

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JIMMY LEE DANIELS

APPELLANT

VS.

NO. 2008-KA-0127-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This appeal proceeds from the conviction of Jimmy Lee Daniels from the Circuit Court of Pike County, Mississippi, Honorable David H. Strong, Jr. presiding. A Pike County Grand Jury indicted Daniels for a violation of Mississippi Code Annotated section 41-29-139(a)(1) possession of cocaine with intent to transfer within in 1,500 feet of a playground. On November 14, 2007, a jury convicted Daniels of possession of at least ten (10) grams but less than thirty(30) grams of cocaine within 1,500 feet of a playground. The court sentenced Daniels to thirty (30) years in the custody of the Mississippi Department of Corrections, with sixteen (16) years to serve and fourteen (14) years suspended, five (5) years post-release supervision, and ordered Daniels to pay a \$10,000 fine, court appointed attorney fees and court costs.

STATEMENT OF THE FACTS

On June 15, 2006, Mississippi Bureau of Narcotics (MBN) agent James Kenneth Cotton (Cotton) received a citizen's telephone tip that Jimmy Lee Daniels (Daniels) was selling cocaine out of a red Jaguar in Community Parks apartments. (Supp.Tr. 176). Cotton and MBN agent Sheldon Jolliff (Jolliff) drove to the apartments and observed Daniels sitting in the driver's seat of a red

Jaguar. (Supp.Tr. 142-43, 166, 177). Jolliff knew Daniels from a prior drug case. (Supp.Tr. 143). Daniels saw Jolliff as the agents approached in their vehicle, so the agents drove around the block before parking behind the Jaguar. (Supp.Tr. 158-160, 166-67, 176-77). After the agents made the block and returned to the Jaguar, Daniels exited the Jaguar and started walking quickly toward the apartments. (Supp.Tr. 143, 158, 177). The agents did not see anyone else in the Jaguar or near it. (Supp.Tr. 159, 178). The agents stopped Daniels and asked for identification and for consent to search the car. (Supp.Tr. 178). Daniels, initially calm, became nervous after he gave Jolliff the car keys. Daniels asked Cotton to step to the back of the car with him at which time he fled the scene. (Supp.Tr. 179).

When Daniels fled, Cotton gave pursuit and Jolliff remained with the Jaguar. (Supp.Tr. 144, 179). Unable to apprehend Daniels, Cotton returned to the Jaguar. (Supp.Tr. 179). Based upon the verbal consent to search the car and the fact that Daniels gave Jolliff the car keys, Jolliff unlocked the car and commenced a search. (Supp.Tr. 145).

Jolliff found a brown bag on the driver's seat next to the console. (Supp.Tr. 145). The bag contained five smaller bags of powder cocaine and rocks of crack cocaine. (Supp.Tr. 146, 149; Ex.S 1, 2, 4-9). Jolliff also found a set of digital scales on the floorboard under the driver's seat. (Supp.Tr. 146; Ex.S3). The agents testified that the cocaine was packaged in a manner that would infer intent to distribute and the digital scales, like the set found, were commonly used in drug sales. (Supp.Tr. 154). The agents further testified the Jaguar was parked less than 1500 feet from the Community Parks Apartments playground.

The agents determined the Jaguar belonged to Daniels' aunt who apparently was ignorant of the drug activity in her car. (Supp.Tr. 153, 180).

Jolliff testified that he arrested Daniels on March 28, 2007. Agent Jolliff and another MBN

agent apprehended Daniels after a brief car chase. (Supp.Tr. 155).

Daniels' cousin, Taisha Martin, testified for the defense and gave a somewhat confusing rendition of the events surrounding the agents' discovery of the cocaine. (Supp.Tr.196-203). Ms. Martin testified she didn't see anyone in the Jaguar when the agents pull up behind it. She claimed Daniels was on the porch of apartment number 24 with "twenty or fifteen" other people standing in front of the apartment. The agents called Daniels over to talk to them. He emptied his pockets, talked to them and then ran. According to Ms. Martin, the keys to Jaguar were in the car; she failed to respond when defense counsel asked her how she knew the keys were in the Jaguar. (Supp.Tr. 200).

