IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLEVELAND JOHNSON — APPELLANT

VS. — NO. 2008-KA-1099

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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STATEMENT OF THE ISSUES

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT EACH ELEMENT OF THE CRIME.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE APPELLANT'S PRIOR CONVICTION INTO EVIDENCE.

STATEMENT OF THE FACTS

Sandra Bell loaned her white Cadillac to the Appellant, Cleveland Johnson on January 12, 2007 so he could pick up something for his daughter. (Transcript p. 107). The Appellant accompanied by his daughter, then returned to Ms. Bell's house and spent the night there. (Transcript p. 108). The next morning, Ms. Bell drove the same car to the beauty shop to get her hair done and returned home. (Transcript p. 109-110). Later that day, the Appellant once again borrowed

Ms. Bell's car. (Transcript p. 111). He was gone approximately two to three hours in the car. (Transcript p. 112). At some point during that time, the Appellant called Ms. Bell to see if she wanted to go to the movies later that night. (Transcript p. 112). She agreed and he returned to her house driving the vehicle. (Transcript p. 113). The Appellant drove Ms. Bell's car and she rode in the passenger seat. (Transcript p. 49). The two arrived at the movies, saw that the lines were long, and decided to go to Sonic to get some food instead. (Transcript p. 114). After eating at Sonic, they rode around for a while. (Transcript p. 116).

Meanwhile, Assistant Chief Danny Suber of the Greenville Police Department heard a dispatch call that the Appellant was at the Sonic on Highway 82 and that there were felony warrants out for his arrest. (Transcript p. 36). As he headed toward Sonic, dispatch advised that the Appellant had left Sonic and gave information regarding the direction he was traveling. (Transcript p. 37). After following the Appellant for some time, Chief Suber advised a fellow officer who was closer to the Appellant's vehicle to pull the vehicle over. (Transcript p. 40 - 41).

Ms. Bell testified at trial that when the Appellant saw the officer turn on his blue lights, he stated that "they looking for me." (Transcript p. 116). Ms. Bell was asked at trial what happened once the police pulled the car over and she replied:

> At that time, [the Appellant], when he actually stopped the car, and I could just visually see him back some kind of gesture as if he was just going into the pocket and sliding something down. I wasn't sure what it was. I did not see what it was. And by that time the officers ordered us to both put our hands out the window. . . . I mean, it was just a motion that - - whatever he was doing, it appeared to be that he was just pulling something out of his pocket and sliding it down.

(Transcript p. 119). The Appellant was ordered out of the car first. (Transcript p. 42). Ms. Bell was later removed from the car as well. (Transcript p. 43).

Officer James Cole of the Greenville Police Department arrived at the scene after the

Appellant was removed from the vehicle. (Transcript p. 80 - 81). After Ms. Bell was removed from the vehicle, Officer Cole searched the vehicle. (Transcript p. 82). When asked at trial about the search, Officer Cole testified as follows:

> I started my search from the driver's side and worked my way back. That's how we normally do searches, so you won't miss anything. And soon as I looked in the floorboard of the car, there was a towel, and the towel was, like, partially folded. I lifted up the towel, and it was, like, aluminum foil, sitting right there, and it was open. And when I looked in the aluminum foil, I turned my flashlight on it, there was a white substance that appeared to be crack cocaine.

(Transcript p. 82). When asked exactly where he found these items, he replied, "the floorboard, right underneath the steering wheel." (Transcript p. 82). He was then asked if the items were tucked underneath the seat at all, and he replied, "no, ma'am plain view." (Transcript p. 83). Charlton Smith of the Greenville Police Department Narcotics Division was then called to the scene. (Transcript p. 51). Officer Smith retrieved the drugs from Officer Cole and field tested the drugs which tested positive for the presence of cocaine. (Transcript p. 52 and 54). The total package weight of the drugs was determined to be 36.7 grams. (Transcript p. 55). The drugs were later sent to the Mississippi Crime Lab where it was determined that the drugs were in fact cocaine and that the actual drug weight was 33.4 grams. (Transcript p. 165 - 166).

Both the Appellant and Ms. Bell were arrested and charged with possession with intent to distribute. Both cases were presented to the grand jury. The Appellant was indicted; however, the grand jury did not indict Ms. Bell. The Appellant was tried and convicted of possession of cocaine with intent to distribute and sentenced to serve twenty years in the custody of the Mississippi Department of Corrections and to five years of post-release supervision.

SUMMARY OF THE ARGUMENT

The trial court properly denied the Appellant's motion for judgment notwithstanding the verdict as there was sufficient evidence that he was in constructive possession of the cocaine in question. This is evidenced by both his proximity to the drugs and by the evidence which established his awareness of the presence and character of the drugs.

