IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY LEE TUCKER — APPELLANT

V. — NO. 2008-KA-00762-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with M.R.A.P. Rule 34(b), the Appellant requests oral argument in this case before the Court. This case involves a complicated set of conflicting facts, as well as technical issues regarding the sufficiency of the indictment and various jury instructions. There are also serious claims regarding prosecutorial misconduct and ineffective assistance of counsel which impacted Tucker's fundamental right to due process and a fair trial. Appellant believes that oral argument will greatly aid the Court in its disposition of this case.

REPLY ARGUMENT OF THE APPELLANT

JURISDICTION

Before replying to the State's argument on the merits of this case, Tucker would briefly respond to the Appellee's contention that this Court is without jurisdiction to hear this appeal. Trial counsel's Notice of Appeal was signed on April 28, 2008, and was marked filed on May 1, 2008. The State is correct in noting the Order denying Tucker's Motion for a New Trial or in the alternative a JNOV, was signed and dated on March 24, 2008. However, what the State fails to note is that the Order was not stamped "Filed" until June 3, 2008. Counsel's Notice of Appeal was therefore timely.

A copy of this Order was provided to the Court, and to the State, in Tucker's Motion to Supplement the Record, which was filed on February 23, 2009. There was no objection lodged by the State, and this Court granted the motion to include a certified copy of the Order on February 27, 2009.

Regardless, even if the Order had been filed on the date it was signed, Tucker filed a pro se Notice of Appeal on April 19, 2008. C.P. 163. The Notice was filed well within the thirty day requirement of M.R.A.P Rule 4. Clearly, this Court has jurisdiction to hear this appeal.

ISSUE NO. 1: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT, OR IN THE ALTERNATIVE, WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

A. Sufficiency of the Evidence.

In its brief, the State makes the conclusory statement that there was evidence "defendant was in actual possession, and had dominion and control over some of the many, many stolen items. And, or, such was constructive possession based upon the facts." Appellee Brief at 6. However, the State fails to cite any facts in the record to support this. In fact, the State failed to even allege a separate Statement of Facts as required by M.R.A.P. 28(b).

Anthony Tucker did not own the house or the shed where these items were found. He was a guest at the house for only a few days prior to search. Tr. 260. There was never any evidence introduced that he was in the actual possession of any of the stolen items. Accordingly, this must only be reviewed as a constructive possession case. Constructive possession is rebuttable when contraband is found on premises which are not owned by a defendant. "[M]ere physical proximity to the contraband does not, in itself, show constructive possession." *Fultz v. State*, 573 So.2d 689, 690 (Miss.1990).

The State never proved dominion or control over the property, or over the place where the property was held. There was absolutely no evidence presented that Tucker had dominion or control over any of the stolen items. There was no testimony that any of the stolen items were found on Tucker's person or in Tucker's personal duffle bag. Tr. 230.

The State cites *Presley v. State*, 994 So.2d 191, 195 (Miss.App. 2008), for the proposition that unexplained possession of recently stolen merchandise creates a presumption of guilt. However, this presumption does not arise in a possession of stolen property case. The presumption of guilt to burglary or grand larceny only arises where there is an unexplained possession of recently stolen property. See generally, *Shields v. State*, 702 So.2d 380 (Miss. 1997). These cases do not address the key issue here of constructive possession, that is, dominion and control.

Christann Gibbs testified that she gave Tucker some clothes out of James Gibbs's closet as a gift from her husband. Tr. 344-45. There was never any proof put forth by the State that these particular items of clothing came from Foot Gear. Even if the State would have provided such proof, Christann's testimony would have provided a reasonable explanation for Tucker's possession of them. This is especially significant given James Gibbs's subsequent guilty plea to possession of stolen property. Tr. 228-29, C.P. 149-54.

B. Weight of the Evidence.

The State again points to the fact that several stolen items were found in Gibbs's shed where the State alleged Tucker was staying. Appellee Brief at 7. However, the weight of the evidence still does not show dominion or control. Even if Tucker was sleeping there, the

evidence showed there were all types of merchandise in that shed, not just items allegedly from Foot Gear. Exhibits 13-17. The State did not prove any of these items actually belonged to Tucker, or that he even used any of them, or that he had any intention to convert them to his use. Again, the only evidence of any guilty knowledge came from Johnny Hancock, who testified Tucker told him he received the property from two guys in a van. Tr. 253, 275. The State relies heavily on this one piece of disputed evidence. This crucial fact was not even contained in Hancock's written report, but was added as an afterthought later. Tr. 275-76. This was apparently the "abundance of evidence" the State alleges was presented to the jury to prove guilty knowledge. The jury's verdict based on that fact alone clearly mandates a new trial.