Daniels, who testified in his own defense, also gave a somewhat confusing rendition of events. (Supp.Tr. 204-213). Daniels of course denied any knowledge of the drugs, and having possession or control of the Jaguar. Daniels claimed the agents pulled up suddenly, jumped out of their vehicle and began yelling at him as they ran toward him. Daniels testified that when talking to the agents he told them he was going to run. He was frightened that a problem was coming and so he ran. (Supp.Tr. 210-11).

The jury convicted Daniels of "possession of at least ten grams but less than thirty grams of cocaine within 1500 feet of a playground." (Supp.Tr. 248, C.P. 44, R.E. 13). In sentencing Daniels the court applied the enhancement found in Mississippi Code Annotated section 41-29-142 which doubles the statutory sentence for convictions for the sale or possession with intent to sell a controlled substance within 1500 feet of parks and schools. (Supp.Tr. 253). Daniels received thirty (30) years in the custody of the Mississippi Department of Corrections, sixteen (16) years to serve and fourteen (14) years suspended, with five (5) years post-release supervision, and ordered to pay a \$10,000 fine, court appointed attorney fees and court costs. (Supp.Tr. 253, C.P. 45-46, R.E.15).

After the denial of post trial motions, Daniels appealed raising the following issues.

- I. THE TRIAL JUDGE COMMITTED PLAIN ERROR IN FAILING TO PROPERLY INSTRUCT THE JURY ON ALL THE ELEMENTS OF CONSTRUCTIVE POSSESSION.**
- II. THE TRIAL COURT COMMITTED PLAIN ERROR IN SENTENCING APPELLANT TO AN ENHANCED SENTENCE WHEN APPELLANT WAS CONVICTED ONLY OF POSSESSION AND NOT POSSESSION WITH INTENT UNDER MISS. CODE. ANN. § 41-29-142.**
- III. THE TRIAL JUDGE ERRED IN FAILING TO GRANT A DIRECTED VERDICT.**
- IV. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**
- V. THE TRIAL JUDGE ERRED IN FAILING TO DISMISS THE INDICTMENT PRIOR TO DANIELS' SECOND TRIAL ON THE BASIS OF DOUBLE JEOPARDY.**

SUMMARY OF THE ARGUMENT

There was no plain error by the court in instructing the jury. The jury instructions when read as a whole, adequately explain to the jury the elements of constructive possession the State must prove.

The trial court incorrectly enhanced Daniels' sentence pursuant to Mississippi Code Annotated section 41-29-142. The case should be remanded solely for the purpose of re-sentencing Daniels.

The evidence in the record sufficiently supported the jury's verdict. MBN agents testified they saw Daniels sitting in the driver's seat of a parked red Jaguar prior to finding cocaine on the driver's seat and digital scales under the driver's seat. The agents further testified Daniels had possession of the car keys to the locked Jaguar and no one else was around the vehicle.

The jury's verdict is not against the overwhelming weight of the evidence. The state

presented credible evidence through the testimony of the narcotics agents that Daniels had constructive possession of the cocaine. A reasonable juror could find Daniels guilty of every element of possession of cocaine. Daniels' weight and sufficiency argument must fail.

Double jeopardy did not bar Daniels' second trial. The prosecutor's inadvertent failure to disclose evidence to the defense during Daniels' first trial did not amount to bad faith misconduct or prosecutorial misconduct intended to force the defense to move for a mistrial. Hence, double jeopardy principles did not bar a new trial.

ARGUMENT

I. THE COURT DID NOT COMMIT PLAIN ERROR IN INSTRUCTING THE JURY ON THE ELEMENTS OF CONSTRUCTIVE POSSESSION.

In his first assignment of error, Daniels argues that the court failed to instruct the jury on all the elements of constructive possession. Daniels asserts Jury Instruction No. 10 (S-6) provided an incomplete definition of constructive possession; the instruction failed to explain to the jury that they must find Daniels was aware of both the presence and the character of the cocaine. (C.P.37). Daniels failed to object to the instruction at trial and therefore relies on the plain error doctrine.

