IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLEVELAND JOHNSON — APPELLANT

V. — NO. 2008-KA-1099-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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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. Cleveland Johnson, Appellant
3. Honorable Dewayne Richardson, District Attorney
4. Honorable Margaret Carey-McCray, Circuit Court Judge

This the 19th day of October, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGEMENT-NOT-WITHSTANDING-THE-VERDICT WHERE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT.

ISSUE NO 2 : WHETHER THE TRIAL COURT ERRED IN FAILING TO CONDUCT A BALANCING TEST IN ALLOWING DEFENDANT'S PRIOR CONVICTION INTO EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Washington County, Mississippi, and a judgement of conviction for the crime of possession of cocaine with intent to distribute against Cleveland E. Johnson, a/k/a Cleveland Johnson, Jr. following a jury trial commenced on April 29, 2008, Honorable Margaret Carey-McCray, Circuit Court Judge, presiding. Cleveland E. Johnson was thereafter sentenced to a term of twenty years in an institution under the supervision of the

Mississippi Department of Corrections and is presently incarcerated pursuant to that sentence.

FACTS

As summarized in the State's opening statement, Cleveland E. Johnson, ["Johnson"], was arrested along with his female companion, whose car Johnson was driving, on a unrelated felony warrant. An officer entered the car after Johnson was in custody, opened a towel on the drivers side floorboard, and uncovered 33.4 grams of cocaine. Solely premised on the weight of the cocaine, Johnson and Sandra Bell, the car's owner, were charged with possession of cocaine with the intent to distribute. (T. 30-33) Defense counsel addressed the jury as well, noting briefly the cocaine was recovered from Bell's car, from underneath her towel. (T. 33-34) The State then proceeded with it's proofs, flushing out details of the foregoing.

Danny Suber, ["Suber"], an officer with the Greenville Police Department, pulled Johnson over, after receiving a tip, premised upon a felony warrant for Johnson. After being removed from the white Cadillac he was driving, Johnson was handcuffed. A female passenger, Sandra Bell, was also arrested. (T. 36-43) A substance, believed to be cocaine, was recovered from the "drivers seat." (T.43) When Suber explained the stopped was made pursuant to "felony warrants" the defense entered an objection. In the prior rulings and discussions, the State was limited to a singular felony warrant. The defense asked the court for a limiting instruction. (T. 43-44)

Cross examination elicited that the car, the white Cadillac, belonged to Bell, who was present in the car and also arrested. Johnson had co-operated and pulled over without a chase. The drugs were found pursuant to an "inventory" search according to Suber. (T. 46-48)

Carlton Smith, worked for the Greenville Police Department as a narcotics officer. After being advised that a "large amount of narcotics [had been] found in a vehicle" Smith went to the scene. (T. 50-52) He decided that both Sandra Bell and Johnson should be charged with possession

with intent to distribute. (T. 52) Smith took the purported cocaine, a black "do-rag", some tin foil, the towel that the suspect covered the contraband, and a cell phone as evidence. (T. 56-58) Both Bell and Johnson were charged as they both were "within arm's reach" of the contraband. (T. 59)

He weighed the entire package at 36.7 grams. (T. 56) Smith decided to charge both Bell and Johnson with possession with intent to distribute due to what he felt was a "large and rather excessive amount" of substance. He opined, with an apparently unintended pun, that "[i]t's been my experience as a dealer amount. Any kind of user will never be that high." (T. 59) He offered that an amount he would call consistent with personal use to be "less than a gram."(T. 59) He gave his break point for charging intent as an amount of 10 grams or more. (T. 60) No objection to any opinion testimony was entered concerning Smith's opinions on the amount of drugs necessary to exceed personal use and indicate, in his opinion, intent. He also felt the packaging and presence of a large solid piece to be indicative of intent. Smith also confiscated the cash found on Bell and Johnson. Bell had $3,602.20, while Johnson had $480.94. (T. 62)

The defense uncovered the indifferent nature of Smith's investigation. He took no prints from the packaging, took no statements, nor pictures. The towel was not tested for DNA. But he did initiate forfeiture proceedings on both Bell's car and her cash. (T. 67) Contradicting earlier testimony, Smith alleged the cocaine was in "plain view" on top of the towel. (T. 68-69)

One of the officers involved in the stop of Bell's car, James Cole, actually found the contraband. He was told to search the vehicle for weapons, even though both Bell and Johnson had been removed from the vehicle. He observed a towel on the floor board, underneath the steering wheel. He lifted the "partially folded towel and found aluminum foil and a white substance he thought to be cocaine. (T. 78-82) No objection to the search was imposed by the defense.

