

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DIANN WRIGHT GOODEN**

**APPELLANT**

**VS.**

**NO. 2009-KA-0027-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 Circuit Court of Washington County and the judgment of conviction of Diann Wright Gooden. Gooden was indicted on four counts of fraud in violation of Section 97-7-10 of the Mississippi Code Annotated. (CP 1-2, 28-9). The State dismissed Count IV of the indictment prior to commencement of testimony at trial. After a two day trial, the jury acquitted Gooden on Count I of the indictment and convicted her of fraud in Counts II and III. (CP 70, 130, 133). The trial court sentenced Gooden to five years in the custody of the Mississippi Department of Corrections on each count, with the sentences to run concurrent, and fined her \$5,000.00 on each count. (CP 134-35). After denial of post trial motions, Gooden appealed raising the following issues. (CP 166-67,171-72).

## **STATEMENT OF THE ISSUES**

- I. Whether the verdict is against the overwhelming weight of the evidence as to Count II of the indictment.
- II. Whether the verdict is against the overwhelming weight of the evidence as to Count III of the indictment.
- III. Whether the lower court erred in overruling Gooden's motion for a directed verdict.
- IV. Whether the trial court erred in denying Gooden's motion to suppress.

## STATEMENT OF THE FACTS

In May 2007, the Mississippi Attorney General's Office commenced an investigation of the Washington County Tax Collector's Office after receiving a complaint that persons in the tax collector's office were changing people's taxing districts from the city to the county in order to reduce the costs of car tags. (Tr 89). Karl Pree (hereinafter "Pree") headed the investigation of the case. During the course of the investigation Pree talked with over four thousand people, including the deputy clerks in the office, Diann Wright Gooden, Cordell Gray, Marcus Cannon, and Bernard Marsalis.

While interviewing Gooden at the Washington County Tax Collector's Office, Gooden admitted to Pree that she was greedy and that she changed addresses on tag applications to give people cheaper tags and also admitted that she gave forms with false information stating a vehicle had not been driven for over a year. (Tr. 108-9; 123). Gooden did not recall how many times she changed the taxing districts to the county. (*Id.*) While she did not know how much money she made by changing the tag information she admitted to making around \$2,000. (*Id.*). According to Pree, Gooden admitted that she took a blank affidavit, filled in the VIN of Bernard Marsalis's truck and a false statement that the engine was being repaired so he would not have to not pay a late fee. (Tr. 93; 108;).

Marcus Cannon (hereinafter "Marcus") testified to being employed at the Washington County Tax Collector's Office from 1998 to 2001. (Tr. 125-6). Cannon admitted to improperly changing taxing districts on tag applications and renewals when employed as a deputy clerk and sometimes receiving money for the change. (Tr 136-7; 145-7). Cannon explained that the clerk waiting on a customer in the office enters the vehicle information and customer's address into the tax collector's system; therefore, the clerk has the ability to change the taxing district and reduce the cost of a tag.

Marcus was married to Yolanda Owens Cannon, owner of the Chevrolet Blazer identified in Exhibits S-4 and S-5. (Tr. 127-8; 133-5). After Ms. Cannon purchased the vehicle, the dealership issued an Application for Certificate of Title which reflected the Cannon's correct address inside the City of Leland. (Tr. 127-8). Marcus called Gooden at the Tax Collector's office to inquire about the price of the tag. Initially it was around \$300. (Tr. 127-31; 140). However, Marcus knew Gooden would reduce the cost of the tag for him by putting a false address on the registration papers thereby changing the taxing district. (Tr. 127-31; 141-2; 149; Ex. S-4; Ex. S-5). During the call, Marcus gave Gooden the information on the car, but not his address, and she advised him the tag was \$185. (Tr. 129). According to Marcus, he didn't have to give Gooden his address because he knew she would cut him a deal as she had done in the past. (Tr. 129; 143). When Marcus went to the Tax Collector's Office he did not actually see Gooden enter the tag information into the computer but when he asked her to for the tag, she delivered it to him at the reduced price. (Tr. 132-33; 149). Marcus identified the subject tax receipt and noted Diann Gooden's initials were on the receipt. (Tr. 133-5; Ex. S-5).

Marcus testified that after Cordell Gray discovered the tag for his Ford Expedition would cost him \$600, Gray contacted Marcus about getting him a reduced tag. (Tr. 130). Marcus in turn contacted Gooden who gave him the tag for \$250 to \$300. (Tr. 130-1; ). Marcus gave Gooden a gratuity of \$60 to \$70. (Tr. 131).

