IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.2007-KA-01901-COA

TIMOTHY DAMPEER
aka Fatty Hatty — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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. Timothy Dampeer

THIS 12th day of February, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Timothy Dampeer

By: George T. Holmes

George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Simpson County, Mississippi where Timothy Dampeer was convicted of possession of cocaine. A jury trial was conducted September 17, 2007, with Honorable Robert G. Evans, Circuit Judge, presiding. Dampeer was sentenced to four (4) years as an habitual offender and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Mendenhall police officer Chris Seghini testified that on January 6, 2006 he was "patrolling the streets" around 7:00 p. m. [T. 46] While on Lee Street, Seghini said he "observed a person named Anthony Reed standing in the middle of the street holding a brown bag." *Id.* Seghini said he approached Reed and stopped and exited his vehicle. *Id.* While doing this, the officer "noticed Timothy Dampeer standing beside the vehicle" and as he approached Reed, "Timothy Dampeer took off running." *Id.*

Seghini said he pursued Dampeer on foot about 40 yards down a drainage ditch; and, before apprehending Dampeer, "noticed [Dampeer] throw a pill bottle down". *[Id.*; T. 50]. Upon subduing Dampeer, Seghini cuffed Dampeer and took him to the patrol car, and then went back for the pill bottle. [T. 46-47]. The pill bottle looked to contain crack

cocaine, so Seghini turned it into the Chief of Police. *Id.*

The alleged crack cocaine associated with Dampeer's arrest was not turned into the crime laboratory until January 25, 2006 and the affidavit which Seghini signed stated that the arrest and contraband seizure took place on January 8 rather than the 6th. [T. 53-54; Ex. D-1].

There were some twelve to fifteen people arrested that night at the same time and at the same place by at least three other police officers. [T. 49-50, 55-56]. It was dark. *Id.* The bottle was not fingerprinted and no name appeared on the bottle. [T. 51]. Other drugs were found throughout the area and there was at least one other person in the drainage ditch at the time Dampeer was arrested. [*Id.*; T. 54-56].

Dampeer's girlfriend Shanda Hall testified that she was with Dampeer on January 6, 2006 around 7:00 p. m. down on Lee Street. [T. 77-81]. There were several small groups of about 10 to 11 people who all scattered, except for Shanda and three others, when the police "came from both ways." *Id.* The police rounded up "seven or eight" people and "officers was [sic] all over the ditch collecting ... drugs and stuff that people supposedly had thrown." *Id.* Shanda said Dampeer did not have any drugs. *Id.*

SUMMARY OF THE ARGUMENT

The trial court should have rendered a directed verdict of acquittal or should have rendered a judgment of acquittal notwithstanding the verdict.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT OF ACQUITTAL OR JNOV?

With several people all in the same area all allegedly throwing drugs on the ground, as in this case, the evidence presented was insufficient to establish beyond a reasonable doubt that the alleged drugs allegedly thrown down by Dampeer were indeed the same as those purportedly recovered by Seghini. Therefore, Dampeer's conviction should be reversed and rendered.

In *Robinson v. State*, 967 So.2d 695, 697-99, (Miss. App.2007), the defendant was tried for narcotics possession when a traffic stop and subsequent search of the automobile resulted in drugs being found in a travel bag in the trunk of his car. At trial, he presented testimony that another person placed the drugs in the car, thus Robinson had no knowledge of the contraband. *Id.*

In reviewing the denial of a motion for directed verdict, the *Robinson* court recognized that the standard for review is under an abuse of discretion standard where it must be determined "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; and where the evidence fails to meet this test it is insufficient to support a conviction.' " (citing *Dilworth v. State*, 909 So.2d 731, 736(¶ 17) (Miss.2005) quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). *Id.*

In reviewing a challenge to the sufficiency of evidence to sustain a conviction by way of a motion for judgment notwithstanding the verdict (J.N.O.V.), the legal sufficiency of the evidence should be viewed in a light most favorable to the State. *Dixon v. State,* 953 So.2d 1108, 1111-13 (Miss.2007) (citing *Johnson v. State*, 904 So.2d 162, 166 (Miss.2005) (citing *McClain v. State*, 625 So.2d 774, 778 (Miss.1993)). In the process, all credible evidence of guilt should be accepted as true, and all favorable inferences from the evidence are to be resolved in favor of the state's conviction of the accused. *Id.* If after considering all of the evidence, it is concluded "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" and the trial court's ruling should not be disturbed. *Carr v. State,* 208 So.2d 886, 889 (Miss. 1968). "[W]here the evidence fails to meet this test it is insufficient to support a conviction." *Id.*

The *Dixon* court pointed out that "[p]ossession of a controlled substance may be actual or constructive, individual or joint" and restated, "the concept [that] 'possession' is a question which is not susceptible to a specific rule" and that there must be proof beyond a reasonable doubt that:

> 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. 953 So.2d 1108, 1111-13 .