Cole admitted to making alterations to his report with whiteout. He claimed to have seen weapons under other towels, but did not say that this towel appeared to cover a weapon. (T. 86-89)

The parties and court met in chambers prior to the testimony of Sandra Bell. The Court instructed the State that Johnson's prior convictions should not be used, except that Bell could testify that Johnson told her he had a prior conviction, and that was why she asked him if he was "dirty", or had drugs. (T. 95-96) Although the trial court stated it was making its ruling pursuant to M.R.E 403, no balancing test was utilized. The Court allowed that the state could ask Johnson about his prior conviction, but not get into the facts of the conviction. (T. 101-102) The defense argued, as Johnson is denying possession entirely, his defense is not concerned with the issue of intent; thus, any use of an old conviction to show intent is not admissible. (T. 104)

Sandra Bell, the co-indictee, then took the stand. (T. 105) She had become acquainted with Johnson after his release from prison and was seeing him frequently. (T. 106-107) She had never let him borrow her car, the day in question, was the first time he had ever used it. He asked to use her vehicle to go purchase a birthday present for his daughter. He was gone shortly and returned with a "baby thing in the back of the car." (T. 108)

She then allowed Johnson to continue to use her car to go home and "regroup." According to bell, Johnson then had the car from around 2:00 p.m. until around 8:00 p.m., when he returned to take her to the movies. When he came to her house, he had his daughter with him. (T. 111) When they got to the movies, they decided to not go in, but instead to go to the Sonic drive-in. They then rode around until they were stopped by the police. (T. 114-116) When they saw the blue lights, she heard Johnson say: "They are looking for me." (T. 116) When they stopped, Johnson appeared to pull something from his pocket. After she was arrested, Bell was asked what she knew about the cocaine. She claimed ignorance, she said she knew nothing about it. Bell claimed she possessed over

$300.00 in cash because she had just been paid. She was not aware if Johnson was employed. (T. 126)

When questioned by Johnson's counsel, she allowed that it was her car, that she was also arrested for possession with intent, and that her car and money had been confiscated. At the forfeiture hearing, she had not told them that Johnson had used her car earlier in the day. (T. 129-134) She was unaware of Johnson's vocation as a male stripper. (T. 140) Her relationship with Johnson was not exclusive, she did see other people. She was aware of his prior drug conviction, but believed him to be " a changed" man. (T. 150)

Allison Conville was qualified as an expert from the Mississippi Crime Lab in the field of controlled substances and testified the substance in question was 33.4 grams of cocaine. Thereupon, the State rested. (T. 167)

The Defense motion for a directed verdict argued that State need show more than proximity for proof of possession and that Bell, as owner of the car, was presumed to be in possession of its contents. The trial court found the state had made a prima facie case. (T. 173) Further proceedings outside the presence of the jury included the mutual agreement to dismiss one juror. The *Culverson* explanation was made to Johnson while the prosecution was excused from chambers. The trial judge also ruled that prior conviction for drug sale would be admitted under M.R.E. 404 (B) to show intent. No balancing test was performed. The court would give the jury a limiting instruction. The defense requested the instruction be given along with the other jury instructions. The trial court initially agreed to give the limiting instruction, in written form, at the time of the other instructions. (T. 188)

Cleveland Johnson was then called to the stand in his own defense. He agreed to being with Bell, driving her car and deciding to not go to the movies. He denied however, using her car earlier that day. Johnson said he never went home to shower, but stayed at Bell's all day. He had seen two

towels in her car, along with sundry other items. He denied telling Bell he had been convicted for drugs. He denied she had ever inquired of him if he was "dirty." He agreed he had been convicted in 1993 when he was twenty-five years old. (T. 192-195) Bell had testified that Johnson had the towel to wipe sweat with on that January day. Johnson remembered he was wearing a long sleeve shirt and did not believe it was warm that day. (T. 196) He did not get anything from his pockets, his only hand gestures were to comply with the police command to put his hands out the window. (T. 186-197)

Johnson admitted he and Bell would smoke weed together. (T. 198) However, once he opened up a "joint" and found crack cocaine in it. (T. 198-199) He explained having cash on him: he had just worked as a stripper at a bachelorette party. (T. 199)

Johnson specifically denied knowledge of cocaine in the car. He had rehabilitated himself in prison. As he said, if he had known that the car he was driving contained drugs when the police pulled him over, he would not have co-operated. He said, " Jesus couldn't have stopped the car."(T. 210-203)

When crossed examined, he stated that he did not know that Bell was a drug dealer. He did not know why she would lie. He explained that when he testified that Bell would have "a quarter" he was referring to a quarter of an ounce of marijuana. (T. 206-207) He denied ever dealing in marijuana and ever selling larger amounts of cocaine. He said he did not know the value of 33 grams of cocaine.