The State summarily dismisses this issue by pointing out that a conviction may be obtained on circumstantial evidence alone. Appellee Brief at 7. However, the State failed to distinguish the case from *Lewis v. State*, 573 So.2d 713, 715 (Miss. 1990). Circumstantial evidence alone is insufficient to prove guilty knowledge. Mere possession without any indication of guilty knowledge is not enough to uphold a conviction of receiving stolen goods. *Thompson v. State,* 457 So.2d 953, 956 (Miss. 1984); *Johnson v. State,* 247 So.2d 697, 699 (Miss. 1971). See also *McClain v. State,* 625 So.2d 774, 779 (Miss. 1993) (unexplained possession of recently stolen property, standing alone, is insufficient to satisfy the guilty knowledge required as an element for the crime of receiving stolen property).

It is clear that Tucker was convicted not on the competent evidence admitted at trial, but rather on the inadmissible hearsay from the anonymous caller that Tucker burglarized

the Foot Gear store. No reasonable juror could have found that Tucker received or possessed stolen property unless they treated the hearsay comments from the anonymous caller as substantive evidence. Allowing this verdict to stand would constitute a manifest injustice.

ISSUE NO. 2: IN THE ALTERNATIVE, WHETHER TUCKER WAS IMPROPERLY CHARGED WITH RECEIVING STOLEN PROPERTY WHEN THE STATE'S THEORY OF THE CASE WAS THAT TUCKER ACTUALLY STOLE THE PROPERTY.

The State dismisses this claim of error in one page of argument. Appellee Brief at 9. However, the Appellee failed to address or even distinguish the cases cited by Tucker in support of this claim. Instead, the State cites to other cases to illustrate the proposition that the prosecution can show evidence of other crimes to tell a complete story to the jury. Apparently, therefore, the State concedes that the prosecution was trying to prove Tucker was guilty of other crimes, i.e. burglary, to tell a complete story to the jury. Failure to address a claim is tantamount to a confession of error. *Trammell v. State*, 622 So.2d 1257, 1261 (Miss.1993).

As pointed out in our original brief (which the State does not contest), the prosecution did not merely infer that Tucker had something to do with the actual theft of the items, the prosecution actually argued that theory to the jury. Tr. 110, 112-13, 168-69, 171, 182-89, Tr. 178-79, 454-56, Exhibits 9, 10, 12A-12J. The defense offered to stipulate that the items were taken as a result of a burglary, but the State was bound and determined to prove that Tucker was the actual burglar. Tr. 116-17.

Hentz v. State, 489 So.2d 1386, 1389 (Miss.1986), is binding precedent on this Court, and the State has failed to argue why *Hentz* does not apply. Tucker's conviction for possession of stolen property should be reversed and rendered.

ISSUE NO. 3: IN THE ALTERNATIVE, WHETHER TUCKER'S INDICTMENT WAS INSUFFICIENT TO ALLEGE WHAT STOLEN ITEMS HE WAS ACCUSED OF CONSTRUCTIVELY POSSESSING.

The State contends that the indictment alleging Tucker received stolen "athletic apparel" was sufficient to put him on notice of the charge, as "athletic apparel" is fungible in nature. However, "The term 'fungible goods' defines goods of which each particle is identical with every other particle, such as grain and oil." *Mississippi State Tax Commission v. Columbia Gulf Transmission Co.*, 249 Miss. 88, 102, 161 So.2d 173, 178 (Miss. 1964), citing 1 Williston, Sales (rev. ed. 1948), §§ 155-159. Tucker asserts that this Court would be hard-pressed to find a citizen in the State to agree that a Ole Miss sweatshirt is identical to a Mississippi State or Jackson State sweatshirt. Furthermore, the items alleged to have been stolen included, among other items, caps, shirts, shoes, and jeans. Exhibit 8. Clearly these are not identical items.

From the jury's verdict, it is unclear whether Tucker was convicted of aiding and abetting the possession of stolen goods found in Gibbs's house, or with the items found in Gibbs's shed. Tucker was entitled to know exactly what stolen items he was accused of receiving or possessing. This is especially crucial given none of the stolen items were actually found in his possession or in his duffle bag.

The State also cites *Nguyen v. State*, 761 So.2d 873 (Miss. 2000). This case was cited in our original brief and is controlling. Similar to *Nguyen*, the indictment in this case did not adequately inform Tucker of what he was charged with receiving in order to allow him to prepare a defense. "Discovery is not a substitute for the requirements of URCCC 7.06 .... the appellants should not be forced to engage in discovery in order to find out the essential facts constituting the offense charged and to be fully notified of the nature and cause of the accusation against them. *Id.* at 877.

The indictment is this case clearly had a substantive defect in failing to sufficiently identify the stolen property Tucker was alleged to constructively possess. Due process demands Tucker's conviction be reversed.

ISSUE NO. 4: WHETHER THE TRIAL JUDGE ERRED IN DENYING JURY INSTRUCTION D-2A AND D-3, AND GRANTING S-3 AND S-4.

