there.

Q. Did you have a conversation with anybody?

A. Yeah, I had a conversation.

Q. Who did you have a conversation with?

A. Some guy from Jackson. I don't even have a clue what his name was. He just told me he's from Jackson.

Q. What did he look like?

A. Kind of tall.

Q. Okay. Do you know him by any kind of nickname or anything?

A. No, ma'am.

Q. Ever seen him before?

A. No, ma'am. The first time I ever seen him was that day.

Q. What did you talk about?

A. What did I talk about?

Q. You said –

A. I asked him did he think they was going to pick me back up today about my situation, me going back to Warren County.

Q. Why did you ask him?

A. Why did I ask him?

MR. WALLACE: Your Honor, we would object on relevancy.

THE COURT: Well, move on, counsel. I'll let him answer the question, but move on.

Q. So you had this conversation with him, and you didn't know anybody else around?

A. No, ma'am we didn't have a conversation about this here.

Q. You didn't have a conversation –

A. No, ma'am. I didn't have a conversation with this here with no one because I figured, hey, my situation was more important than this here because he tried to put this on me.

Q. All right. Now, you said you got over there to lock down about 8:30 in the morning?

A. Yes, ma'am.

Q. And what time did all of this happen where the guard came up and all of that?

A. Ma'am, I couldn't even tell you what time this happened.

Q. Was it 20 minutes later or hours later?

A. All I know it was after 12 o'clock.

Q. After 12 o'clock?

A. Yes, ma'am.

Q. Now, when you were transported – when you were moved from C zone into lock down, okay, were you searched before you left C zone and got into lock down?

A. I can't remember, ma'am. I can't remember nothing that far back in March.

Q. Well, you're remembering what happened in March. You can't remember what happened a few minutes earlier?

A. No, ma'am.

Q. So you don't know if you were searched or not? No?

A. No, ma'am.

T. 47-48

Q. And tell me again what happened.

A. He tried to put a brown bag in my arm. I opened my arm up. The bag hit the floor. When the bag hit the floor, the guard got the bag. About 20 minutes later, the guard came back and said, "You don't know what you're getting yourself" –I said, "what you mean?" He said, "Marijuana was in that bag."

Q. And when he came through the door, where was that bag?

A. I don't know. All I know he just got the bag – he did something like this here. He put his hand and tried to put it in my arm. That's when the bag hit the ground.

Q. So are you saying he took it out of his pants or his shirt?

A. Somewhere.

Q. Did he have it in his hand when he walked through the door?

A. I can't tell you that. When he got the bag, he put the bag in his hands and tried to put it in my arms and it hit the floor.

Q. So you don't remember if you were searched, you don't remember if he had the bag in his hand, any of that, you don't remember any of that?

A. I remember he tried to put the bag in my arm.

Q. But you don't remember if he had it in his hand?

A. No, ma'am. I don't know where about he got it from.

JEROME BANKS

On the day of trial was incarcerated at Parchman Penitentiary, but on March 4, 2007, he was incarcerated at Jefferson County Correctional Facility in Fayette, Mississippi. Says he remembers that day because his fiancée had pneumonia and could not visit. T. 131. He was housed in lock down. He got up to get coffee, because he was not locked down at that time. T. 132. When he went to get coffee, he talked to Knight and Knight was telling him about old traffic tickets and fines and that Warren County was coming to pick him up etc... T. 133. He said Knight had marijuana that he was trying to get up off of him. He saw him go in his pants and come out with a brown paper bag, but there was a camera right there facing me and him. He did not see the marijuana. Only what he told him. He actually saw him pull out his pants a brown paper bag. He says that's marijuana. T. 134.

He said he told him - - I hollered, "Let me go get my coffee." Just the brush-off move because I didn't have but 120 days left. I didn't have but 120 days then, so I ain't trying to get caught up in that. I'm trying to get to my family. T. 134. When he saw him again, he was talking to someone else, and he tipped on by him and went on. Says he didn't even come back to the telephone to check on my old lady. Because he did not want to be labeled a snitch, he did not tell anybody. T. 135.

Q. You're not saying something just to try to help Leroy?

A. I got 22 days. You know, what's right is right, wrong is wrong.

CROSS-EXAMINATION

1. Almost 16 years been incarcerated and had 22 days left. T. 136.

A. I'm 51 years old, and these children are our future. I do things to help the children, not to hurt them. T. 137.

2. Says Leroy Stewart was not one of his friends. T. 138.

3. Says inmate Knight approached him. He had seen him walking to the chow hall. He was showing him his paperwork that's how he knew who he was. He had a stack of papers from his ERS violation. T. 138.

4. Says he talked to Knight about 10, 15 minutes and he pulled out brown paper bag. Says he knows Leroy from incarcerated they played basketball, lift weights. Know him from parchman. Just play basketball and different things. T. 139. Read 139-142.