Defense cites *Dora v. State*, No. 2005-KP-00487-COA(¶29)(Miss.App. May 15, 2007), cert. granted, *Dora v. State*, 973So.2d 244 (Miss. 2008), *rev'd on other grounds*, No. 2005-CT-00487-SCT (Miss.2008) in support of his argument that Jury Instruction No. 10 was deficient. However, the appellate court found in *Dora* that nowhere in the cumulative jury instructions did the trial court instruct the jury on all the elements of constructive possession. Such is not the case here.

For the purpose of reviewing challenges to jury instructions, the instructions actually given must be read as a whole; when so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. *Williams v. State*, 803 So.2d 1159 (Miss. 2001)

In the case *sub judice*, Jury Instruction 1 (C-1) instructs the jury to “consider these **instructions as a whole.**” (C.P. 23). Jury Instruction 5 (S-3) provides in part:

If you find from the evidence in this case beyond a reasonable doubt that:
Jimmy Lee Daniels, on or about June 15, 2006, in Pike County, Mississippi; knowingly and feloniously had in Defendant’s possession; at least ten (10) grams but less than thirty (3) grams of cocaine; and Jimmy Lee Daniels **knew that it was cocaine**; and, **at the time, he possessed such cocaine....**” (C.P. 27).

Jury Instruction 10 (S-6) reads:

The Court instructs the Jury that to constitute a possession there must be sufficient facts to warrant a finding that the defendant **was aware of the presence of the particular item or substance** and was intentionally and consciously in possession of it. It need not be actual physical possession; constructive possession may be establishing that the item or substance involved was subject to the defendant’s dominion or control. (C.P. 31).

Knowing that the substance Daniels possessed was cocaine is in essence the same thing as being aware of the presence and character of the cocaine. In reading Instructions 1 (C1), 4 (D-5), 5 (S-3) and 10 (S-6) together, the jury was instructed on all the elements of possession and constructive possession. Daniels’ deficient instruction argument is without merit and therefore the plain error argument must fail.

II. THE DEFENDANT SHOULD BE RE-SENTENCED.

It would appear from the record that in sentencing Daniels, the trial judge incorrectly applied the enhancement found in Mississippi Code Annotated section 41-29-142. Section 41-29-142 doubles the statutory sentence for a violation of Mississippi Code Annotated 41-29-139(a)(1), the sale or possession with intent to sell a controlled substance, if the violation occurred within 1500 feet of a park or school.

Although indicted for a violation of 41-29-139(a)(1), the jury convicted Daniels of a violation of 41-29-139(c)(1)(D), possession of more than ten (10) grams but less than thirty (30) grams of cocaine and therefore Section 41-29-142 should not apply. The case should be remanded to the trial court solely for the purpose of re-sentencing. (Supp.Tr. 253).

III. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

In determining whether the State presented legally sufficient evidence to support the jury's verdict, the reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843 (¶16)(Miss.2005).

Daniels claims on appeal that the State failed to prove he had constructive possession of the cocaine. The MBN agents received a tip that Jimmy Lee Daniels was selling crack cocaine in a red Jaguar at Community Parks Apartments. (Supp.Tr. 142, 176). Agent Jolliff knew Daniels from a previous drug case. (Supp.Tr. 142, 158). The agents testified they saw Daniels sitting by himself in the driver's seat of a red Jaguar in the apartments parking lot. (Supp.Tr. 142-43, 176-77). Daniels exited the Jaguar after he saw Agent Jolliff. (Supp.Tr. 160, 167, 177). The agents didn't see anyone else near the Jaguar. (Supp.Tr. 159, 177) Daniels had the keys to the locked car and agreed to its search. (Supp.Tr. 143-45, 178). Daniels fled the scene after giving the keys to Jolliff. (Supp.Tr. 144) Jolliff found a paper bag containing five separate bags of cocaine on the driver's seat next to the console and a pair of digital scales on the floorboard under the driver's seat where Daniels had just been seen sitting. (Supp.Tr. 145-49, 176-80).

Appellee contends that from the above evidence, the jury could have reasonably inferred that Daniels was in possession and control of the cocaine found in the Jaguar and therefore guilty. This issue is without merit.