Additionally, the trial court did not abuse its discretion in allowing the Appellant's prior conviction into evidence. The prior conviction was entered into evidence only to prove intent to distribute. A limiting instruction was given to the jury instructing them in that regard and the trial court did conduct a 403 balancing test.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT EACH ELEMENT OF THE CRIME.

The Appellant first questions "whether the trial court erred in denying [his] motion for judgment notwithstanding the verdict where the evidence was insufficient to sustain the verdict." (Appellant's Brief p. 8). "A motion for judgment notwithstanding the verdict implicates the sufficiency of the evidence." *Barnett v. State*, 987 So.2d 1070, 1072 (Miss. Ct. App. 2008) (quoting *Ginn v. State*, 860 So.2d 675, 684 (Miss. 2003)). With regard to issues involving sufficiency of the evidence, this Court has previously held:

> In reviewing a challenge to the legal sufficiency of the evidence, we consider all of the evidence in the light most favorable to the prosecution and accept all evidence supporting the verdict as true. *Ellis v. State*, 778 So.2d 114, 117 (Miss.2000) (citing *Davis v. State*, 568 So.2d 277, 281 (Miss.1990)). The State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Seeling v. State,* 844 So.2d 439, 443 (Miss.2003). We will reverse only where, " 'with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.' " *Gleeton v. State*, 716 So.2d 1083, 1087 (Miss.1998) (quoting *Wetz v. State*, 503

So.2d 803, 808 (Miss.1987)).

Dampeer v. State, 989 So.2d 462, 464 (Miss. Ct. App. 2008). Basically "it is only this Court's duty to determine whether it would be impossible for a reasonable juror to find [the Appellant] guilty." *Ducksworth v. State*, 767 So.2d 296, 301 (Miss. Ct. App. 2000) (*Wetz v. State*, 503 So.2d 803, 808 (Miss. 1987)) (*emphasis added*). The State of Mississippi respectfully contends, with the above referenced standard in mind, that it was NOT IMPOSSIBLE FOR a reasonable juror to find the Appellant guilty; therefore, there was sufficient evidence to support the verdict.

The Appellant specifically argues that there was insufficient evidence to establish that he was in possession of the cocaine. As set forth above, the cocaine was found on the floorboard beneath the steering wheel of the vehicle driven by the Appellant. (Transcript p. 82). Thus, the Appellant did not have actual possession of the cocaine. However, "constructive possession allows the prosecution to establish possession of contraband when evidence of actual possession is absent." *Barnett*, 987 So.2d at 1073. (quoting *Roberson v. State*, 595 So.2d 1310, 1319 (Miss. 1992)). "In Mississippi, proximity to the contraband along with 'any other scintilla of evidence of possession' may establish constructive possession." *Watts v. State*, 976 So.2d 364, 367 (Miss. Ct. App. 2008) (quoting *Fultz v. State*, 573 So.2d 689, 690 (Miss. 1990)). This Court has previously set forth the standard with regard to constructive possession as follows:

> What constitutes a sufficient external relationship between the defendant and the narcotic property to complete the concept of "possession" is a question which is not susceptible of a specific rule. However, there must be sufficient facts to warrant a finding that the 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 it is not adequate in the absence of other incriminating circumstances.

Cheatham v. State, 12 So.3d 598, 600-01 (Miss. Ct. App. 2009) (quoting *Curry v. State*, 249 So.2d

414, 416 (Miss.1971)).

Proximity to the Appellant was certainly established in that the cocaine was found on the floorboard underneath the steering wheel of the vehicle the Appellant was driving. (Transcript p. 82). While the Appellant claims that there was no additional proof that the Appellant was aware of the presence and character of the particular substance, the record indicates otherwise:

a. Ms. Bell testified that just after the Appellant stopped the vehicle she saw what "appeared to be that [the Appellant] was just pulling something out of his pocket and sliding it down. (Transcript p.119).
b. Officer Cole testified that it would have been impossible for Ms. Bell to rearrange the contents of the car after the Appellant was removed from the car. (Transcript p. 88).
c. Ms. Bell was never left unattended in the card after the stop was made. (Transcript p. 156).
d. Ms. Bell testified that she had no idea that the drugs were in the car and she had never seen the drugs before. (Transcript p. 123 - 124).
e. Ms. Bell also testified that she had seen nothing on the floorboard of the vehicle the last time she drove the car before the Appellant borrowed the car. (Transcript p. 129).
f. The Appellant testified that he did not believe Ms. Bell was a drug dealer and that he had never known her to have a large amount of cocaine. (Transcript p. 204).