The Appellant would briefly note that the State failed to address the claim that Instruction S-3 was an incomplete statement of the law. Tucker would again submit that this issue is therefore conceded as error by the State. *Gilbert v. State*, 934 So.2d 330 (¶16) (Miss.App. 2006). The Appellee simply noted that there was evidence in the record to justify the instruction. Even if true, that does not relieve the State from submitting an instruction that adequately defines aiding and abetting.

Although this Court in *Randolph v. State*, 924 So.2d 636 (Miss.App. 2006), held it was not per se reversible error to fail to grant an aiding and abetting instruction as set forth in *Milano v. State*, 790 So.2d 179 (¶21) (Miss. 2001), the facts in this case made it imperative

to do so. In *Randolph*, the defendant was accused of burglary of a dwelling. The defendant's palm print was found inside the house, and he confessed to burglarizing the dwelling with another man. 924 So.2d at ¶3. The facts in that case were not overly complex, and an inadequate jury instruction on aiding and abetting would not have confused the jury. However, in the case at bar, considering the State's burden to prove dominion and control, the failure to explain to the jury that Tucker's mere presence at the scene, *and even knowledge that a crime was being committed*, are not sufficient to establish that he either directed or aided and abetted the crime. See *Milano* at ¶21. The jury could have easily found Tucker to be "merely a knowing spectator." *Id.* The aiding and abetting instruction granted was insufficient, and because the jury was not completely instructed, there can be no confidence in its verdict. Tucker is entitled to a new trial.

Finally, the State cites to *McKee v. State*, 878 So.2d 232 (Miss.App. 2004), to support the granting of Instruction S-4 on joint possession. Appellee Brief at 12. However, *McKee* did not involve joint possession, but rather dealt with a circumstantial evidence instruction to prove constructive possession. *Id.* at ¶15-16. Instruction S-4 informed the jury that "Two or more people may be in possession of the same property at the same time if that property is subject to their dominion and control, no matter has fleeting the possession, or how slight the dominion and control." C.P. 83, R.E. 17. With this instruction, the jury could have convicted Tucker if he had simply moved some jeans off of a chair to sit down.

S-4 was again an incomplete statement of the law. As the Mississippi Supreme Court held in *Berry v. State*, 652 So.2d 745 (Miss. 1995), constructive possession is defined in

terms of the exercise of dominion and control. Momentary handling can be insufficient to support an inference of dominion and control. *Id.* at 751. Given the unique facts of this case, it was clearly reversible error to grant a "fleeting possession" instruction. Again, Tucker is entitled to a new trial.

ISSUE NO. 5: WHETHER THE TRIAL JUDGE ERRED IN FAILING TO SUSTAIN A DEFENSE OBJECTION DURING CLOSING ARGUMENTS WHEN THE STATE IMPLIED TUCKER WAS GUILTY OF BURGLARY, AND WHETHER HE WAS IRREPARABLY HARMED BY THE STATE REFERRING TO HIM AS AN EX-CONVICT.

The State, once again, gives a "very succinct" response to this assignment of error. The State again claims the prosecution had a right to tell the whole story to the jury on how Tucker committed the burglary in this case, even though he was charged with receiving stolen property. Appellee Brief 14-15. Tucker is not complaining that the State argued the items were stolen in a burglary. However, it was certainly improper for the State to argue that the burglary was a profession job, "what we call an ex-con job." And when "he," obviously meaning Tucker, got "here," he used those skills. The prosecutor alleged the ex-con [Tucker] broke into the store. Although the court sustained an objection to the use of "ex-con," the court allowed the State to argue Tucker actually committed the burglary. Tr. 454-55. The prosecutor argued that since Tucker actually stole the items, he had to know they were stolen.

> [BY PROSECUTOR]: Ladies and gentlemen, does this look like a professional person's job or like a bunch of 20 year olds going and smashing the window and just grabbing some stuff and running? You know what it looks like. You can tell what it looks like. And, ladies and gentleman, if you believe anything that Ms. Gibbs said, that stuff appeared at her house the very

next morning. So you tell me who you think knew stuff was stolen at that house?

Tr. 455-56.

The jury was told Tucker was on parole. Tr. 45, 172-73, 202. These comments about being a professional allowed the jury to reasonably infer that Tucker's prior convictions were for burglary. This was unquestionably prejudicial and clearly exceeded the wide latitude allowed on closing arguments. This case should be reversed and remanded for a new trial on this issue alone.

CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, Anthony Lee Tucker, contends that he is entitled to have his conviction reversed and rendered, or at the very least, that he should be granted a new trial. The appellant would stand on his original brief in support of issues not responded to in this reply brief.

Respectfully submitted,
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CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 12th day of June, 2009, mailed a true and correct copy of the above and foregoing Reply Brief of Appellant, by United States mail, postage paid, to the following:

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