IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JEROME THORNTON — APPELLANT

V. — NO. 2007-KA-02254-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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JEROME THORNTON **APPELLANT**

V. **NO. 2007-KA-02254-SCT**

STATE OF MISSISSIPPI **APPELLEE**

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. Jerome Thornton, Appellant
3. Honorable John W. Champion, District Attorney
4. Honorable Andrew C. Baker, Circuit Court Judge

This the 16th day of September, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

OTHER AUTHORITIES

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STATEMENT OF THE ISSUE

ISSUE:

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT

STATEMENT OF INCARCERATION

Jerome Thornton, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of DeSoto County, Mississippi, and a judgement of conviction for the crime of unlawful possession of at least one tenth (0.1) but less than two (2) grams of cocaine in count two, and unlawful possession of less than thirty (30)

grams of marijuana in count three, against the Appellant, Jerome Thornton, following a jury trial on November 27, 2007, Honorable Robert P. Chamberlin, Circuit Judge, presiding.

Thornton was subsequently sentenced to a term of eight (8) years in the Mississippi Department of Corrections to be served two and one half (2 ½) years incarceration and five and one half (5 ½) years post release supervision. Thornton was also ordered to pay a one thousand (1000) dollar fine as to count two, a two hundred fifty (250) dollar fine as to count three, and one hundred fifty three (153) dollar restitution to the DeSoto County Metro Narcotics. Thornton is currently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the testimony at trial, on August 30, 2006, Officer John Alexander ("Officer Alexander"), a Sargent with the DeSoto County Sheriff's Department, observed what he believed to be an exchange between the Appellant, Jerome Thornton ("Thornton") and an unidentified female. (T. 101). Because Officer Alexander believed the area to be a "high traffic area for narcotics" and because of Thornton's actions, Officer Alexander continued to observe the defendant and eventually conducted a traffic stop. (T. 102).

Officer Alexander approached the vehicle and asked Thornton whether he had a suspended license. (T. 103). Thornton admitted to having a suspended license. *Id.* Officer Alexander then asked whether Thornton had any narcotics in the vehicle. *Id.* At first Thornton said no, but then stated he would be honest and produced a small bag of what appeared to be marijuana. *Id.* Officer Alexander asked if there was anything else in the vehicle. Thornton replied that there was not and that Officer Alexander could search the vehicle if he wanted to. (T. 105).

Officer Alexander searched the vehicle and found what he believed to be a rock of crack cocaine underneath the driver's seat. (T. 105). After finding the substance, Officer Alexander took Thornton into custody and transported him to the metro office for processing. (T. 107). Once they arrived at the metro office, Officer Alexander advised Thornton of his ***Miranda*** rights. (T. 108). Thornton waived his rights and gave a voluntary written statement which set out the details of his drug transaction with the unidentified female. (T. 110). According to Officer Alexander, the written statement was voluntary and not the result of threats or coercion. (T. 113).

On cross examination Officer Alexander admitted he did not know exactly what was exchanged between Thornton and the unidentified female. (T. 118). Officer Alexander confirmed the fact that Thornton voluntarily handed over the bag containing marijuana and gave him consent to search the vehicle. (T. 120-121). Officer Alexander searched the car once and found nothing. (T. 121). After he searched for the second time, he found what appeared to be a crack rock underneath the driver's seat. *Id.* According to Officer Alexander, when he confronted Thornton about the crack rock Thornton flatly denied that it belonged to him. *Id.*

The State called Erik Frazure, a forensic scientist employed by the Mississippi Crime Lab, in order to verify that the substances found in Thornton's vehicle were in fact marijuana and cocaine, both of which are controlled substances. (T. 131-136). Frazure testified that the tests showed the substances were in fact marijuana and cocaine. (T. 134,136). The State rested after Frazure was excused as a witness. (T. 136).

The defense called Thornton to the stand to testify in his own defense. (T. 145). Thornton testified that he did not conspire to sell drugs on August 30, 2006, nor did he

knowingly possess the cocaine found in his vehicle. (T. 146-147). According to Thornton, he met the girl Officer Alexander saw him talking with just days before. (T. 147). Thornton claimed he and the girl were just talking and not in the midst of a drug deal in plain view of the public. (T. 148).

Thornton corroborated the fact testified to by Officer Alexander that, after being pulled over, he initially denied having any narcotics but then voluntarily produced a bag of marijuana. (T. 150). Thornton contended however, that Officer Alexander allowed him to enter the convenience store to buy something, and then asked for consent to search his vehicle. (T. 151). Officer Alexander did not find anything until he searched the car for a second time. (T. 152).

Thornton was then transported by Officer Alexander to the narcotics office. (T. 154). It was there, Thornton testified, that Officer Alexander threatened him in order to elicit a statement. *Id.* Thornton contends that Officer Alexander threatened to take his car, his money, and lock him up without bond. *Id.* Under pressure from Officer Alexander, Thornton gave a statement. (T. 155). Thornton testified that he made up the statement because he felt it was the only way he could get out of the narcotics office. (T. 155-156).

The jury found Thornton not guilty of conspiracy to sell a controlled substance, but found him guilty of unlawful possession of cocaine and marijuana. (T. 242). On December 4, 2007, the Appellant filed a Motion for J.N.O.V. or a New Trial. (C.P. 84-85, R.E.9-10). On December 17, 2007, the motion was denied. (C.P. 86 R.E. 11). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 87, R.E. 12).