The State engaged in a tedious attempt to get Johnson to explain how he would not have kicked the cocaine while it was on the floorboard. (T. 217-224) Johnson said he never saw the stuff on the floorboard. (T. 226)

The defense rested, calling no other witnesses. The State responded with one rebuttal witness, Franchester Clifton, Johnson's daughter. Her testimony was objected to by the defense, as she had a pending charge which would prevent full cross examination. She testified Johnson had picked her up earlier that day in a white Cadillac. (T. 230-235)

The State rested and the defense declined an offer of a lesser included instruction of possession.[1] The trial court later ruled that the state had a right to request such an instruction. The aforementioned limiting instruction was given during trial, and the court told the defense to argue the limiting instruction, but it would not submit a written instruction to the jury.

The jury returned a verdict of guilt of possession with intent. Sentencing had an unusual twist, as the trial judge advised th parties that Johnson's father had come to her home. The defense did not object nor seek recusal. Johnson was sentenced to 20 years, with 5 years post release supervision. The trial court chose not to enhance the sentence as a second subsequent offender.

SUMMARY OF THE ARGUMENT

Sandra Bell was the owner of the car in which the Greenville police discovered cocaine. She was present in the car when the drugs were found. The investigating officer placed her with arm's length of the cocaine. Johnson was also in the car, within arm's length, but precious little, if any, evidence connected him to the cocaine. Accordingly, the State had failed in its burden to provide evidence sufficient to sustain the verdict.

The trial court ruled that evidence of a prior conviction for sale of cocaine could be admitted into evidence without conducting a balancing test under M.R.E. 403. Such evidence was highly prejudicial and clearly influenced the jury.

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[1]The penalty was the same, thirty years.

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGEMENT-NOT-WITHSTANDING-THE-VERDICT WHERE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT.

It is a well established principle that in a case of a defendant being charged with possession of drugs by constructive possession where the drugs are found in the vehicle owned by another person, there must be something more than mere proximity to the drugs to support a finding of possession. At declared in *Fultz v. State,* 573 So. 2d 689 (Miss. 1990) the owner of a motor vehicle is presumed to own or possess drugs found within that vehicle, absent additional evidence connecting the defendant to the drugs. Importantly, proximity, standing alone is not sufficient. In *Fultz, Id.,* although Fultz was driving the vehicle in which a quantity of marijuana was found in the trunk, and Fultz additionally possessed some lesser quantity of marijuana in his wallet, there was not sufficient evidence to connect him to the marijuana.

> [W]hen the defendant is not the owner of the premises the state must show additional incriminating circumstances to justify a finding of constructive possession. Boches, supra, 506 So.2d at 259 ("This is not a case where the presumption of constructive possession arises based on the ownership of the automobile because Boches was not the owner."). The same is true when a defendant is not in exclusive possession of the premises, as in this case. In Powell v. State, 355 So.2d 1378 (Miss.1978) this Court held that in such cases a defendant is entitled to acquittal "absent some competent evidence connecting him with the contraband." Id. at 1379. In Hudson v. State, 362 So.2d 645 (Miss.1978) this Court reversed the conviction of a defendant found asleep in a vehicle that had marijuana secreted under the hood. Another person owned the car. The court noted that even if the proximity requirement were satisfied reversal was required because there was a total absence of other incriminating circumstances. Id. at 647.

Fultz , Id. at 690 -691

In the present case, not only was Johnson not the owner of the car, but the owner was actually present in the vehicle. In Fultz, the car was in his exclusive possession at the time of the stop. The

drugs found were in arms reach of the owner of the vehicle, Sandra Bell.

Q. And why did you charge Ms. Bell?

A. Same reason.

Q. Because what ?

A. Because she was in arm's reach of the narcotics.

As previously shown, the owner of the car is presumed as a matter of law to be the owner of drugs found within that car. To overcome such a presumption the state must show that Johnson was aware of the presence of the cocaine. The State was required to show he knew what was on the floor of that car, that he consciously possessed it and exercised dominion and control of it. *Berry v. State*, 652 So. 2d 745 (Miss. 1995) There is no such showing in the case at bar. While Sandra Bell testified that she saw Johnson's hand move at the time of the stop, she did not see him place anything on the floor of the car. All she saw was hand movement. The officers who stopped the car certainly did not testify to seeing any movement indicating that Johnson placed anything on the floor.

Where a defendant is not in sole possession of the premises or the vehicle, a defendant is entitled to an acquittal, barring competent evidence of conscious possession connecting him with the controlled substance. *Powell v. State,* 355 So. 2d 1378 (Miss.1978) Clearly, in this case, the presumption is that Bell was the possessor of the cocaine, as the owner of the car. She was in arms length of the cocaine. There is nothing in the evidence that overcomes this presumption.

