

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WENDY MICHELLE CHEATHAM

APPELLANT

VS.

NO. 2008-KA-0090

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUE

I. The verdict is supported by the overwhelming weight of the evidence.

STATEMENT OF THE CASE

On or about October 29, 2007, Cheatham, along with Jason McKee and Malcolm Allen, was indicted by the Leake County Grand Jury for possession of over 30 grams of methamphetamine. McKee and Allen pled guilty. Cheatham was tried in the Circuit Court of Leake County on January 8, 2008. She was found guilty of possession of over 30 grams of methamphetamine and sentence^d to serve ten (10) years in^{The} custody of the Mississippi Department of Corrections, four years suspended and four years post-conviction supervision. While in confinement, Cheatham was ordered to participate in long term drug and alcohol treatment. The instant appeal ensued.

STATEMENT OF THE FACTS

On April 11, 2007, officers of the Leake County Sheriff's Department and the Mississippi Bureau of Narcotics executed a search warrant on a camper in Leake County. (Tr. 25) Leake County Sheriff Greg Waggoner testified that as he approached the camper, there were two or three vehicles in the yard. He saw Cheatham on the outside of the camper as he approached. She appeared to be looking for something in one of the vehicles. Sheriff Waggoner observed her for a few minutes until she went back into the camper. (Tr. 27) Waggoner went to the back side of the camper. He could hear people moving inside. He heard voices and heard the commode flush. He grabbed the drain pipe and what was being flushed out fell to the ground. He observed that the substance appeared to be methamphetamine that was flushed out through the commode. (Tr. 28) Waggoner remained with the substance until Officer Clay McComb took custody of it.

(Tr. 28) Sherrif Waggoner then entered the camper. The search was ongoing when he entered. He testified that the officers had difficulty getting the occupants of the trailer to come outside. (Tr. 29)

Officer Craig Taylor, who was at the time of the execution of the search warrant an officer with the Mississippi Bureau of Narcotics, identified the black bag taken from the camper, which contained plastic bags that contained a white crystalline substance. He testified that he instructed Officer Clay McCombs as to where the bag was and the Officer McCombs took possession of it. (Tr. 33)

Officer Clay McCombs testified that when they arrived at the camper to execute the search, the officers identified themselves as law enforcement and tried to enter the camper. The camper had one door. The officers knocked on the door and tried to open it, but it remained locked. Officer McCombs testified that he was able to see in the windows and could tell that there were three people inside. The door eventually came open and the officers began bringing the people in the camper outside. (Tr. 40) There were three people in the camper, Malcolm Allen, Jason McKee and Wendy Cheatham. McCombs testified that he took into custody the substance that had been flushed through the drain pipe, He also testified that he took into custody the bag that Officer Taylor brought to his attention. The bag was found inside the camper near the bed. (Tr. 46) McCombs also identified a small metal container which he took into custody. It was found on the dining room table just inside the door of the camper. (Tr. 48) McCombs further identified a bag that was found under the bunk bed in the camper. (Tr. 49) McCombs also identified a plastic bag he found in the toilet, floating in the water. (Tr. 52)

Officer McCombs further testified that the next day her interviewed Cheatham.

*Cheatham
in custody*

McCombs gave Cheatham a miranda warning. Cheatham then signed a waiver of rights. (Tr.

81) Officer McCombs testified as follows:

I asked her whose methamphetamine it was that we had found the night before. She stated that it was hers. I asked her how she obtained it, where she got it from. She told me that she had made it. I asked her . . . to tell me the process of how it was made. She said she couldn't tell me; that she had the recipe written down. I then asked her if she was just telling me that to cover for someone else, whether it was just somebody else's dope and she was just claiming it; and she wouldn't answer. She just kind of sat there. That was about the extent of her statements to me.

(Tr. 84)

Ms. Sarah Thames testified that she was present for the conversation between Clay McCombs and Ms. Cheatham. She testified that Officer McCombs read Cheatham her rights and that Cheatham did not ask for an attorney or ask to end the interview. (Tr. 104) ^SShe testified the Cheatham told McCombs that the drugs were hers and that she had a recipe for making methamphetamine.

Keith McMann, a forensic scientist with the Mississippi Crime Laboratory testified that he identified the evidence retrieved from the camper. Exhibit 1 was 76.07 grams of methamphetamine, Exhibit 2 contained 57.27 grams of methamphetamine, Exhibit 3 contained 1.01 grams of methamphetamine, Exhibit 4 contained 26.59 grams of methamphetamine, Exhibit 5 contained .93 grams of methamphetamine, Exhibit 7 contained 3.44 grams of methamphetamine and exhibit 8 contained 1.22 grams of methamphetamine.

the meth

Jason McKee testified that he owned the camper and the land it was on belonged to his father. (Tr. 127) He testified the Cheatham came to the camper with Wayne Allen and that they often came to the camper to buy drugs. He testified that the drugs were his. McKee testified that

he and Allen had both pled guilty to possession.