Additionally, the fact that the rather large amount of drugs were found on the floorboard beneath the Appellant's feet while driving would make it difficult to imagine that he was not aware of the drugs' presence. The above listed evidence constitutes the "other scintilla of evidence" required to be shown along with proximity which was clearly established.

As such, there was sufficient evidence establishing that the Appellant was in constructive possession of the cocaine; thus, the trial court properly denied his motion for judgment notwithstanding the verdict. As this Court "may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that a reasonable and fair-minded jurors could only find the accused not guilty," this Court should affirm the Appellant's

conviction and sentence. *Watts*, 976 So.2d at 367.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE APPELLANT'S PRIOR CONVICTION INTO EVIDENCE.

The Appellant also questions "whether the trial court erred in failing to conduct a balancing test in allowing [his] prior conviction into evidence." (Appellant's Brief p. 10). The State of Mississippi, however, contends that the trial court properly allowed the prior conviction into evidence. "The admissibility and relevancy of evidence are within the discretion of the trial court and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal." *Clarke v. State,* 859 So.2d 1021, 1024 (Miss. Ct. App. 2003) (quoting *McCoy v. State*, 820 So.2d 25 (Miss. Ct. App.2002)). "As long as the trial court remains within the confines of the Mississippi Rules of Evidence, its decision to admit or exclude evidence will be accorded a high degree of deference." *Id.* Additionally, "the admission or exclusion of evidence must result in prejudice or harm, if a cause is to be reversed on that account." *Id.*

"Evidence of prior acts offered to show intent to distribute is not barred by M.R.E. 404 and is properly admissible if it passes muster under M.R.E. 403 and is accompanied by a proper limiting instruction." *Bryant v. State,* 746 So.2d 853, 862 (Miss. Ct. App.1998). In the case at hand, the evidence was offered only to prove intent to distribute and a limiting instruction was given to the jury instructing them to only consider the prior conviction with regard to whether the Appellant had the intent to distribute. (Transcript p. 229 - 230). Contrary to the Appellant's argument, the trial court did conduct a 403 balancing test. Prior to trial, the trial judge stated, with regard to pending motions, that she did not intend to allow the prior conviction into evidence. (Transcript p. 14). In chambers prior to the start of the second day of trial, the trial court once again addressed the issue noting as follows:

> On the issue of Ms. Bell[1], I've had the opportunity to look at a number of cases. In fact, I looked at some cases on that ruling that I made yesterday which, if I was going to undo that, might have me rule otherwise. But I'm still going to find that, as the case is now, under 403, that the prior convictions will not come in. However, I do believe that *Palmer v. State*, which is 939 So.2d 792, a 2006 case, speaks almost directly to the issue that's involved with Ms. Bell. And in this case the Court made clear that, in order to present a complete story, or to prove intent to distribute, that some prior - - in this case it was prior dealings with the defendant around drug sales - - was admitted. Now, I don't know if she's going to say that she's seen large quantities of drugs before in the vehicle or on this person or she has some other knowledge of him selling drugs or having large quantities of drugs on it. It all goes to the issue of whether or not this is possession with intent. So I don't know the facts, but I do know that if that is what she's in a position to talk about, the Court is going to allow her to do that.

(Transcript p. 95). After some discussion about what the attorneys believed Ms. Bell would testify to, the judge stated:

> You know what, now that I know what it is that she knows, let me wait for LaShonda to pull me another case on these prior convictions, whether or not his testifying is what allows that to come in.

(Transcript p. 98). After a break, the Court held as follows:

> I am going to allow her to testify that he told her he had the prior conviction and that, you know, this course of where she would ask, basically, whether or not drugs were in the vehicle, I believe that is essential to the full story being told in this case, especially where the defense is that it was her drugs. <u>And I'm going to find that the probative value outweighs any prejudicial effect, both in having a complete story come out and in the review of the case law for the issue of intent, and I am going to allow it.</u>

(Transcript p. 98) (*emphasis added*). Clearly, the trial court conducted an on the record 403 balancing test. Thus, the prior conviction was properly allowed into evidence.

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[1] The issue being whether Ms. Bell could testify as to her knowledge of the Appellant's prior convictions.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the Appellant's conviction and sentence as there was sufficient evidence to support the verdict and as the trial court did not err in allowing his prior conviction into evidence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: Stephanie B Wood

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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:

Honorable Margaret Carey-McCray
Circuit Court Judge
P. O. Box 1775
Greenville, MS 38072-1775

Honorable Dewayne Richardson
District Attorney
P. O. Box 426
Greenville, MS 38702

W. Daniel Hinchcliff, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 28th day of December, 2009.

Stephanie B. Wood

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680