One bit of evidence which could be argued to support the verdict, Johnson's prior conviction for sale should not be considered as evidence of mere possession. Johnson's whole defense is not premised on intent to sell, but on knowledge of the presence of the cocaine. While he admitted during his testimony to having such a prior conviction, the jury was specifically instructed to consider his prior crime only on the issue of whether he had any intent to sell. If the jury followed

the court's instruction, his prior drug conviction was only to be considered on the issue of intent to distribute.

> THE COURT: The Court instructs the jury that the evidence of prior conviction for sale of cocaine of the defendant may be considered solely for the purpose of determining whether the defendant possessed the cocaine in question **with the intent to sell it.** (Emphasis added.) (T. 229)

this is in accord with the case law relied on in this trial for admitting the prior conviction at all. As the trial judge ruled, evidence of the prior cocaine sale conviction was limited to whether Johnson had "the intent to distribute." (T. 184) The defense asked that the court give this instruction along with the court's other instructions (T. 262-263), but the trial judge gave it only after the testimony and told defense counsel to use its instruction during its argument. (T. 276)

This Court should reverse and render this matter because proof of the element of possession of cocaine by Appellant Johnson is so deficient that a reasonable and fairminded juror, following the trial court's instructions could only have found Johnson not guilty beyond a reasonable doubt. *Mauldin v. State*, 750 So. 2d 564, (Miss. App. 1999)

ISSUE NO 2 : WHETHER THE TRIAL COURT ERRED IN FAILING TO CONDUCT A BALANCING TEST IN ALLOWING DEFENDANT'S PRIOR CONVICTION INTO EVIDENCE.

Appellant Johnson had been previously convicted of the crime of possession of cocaine with intent to distribute. The defense sought to suppress admission into evidence of this prior conviction. (C.P. 30, R.E. 5, T. 184-188) However, the trial court specifically ruled that such evidence was admissible under M.R.E. 404(b) (T. 184-185) In doing so, the court neglected to perform a balancing test as required under M.R.E. 403. This requirement has been affirmed on numerous occasions. *Simmons v. State*, 813 So. 2d 710(Miss. 2002), *Stallworth v. State,* 797 So. 2d 905 (Miss. 2001) The premise was trenchantly stated as follows:

> Even where the evidence of other crimes is admissible under M.R.E. 404(b), it cannot be admitted unless it also passes muster under M.R.E 403.

Bellenger v. State, 667 So. 2d 1242, 1257 (Miss. 1995). Nowhere in this record can a hint of a balancing test be discerned. There is no statement as to the potential prejudice of Johnson's prior conviction; nor comparison of the probative value.

In Johnson's trial, the prejudice of admitting his prior conviction for the same crime is glaring. Johnson was driving a car owned and occupied by another person. Both parties were within immediate proximity to the cocaine. The cocaine was under a towel. Johnson said that Sandra Bell owned the towel, while she claimed Johnson was carrying a towel on a January day to wipe sweat. The proofs at trial produced scant if any evidence connecting Johnson with the drugs. Thus evidence of another crime, one exactly the same charge as his current charge, is prejudicial per se. Admission of a similar crime makes it likely that the jury will infer guilt from the past same or similar crime. *Tripplett v. State*, 881 So. 2d 644 (Miss App. 2004) A sale case requires a balancing test due to the similarity. "Evidence of prior involvement in the drug trade is admissible under M.R.E. 404(b) to prove intent to distribute **if it passes the M.R.E. 403 filter** and is accompanied by a limiting instruction." *Sumrall v. State*, 758 So.2d 1091, 1095 (Miss. App., 2000)

This record gives no hint that a balancing test was conducted as might allow it to pass the abuse of discretion standard. While the court acknowledged the necessity of a limiting instruction, there was no language from which an internal balancing test could be surmised as seen in *Brooks v. State*, 788 So. 2d 794, 798 (Miss. App. 2001)

Without this evidence, the law presumes that the owner of the vehicle was also the owner of the drugs. *Hudson v. State*, 362 So. 2d 645, 647 (Miss.1978) so the error cannot be harmless. This case is premised almost entirely on Johnson's proximity to the drugs. Nothing Johnson did can be

equated to the exercise of dominion and control over the cocaine. He did not even push it under the seat.

Failure to perform the required balancing test is an abuse of discretion and requires reversal

CONCLUSION

Appellant respectfully submits that for the reasons set forth above, the judgement of conviction and sentence of the lower court should be reversed and rendered, or in the alternative, reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO [redacted]

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Cleveland Johnson, 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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