SUMMARY OF THE ARGUMENT

The evidence was insufficient to support the verdict of guilty of possession of cocaine because the State failed to prove the defendant was in constructive possession. The State failed to show the defendant intentionally and knowingly possessed the cocaine. Because the State failed to prove an essential element of the crime of possession of cocaine the verdict is contrary to the law and must be reversed.

ARGUMENT

ISSUE: THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT

i. Standard of Review

The standard of review for a post-trial motion is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731 (¶17) (Miss. 2005)(citing ***Howell v. State***, 860 So. 2d 704 (¶212) (Miss. 2003)). Review of a motion for directed verdict or a judgment notwithstanding the verdict tests the sufficiency of the evidence. ***Bush v. State***, 895 So. 2d 836 (¶15) (Miss. 2005). The court must determine 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." *Id.* At 843 (¶16) (quoting ***Carr v. State***, 208 So. 2d 886, 889 (Miss. 1968)).

Taking the evidence in the light most favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements beyond a reasonable doubt. ***Bush***, 895 So. 2d at 844 (¶16) (quoting ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979)).

ii. The evidence was insufficient to convict as to Count Two

The State's case depended on Thornton being in constructive possession of the cocaine. Constructive possession is 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 circumstances." ***Hamm v. State***, 735 So. 2d 1025, 1028 (¶13) (Miss. 1999) (quoting ***Curry v. State***, 249 So. 2d 414, 416 (Miss. 1971)). The prosecution must also show that the defendant knowingly and intentionally possessed the item in question. *Id.*

The owner of the premises or vehicle in which the contraband is found is presumed to be in constructive possession of the contraband. ***Hamburg v. State***, 248 So. 2d 430 (Miss. 1971) (citing ***Hill v. State***, 105 So. 2d 478 (Miss. 1958)). This presumption, however, is rebuttable and "does not relieve the State of the burden to establish defendant's guilt as required by law." ***Hamburg***, 248 So. 2d at 432.

In the case at bar, the cocaine was found underneath the driver's seat of the Appellant's vehicle after the second search of the vehicle. (T. 121). According to Officer Alexander, Thornton denied the cocaine was his. (T. 121-122). Prior to Officer Alexander finding the cocaine, Thornton voluntarily handed over the marijuana that was in his possession and gave consent to search the vehicle. (T. 105). Voluntarily handing over a controlled substance and then freely giving consent to search the vehicle hardly seems consistent with someone who knowingly and intentionally possesses cocaine.

Regardless, the State had to prove beyond a reasonable doubt that Thornton knowingly and intentionally possessed the cocaine, and that it was subject to his dominion or control. ***Hamm***, 735 So. 2d at 1028. Because the cocaine was found in the vehicle Thornton owned, the presumption of constructive possession arises. ***Powell v. State***, 355 So. 2d 1378 (Miss. 1978).

However, where the defendant is not in exclusive control or possession of the premises where contraband is found, additional incriminating facts must be presented linking the defendant to the contraband. ***Powell***, 355 So. 2d at 1379.

Thornton testified the vehicle in which the contraband was found was also used by his brother, cousin, and wife. (T. 184). The vehicle, therefore, could not have been in his exclusive control or possession. Any one of the other people using the vehicle could have left the cocaine under the driver's seat. The presumption of constructive possession may have arisen, but the State still had to meet the burden of proving the defendant's guilt as required by law. ***Hamburg***, 248 So. 2d at 432. In order to prove constructive possession in a case where the defendant was not in exclusive control or possession of the premises, the State has to show additional incriminating circumstances. ***Fultz v. State***, 573 So. 2d 689, 690 (Miss. 1990) *see also* ***Sisk v. State***, 290 So. 2d 608, 610 (Miss. 1974).

The additional incriminating circumstances the State offered to prove constructive possession included Officer Alexander's testimony regarding what he viewed as a drug transaction and the statement given by the defendant at the police station. Officer Alexander testified that he saw Thornton and an unidentified female shake hands in a way he perceived was meant to pass something from one to the other. (T. 101). Officer Alexander testified as such even though he was too far away to identify what, if anything, was passed from Thornton to the unidentified female. (T. 118).

As to the statement made by Thornton at the police station, Thornton testified he made the statement because Officer Alexander threatened to take his car, his money, and to lock him up without bond. (T. 154). Despite that possible coercion, Thornton never admitted to actually

possessing cocaine. (Exib. 2). In the statement, Thornton wrote he was going to purchase the cocaine after receiving the money. *Id.* Thornton was unable to purchase the cocaine because he was pulled over and arrested by Officer Alexander before he could do so.

iii. Conclusion

The State failed to prove construction possession. The State failed to prove constructive possession because it could not show Thornton exercised dominion or control over the cocaine or that he knowingly and intentionally possessed the cocaine. Although he was found in close proximity to the contraband, proximity alone does not suffice. Moreover, the vehicle in which the contraband was found was not under the exclusive control and possession of the Appellant.

Because the defendant was not in exclusive control or possession of the vehicle the State was required to show additional incriminating circumstances linking the defendant to the contraband. The State, however, failed to show additional incriminating circumstances linking the Appellant to the contraband found in the vehicle.

The evidence was thus insufficient to support a finding of constructive possession by the jury. A rational trier of fact could not have found all the elements of constructive possession met in this case. Thus, the verdict should be reversed, this matter rendered, and the Apellant discharged from custody.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Apellant's conviction and sentence should be vacated, this matter rendered, and the Appellant discharged from custody.

CERTIFICATE OF SERVICE

I, Justin T. Cook, Counsel for Jerome Thornton, 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:

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This the 16th day of September, 2008.

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