IV. THE JURY VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Daniel's next assignment of error is that the verdict of the jury was against the overwhelming weight of the evidence and a new trial should be granted. This Court will "only disturb a jury 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 863, 844(¶ 18) (Miss. 2005) (citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). To determine if this has occurred, the Court will look at the evidence in a light most favorable to the verdict. *Id.* While there are conflicts in the evidence presented to the jury, it has long been held that when such an instance arises the jury shall “be the sole judge of the credibility of witnesses and the weight and worth of their testimony.” *Harris v. State*, 970 So.2d 151, 156(¶ 20) (Miss.2007).

The jury heard the testimony of the MBN agents concerning Daniels being seated in the Jaguar and his constructive possession of the cocaine. The jury then heard the testimony from Daniels and his cousin that the defendant was never in the Jaguar, never had possession of the Jaguar keys and had no knowledge of the cocaine. The conflicting evidence presented a factual dispute for jury resolution and obviously the jury believed the MBN agents.

When viewing the evidence in the light most favorable to the verdict, Appellee asserts the court cannot say the verdict constitutes an unconscionable injustice or that the verdict of the jury was against the overwhelming weight of the evidence. The trial court did not abuse its discretion in denying the motion for a new trial. This assignment of error is without merit.

V. DOUBLE JEOPARDY DID NOT ATTACH AT DANIELS’ SECOND TRIAL.

In his final assignment of error, Daniels claims the trial judge erred in denying his motion to dismiss the indictment prior to his second trial. In Daniels’ first trial, the court allowed Agent Jolliff to testify that he could identify the defendant from having previously executed a search warrant on defendant’s residence in Summitt, Mississippi. Agent Cotton, who did not previously know Daniels, testified that the defendant surrendered his driver’s license to the narcotics agents prior to his flight. At the conclusion of Cotton’s testimony, defense counsel moved for and the court granted a mistrial on the basis that the prosecution had not disclosed to defense counsel the information concerning surrender of the license. (Supp.Tr. 62-72; 258-

260).

Daniels cites *Roberson v. State*, 856 So.2d 532 (Miss.App.2003) and *Carter v. State*, 402 So.2d 817 (Miss.1981), for the proposition that when the Defendant was put into a position to move for a mistrial by the prosecution or even the Court, then the Defendant should not be barred from claiming double jeopardy. In order to elevate an order granting a mistrial in a criminal case at the request of the defendant to one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, which is the common predicate to all such orders, but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for the mistrial. *Carter*, 402 So.2d at 821. In other words, “[w]ithout proof of judicial error prejudicing the defendant, or ‘bad faith prosecutorial misconduct,’ double jeopardy does not arise.” *Jenkins v. State*, 759 So.2d 1229, 1234 (Miss.2000)(quoting *United States v. Jorn*, 400 U.S. 470, 482, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971)).

There was no bad faith on the part of the prosecutor in the case at hand. The prosecutor’s inadvertent failure to disclose evidence to defense did not amount to bad faith failed to disclose newly discovered evidence, which would not have impacted on the case.

As the prosecutor stated during the motion hearing, he learned of the defendant’s surrender of his driver’s license during the lunch recess at defendant’s first trial. According to the prosecutor, during the lunch recess, defense counsel approached the prosecutor about calling a witness to rebut Agent Jolliff’s testimony. Immediately before resuming the trial, the prosecutor in turn talked to the narcotics officers. This is when he learned of the driver’s license. As the prosecutor stated, “It had been discussed throughout trial, leading up to trial, and also in the prior reports, that the defendant had been identified prior to flight. (Supp. Tr. 260-63). The defendant was obviously aware of the fact that he had surrendered his driver’s license to the agents... .” (Supp.Tr. 261). The prosecutor did not intend on using the information and did not divulge it to the defense or court. (Supp.Tr. 262).

In the case *sub judice*, the trial court made it clear, and the State agrees, there was no sign of prosecutorial misconduct in the testimony which led to the mistrial. (Supp. 263-64). Daniels offers this Court no legitimate basis for concluding that the prosecution exhibited bad faith. This issue is without merit.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's conviction of Jimmy Lee Daniels for possession of at least ten (10) grams but less than thirty(30) grams of cocaine in violation of Mississippi Code Annotated section 41-29-139. Further, to remand this case to the Circuit Court of Pike County strictly for the purpose of re-sentencing the defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

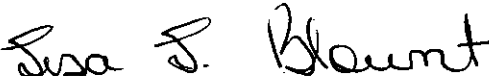
I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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