Wendy Cheatham testified that she believed that she and Wayne Allen were going to McKee's trailer to get window tint. She testified that she had been dating Allen for four or five months and that she thought she was protecting him by claiming the drugs. Cheatham testified that when she was in the trailer with McKee and Allen she knew that there was methamphetamine in the trailer. (Tr. 137)

SUMMARY OF THE ARGUMENT

The evidence in this case clearly shows that Cheatham was in joint possession of over 100 grams of methamphetamine. She was present in a small camper with the other two defendants, within grabbing reach of the drugs and had come with her boyfriend on other occasions. She admitted that she knew the drugs were there and that she knew what they were. She was in very close proximity to the drugs, sufficient to constitute dominion and control. Further, Cheatham admitted the drugs were hers in her interview with Officer McCombs. While Cheatham may wish to distance herself from that admission now, and even if she embellished her role in order to protect her boyfriend, the jury clearly believed her admission that drugs were hers was truthful. It is the jury's duty to determine veracity of witnesses. Her admission plus her proximity and knowledge of the drugs is sufficient to find her guilty of possession.

The weight of the evidence presented at trial, when viewed in the light most favorable to the prosecution, could have led a reasonable trier of fact to find Cheatham guilty of possession of more than 30 grams of methamphetamines. Therefore, the verdict was not so contrary to the overwhelming weight of the evidence so as to cause an unconscionable injustice. This issue is without merit.

ARGUMENT

A trial court's denial of a motion for a new trial should only be reversed when the reviewing court finds that there was an abuse of discretion. *Sheffield v. State*, 749 So.2d 123, 127 (Miss.1999). A motion for a new trial challenges the weight of the evidence, and the appellate court should only "disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So.2d 836, 844 (Miss.2005). The evidence should be viewed in the light most favorable to the prosecution, and the court must ask whether any rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt. *Id.* at 843.

Cheatham contends that the weight of the evidence did not support the jury's finding of guilt in the alleged charges Cheatham claims that the prosecution did not present sufficient evidence to support hher conviction beyond a reasonable doubt. The prosecution made its case on the theory of constructive possession, "a legal fiction used by courts when actual possession cannot be proven." *Fultz v. State*, 573 So.2d 689, 690 (Miss.1990). In Mississippi, proximity to the contraband along with "any other scintilla of evidence of possession" may establish constructive possession. *Id.* The test to be applied in a constructive possession case is as follows:

[T]here must be sufficient facts to warrant a finding 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 subjected to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.

Curry v. State, 249 So.2d 414, 416 (Miss.1971).

→ this goes to sufficiency of the evidence, not the weight
we are only concerned w/ the weight of the evidence

based on jury instructions this is correct

In Mississippi, "one who is the owner in possession of the premises is presumed to be in constructive possession of the articles found in or on the property possessed." *Pool v. State*, 483 So.2d 331, 336 (Miss.1986) (quoting *Hamburg v. State*, 248 So.2d 430, 432 (Miss.1971)). Our supreme court has held that "when the defendant is not the owner of the premises the state must show additional incriminating circumstances to justify a finding of constructive possession." *Id.* 2336 (citing *Boches v. State*, 506 So.2d 254, 259 (Miss.1987)).

Possession of a controlled substance may be actual or constructive, individual or joint. *Wolf v. State*, 260 So.2d 425, 432 (Miss.1972). The State further argues that Berry was aware of the presence and character of the cocaine and was consciously and intentionally in possession of it as required by *Cunningham*, 583 So.2d at 960, and *Curry*, 249 So.2d at 416.

The evidence in this case clearly shows that Cheatham was in joint possession of over 100 grams of methamphetamine. She was present in a small camper within grabbing reach of the drugs and had come with her boyfriend on other occasions. She admitted that she knew the drugs were there and she knew what they were. She was in very close proximity to the drugs, sufficient to constitute dominion and control. Further, Cheatham admitted the drugs were hers in her interview with Officer McCombs. While Cheatham may wish to distance herself from that admission now, and even if she embellished her role in order to protect her boyfriend, the jury clearly believed her admission that drugs were hers was truthful. It is the sole province of the jury to determine the veracity of witnesses. Her admission plus her proximity and knowledge of the drugs is sufficient to find her guilty of possession.

The weight of the evidence presented at trial, when viewed in the light most favorable to the prosecution, could have led a reasonable trier of fact to find Cheatham guilty of possession of

more than 30 grams of methamphetamines. Therefore, the verdict was not so contrary to the overwhelming weight of the evidence so as to cause an unconscionable injustice. This issue is without merit and the judgment of the trial court should be affirmed.

CONCLUSION

The jury's verdict was supported by the overwhelming weight of the evidence and the trial court correctly denied Cheatham's Motion for New Trial. The judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

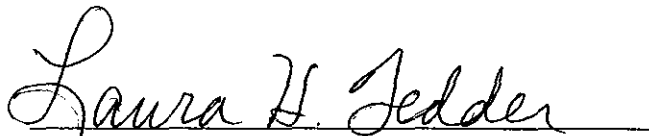
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 30th day of October, 2008.


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