OFFICER TERRY ROBINSON - Direct T. 56

Q. What happened that day with Mr. Stewart?

A. He was coming back from visitation, and I was in control one, and I was coming around to shake them down. He had a brown paper bag trying to push it down in his pants. And as I was coming toward him, he went to another inmate and dropped the paper on the inmate's lap. I got it off his lap, and Leroy Stewart come behind me and tried to snatch the bag out of my hand.

T. 64.

You didn't put anything in your report about he tried to snatch it out of your hand, did you?

A. I can't remember.

T. 60

Q. And were you observing Mr. Stewart in the visitation room?

A. No, I was monitoring something else, but I was in the control tower when he was coming back from visitation.

Q. Were there other officers monitoring him in the visitation room?

A. Yes.

Q. So how many officers normally are in the visitation room?

A. Well, at that time it was two, me and Officer O'Quinn. He was in control one.

Q. And was there anybody actually in the visitation room?

A. Well, we was back and forwards.

Q. An body else? Any other officers?

A. Officer Green was on duty.

Q. Okay. And she was there?

A. We rotate.

Q. So there were at least three of you?

A. There was more than three at work now, but me, O'Quinn, Officer Green - -

Q. Were actually monitoring the visitation, right?

A. (Witness nods head affirmatively.)

DIRECT EXAMINATION-ORLANDO LUCKETT T. 107

1. Orlando Lockett - question by your dress you are an inmate? Yes ma'am, Holmes County. T. 95.

2. Direct his attention to March 4. Says he was housed at Jefferson County, Mississippi. T. 96.

3. He knew something was going on however, he did not actually witness anything, but had an occasion to have a conversation with Officer Robinson. T. 106.

Q. Now, did you have an occasion to have a conversation with Officer Robinson?

A. Yes, I did.

Q. And how did that conversation occur?

A. Well, when I was coming back from visitation, I said, "Y'all found some marijuana a while ago, didn't you, because I seen Officer Kaho come through the visitation with it." And he said yes. And he said, "See how you just come through there?" I said, "Yeah." He said, "well, that guy sitting right there was putting something in his pants." T. 107.

Q. When he said the guy sitting right there, did you know –

A. He was talking about –

Q. He said the guy sitting right there.

A. It was Knight. He said he saw him putting something in his pants. So he walked to him and he come out with it. He said he's assuming that Stewart gave it to him. He said he didn't see him give it to him. He just assumed that. T. 107.

Q. And Officer Robinson told you that.

A. He told me that. I was just being nosey as to what was going on. He told me all that. T.

Q. And did you tell anybody about this conversation, any of the officers or anything?

A. No. When I got back to the zone, you know, I told the other inmates what had happened, but I didn't know, you know.

CROSS-EXAMINATION

Orlando was visiting with his mother and wife. He was the inmate. He says Captain Kaho come to visitation with marijuana. He saw Robinson when he got ready to go back to the zone and he asked him what happened. T. 108.

Q. Now, but you said you saw Robinson?

A. Yes. That's how it all started.

Q. Now, but you said you saw Robinson?

A. I said I saw Robinson when I got ready to go back to the zone. After my family left, I went back to the zone. I asked Robinson what happened.

Q. You already told the jury that you weren't in that area.

A. In what area? The visitation room? I wasn't. I mean, the check point, I wasn't yet.

Q And you also told the jury that you did not see who was in there, either Stewart or Knight?

A. I saw Knight sitting in there.

Q. Or Robinson at the time?

A. At the time when all this occurred?

Q. Yes.

A. No.

Q. You didn't see it, did you?

A. I didn't see what all happened.

Q. Right.

A. Robinson told me what happened.

Q. Oh, so Robinson told you. Now, did you see – you said you saw Knight?

A. I saw Knight sitting at the table. But Robinson pointed to me and said, "You see that guy sitting right there?" He said, "I just caught him with some marijuana, and I'm assuming that Stewart gave it to him. I didn't see Stewart give it to him, but I assumed it." T. 109.