The *Dixon* court focused on whether the two defendants there had joint "dominion or control" over the cocaine in question and had to determine whether one defendant, the driver, jointly and constructively possessed drugs found on another passenger defendant and concluded that he did not. In doing so, the *Dixon* court looked to *Hamburg v. State*, 248 So.2d 430, 432-33 (Miss.1971).

The *Hamburg* court determined that the trial court there should have directed a verdict of acquittal where an owner and driver of a vehicle had no knowledge or control of drugs found on his passenger. So, the *Dixon* court was obligated by precedent to conclude "the evidence [was] insufficient to show [the driver] had dominion and control over the drugs actually possessed by his passenger. Thus, [the driver] was not in constructive possession of the cocaine actually possessed by [the passenger], and the motion for judgment notwithstanding the verdict should have been sustained with regard to [the drivers] possession conviction beyond the thirteen and a half grams he actually possessed."

The facts concerning *Dixon* are also similar to those in *Jones v. State*, 693 So.2d 375, 377 (Miss.1997), where the Court reversed possession of narcotics conviction, finding no constructive possession when the only evidence connecting the defendant to the controlled substance was his presence in the car where the substance was found.

Arguably as the cases pointed out above, there is nothing to here to actually and specifically connect Dampeer to the cocaine found in the ditch as opposed to any of the

other people arrested in and around the same area. As Seghini took Dampeer to the police car, he lost sight of the alleged bottle. [T. 46-47].

Because other contraband was allegedly deposited in the same area, this is not a case where the question is which witness the jury believed because, the court cannot determine what evidence was retrieved by Officer Seghini. Was it the bottle that Dampeer allegedly threw down or was it a bottle thrown down by someone else in the area?

A reviewing court is required to reverse where the evidence, regarding any element, so considered "is such that reasonable and fair-minded jurors could only find the accused not guilty." *Harris v. State,* 921 So.2d 366, 372 (Miss. App.,2005). This is such a case.

An established higher scrutiny for thrown contraband cases was recognized in *Griffin v. State,* 859 So.2d 1032, 1033-34 (Miss. App.2003). As stated in *Griffin*, an officer chasing Griffin, who allegedly threw contraband and ran, "did not lose sight of Griffin during the chase and he saw the exact location where Griffin threw the matchbox. [The officer] testified that the area where he found the matchbox had recently been mowed and that there were no other items on the ground near the matchbox." The *Griffin* court affirmed because the defendant failed "to offer any substantial argument as to why his conviction should be reversed"and failed "to point out any specific examples of bias or prejudice involved."

In the present case, as previously shown, officer Seghini lost site of the contraband while other people were in the area also allegedly throwing dope on the ground. Contrary to *Griffin, supra*, not only did the state fail to establish factors supporting possession beyond a reasonable doubt; but, here there was evidence that Dampeer was told by police officers that Dampeer was going to be charged with possession of cocaine whether it was his or not. [T. 80-81; 89-91]. Thus, meeting the need for "other reasons" mentioned in *Griffin*, supra.

In *Boyd v. State,* 634 So.2d 113, 116 (Miss. 1994), the defendant was charged with possession and argued on appeal that the room where the drugs were found "was regularly occupied by a routine user of cocaine ... [and thus was] not in the exclusive possession or control of the accused" and that there was insufficient connection between "the accused with the contraband", citing *Clayton v. State*, 582 So.2d 1019, 1021 (Miss.1991). The *Boyd* court did not agree because "Boyd was seen by Officer Carter attempting to get rid of the cocaine which was found by Officer Tharpe. No evidence was offered that the occupant of the room had recently been there or that he was in the habit of keeping his cocaine on the bedroom floor." In the present case, there is the opposite, for it is confirmed that other people were being arrested and throwing dope on the ground in the same area, thus the state failed to prove exclusive control in conjunction with proximity to the dope.

In *Powell v. State*, 355 So.2d 1378, 1379 (Miss.1978), the court recognized that

"where contraband is found upon premises not in the exclusive control and possession of the accused, additional incriminating facts must connect the accused with the contraband. Where the premises upon which contraband is found is not in the exclusive possession of the accused, the accused is entitled to acquittal, absent some competent evidence connecting him with the contraband." See *Sisk v. State*, 290 So.2d 608 (Miss.1974). And *Clayton v. State*, 582 So.2d 1019, 1022 (Miss.1991).

CONCLUSION

Timothy Dampeer is entitled to have, and is respectfully requesting only that, his conviction in this case be reversed and rendered as an acquittal.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Timothy Dampeer, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 12th day of February, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Robert G. Evans, Circuit Judge, P. O. Box 545, Raleigh MS 39153, and to Hon. Gary King , Asst. D. A. , P. O. Box 486, Raleigh MS 39153, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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