Q. Now, when you say he said - -

A. He opened the door and pointed Knight out to me. T. 109.

Q. Now, you're telling us you're an inmate?

A. Yes.

Q. And that you, being an inmate, would interrogate or question a guard ?

A. Yeah, being nosey.

Q. And when you're questioning this guard?

A. He told –

Q. You're telling us that you're interrogating this guard?

A. I ain't interrogating. I'm just asking what's going on, who did he get that weed off of.

Q. Now, you knew the defendant and you all were friends while you were there?

A. No, we wasn't friends. I knew him like I know you.

Q. This is the first time you've seen me?

A. That was the first - - that wasn't the first time I seen him. I see him and don't see him like I see you.

Q. So you had seen him almost every day.

A. I hadn't been down there for like four months. I see a lot of them. T. 110.

5. Q. Now, where were you contacted to come in here and testify?

A. Holmes County.

Q. And who contacted you?

A. Willie Marks, the sheriff.

Q. And when you got back, who did you talk to for him to know that you were going to say - -

A. I didn't know. All they said was court order.

Q. My question is: After you got back to the cell and you started talking, who all did you talk to?

A. The lawyers right there.

Q. On March 4th, when you were having this visitation and you went back to your cell, who all did you talk to?

A. Robinson.

Q. Robinson.

A. The first person I talked to was Robinson.

Q. When I got back to the zone, I talked to Stewart.

Q. So you went right then and went and talked to Stewart?

A. I told him what Robinson had told me. I didn't know if he was trying to pin it on him or what. I told two people in the zone what Robinson just told me.

Q. So now you told everybody, you went to everybody in the zone?

A. Gossiping. T. 111.

CLIFTON KAHO - Direct T. 67

Q. Now, were you employed there on March 4, 2007?

A. Yes, sir.

Q. And on that day, what were your duties?

A. My duty was chief of security. At the facility on that day I was assisting with visitation with Sargent Shirley Green. She was checking visitors in and approximately a couple hours after visitation, we had a visitor for Leroy Stewart. And I exited the visitation area, and witnessed Leroy Stewart's brother came to visit him and wasn't pat searched. He went through the metal detector. And after that visitation was ended, I was informed by sergeant – Officer Terry Robinson who was doing lock down. Upon entering lock down, he had recovered a small amount of what appeared to be marijuana off inmate Leroy Stewart.

T. 68

Q. You said that – how – when visitors come in, are they searched?

A. Normal procedure if a visitor come in, they'll report to the window and pass and ID to the officer at the desk. She'll check him in if he's on the visitation list – the females, the female officer will take them in a little adjacent room and search the females, but we're not allowed unless we have probable cause to strip search anyone. So what we have to do is pat search them. And a lot of times we do random searching, and at the particular time we had the metal detector up, and those gentlemen visiting Mr. Stewart, they wasn't searched. They walked through the metal detector.

T. 69.

Q. Now, what happened after that on that day?

A. After I was called back to lock down where Officer Robinson was conducting a search, I discovered that he had confiscated what appeared to be some marijuana off Leroy Stewart. At that time he alleged that it wasn't his marijuana. He put it on another offender who had a detainer on him who would be released to Warren County, put it in his lap and he alleged it was his marijuana. After a brief confrontation with inmate Knight, he admitted that Stewart threw the dope in his lap. After a brief confrontation with inmate Knight, he admitted that Stewart threw the dope in his lap.

SAMMY STEWART T.112

Testified that he is Leroy Stewart's brother and he was visiting his brother as he always does, along with his nephew and other brother. He is employed at Aroso Automobile in Vicksburg, Mississippi. T. 113. He went through the metal detector, raised his hand and they pat searched him down. With his hands up, shirt, chest, between the belly, down below, between his ankles and back side. His brother and nephew were also pat searched. T. 114.

When they entered the visitation room they took the first seat that was available. The prison was crowded. There was a podium right beside them and a guard standing at the podium the entire time they were there. There were at least two guards present the entire time. T. 115-116.

He testified that he did not take anything in the prison on march 4, 2007 when he went to see Leroy. He would not risk Leroy's time nor his freedom. He is aware that he could get five years in prison for taking drugs into that facility. The sheriff nor anyone from the prison has contacted him about bringing drugs into the facility. He has visited his brother in Issaqueena County, Greenville any where he has been housed and they never had any trouble before. No one has banned him from visiting with his brother and he still visits him at whatever facility he is housed. T. 117-118.

Based upon a review of the record in the present case, the evidence is insufficient to warrant a conviction of Mr. Stewart for possession of marijuana in a jail facility. If Officer Robinson saw Mr. Stewart with the marijuana, why would they need to get Mr. Knight to admit that the drugs belonged to Mr. Stewart. "After a brief confrontation with inmate Knight, he admitted that Stewart threw the dope in his lap." T. 69.


CONCLUSION

From a review of the record, Mr. Stewart has shown that the evidence fails to show beyond a reasonable doubt that he committed the crime of possession of marijuana in a jail facility. The state failed to prove that Mr. Stewart willfully, unlawfully, feloniously and knowingly had in his possession 19 grams of marihuana, a controlled substance, at the Jefferson Franklin County Correctional Facility. There is reasonable doubt as to whether Mr. Stewart actually had the marijuana, therefore, the trial court erred in failing to grant Mr. Stewart's motion for judgement notwithstanding the verdict.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Leroy Stewart, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Lamar Pickard
Circuit Court Judge
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Honorable Alexander C. Martin
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This the 3rd day of December, 2007.


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