In his course of dealings with Gooden through the years, Gooden wanted gratuities for the reduced tags and would give Marcus kickbacks for bringing her customers. (Tr. 131).

Cordell Gray denied having approached Cannon about getting a cheaper tag for his 1994 Honda. (Tr. 160). Gray testified to paying \$40 on November 7, 2006, for the tag on his 1994 Honda. Gray also testified the amount of the tag as indicated on State Tax Commission application, Exhibit S- 6, was \$28.57 but he paid \$40 as indicated on the tag receipt, Exhibit S-7. (Tr. 157-163).

Bernard Marsalis owned a Ford 150 truck. (Tr. 165). In 2006, Marsalis planned on selling the truck so he didn't renew the tag. (Tr.165). However, after a year of not being able to sell it, Marsalis finally renewed the tag but did not pay a late fee. (Tr. 165; 168). When Marsalis went to the Tax Collector's Office, a clerk gave him a form affidavit she completed which stated that he had not driven the truck because it had been in Moores Auto Repair Shop, located at 1617 Martin Luther King Boulevard, Greenville for a year. (Tr. 119; 165). Marsalis signed the affidavit in front of a deputy clerk in the Chancery Clerk's office. (*Id.*).

At trial, Marsalis testified that he never took his truck to an auto body repair shop as indicated in the affidavit. (Tr. 119; 167). Marsalis identified the document marked Exhibit S-8 as being the affidavit he signed when he renewed his tag. (Tr. 166-7). When he testified, Marsalis could not remember who in the Tax Collector's Office gave him the form affidavit. (Tr. 167). Marsalis did not remember telling the clerk who waited on him that he had not driven his truck in a year, but knows he would not have told anyone that when he had in fact driven it. (Tr. 168). Marsalis testified he did not take a receipt from the repair shop to the Tax Collector's office as proof the truck was being repaired and not driven and did not pay any late penalty when he finally renewed the truck tag(Tr. 167; 175). On cross examination, Marsalis testified he knew when he signed the affidavit, Exhibit S-8, that it was not true. (Tr. 171). Marsalis previously received waivers of the late fee. (*Id.*).

On cross examination Marsalis could not initially remember what clerk gave him the affidavit, but on redirect he identified Gooden. (Tr. 172-3). Marsalis identified the registration receipt he received when he renewed the subject tag and testified the clerk who gave him the form affidavit and the registration receipt were one in the same clerk. (Tr. 174-5; Ex. S-9). Marsalis also testified that the receipt contained the clerk's initials "DG." (Tr. 176).



## **SUMMARY OF THE ARGUMENT**

Considering the evidence in the light most favorable to the verdict, Gooden's convictions on Counts II and Count III are not contrary to the overwhelming weight of the evidence. There is sufficient evidence to support the jury's verdict. A reasonable juror could find Gooden guilty of every element of both counts of fraud. Gooden's weight and sufficiency arguments must fail.

The state presented credible evidence through the documents from the tax collector's office, the testimony of the investigators and the testimony of Marcus Cannon and Bernard Marsalis that Gooden falsified documents to lower the cost of license plates, thereby causing the State to loose money.

The trial court properly denied Gooden's motion to suppress the statements she made during her interview with Karl Pree. Gooden was not under arrest or in a custodial situation when interviewed so Pree was not required to advise Gooden of her Miranda rights.

**PROPOSITION I: There is ample evidence of guilt to support the jury's verdicts as to Count II and III.**

Gooden argues that the verdict is against the overwhelming weight of the evidence as to Counts II and III. "When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will 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(¶ 18) (Miss.2005). In conducting this analysis, the evidence must be viewed in the light most favorable to the verdict. *Id.* This Court "sits as a hypothetical thirteenth juror," and "[i]f, in this position, the Court disagrees with the verdict of the jury, the proper remedy is to grant a new trial." *Id.*

Gooden admitted to Pree that she changed addresses on car tag receipts, which changed the taxing district, thereby reducing the costs of the tags. (Tr 93). Gooden also admitted to Pree that she would fill in blank forms with false information to save the person from having to pay a late penalty fee. (Tr. 108). Gooden admitted to personally receiving money from people for changing their address or filling in affidavits with false information. (Tr. 93) Gooden received around \$2,000 over a period of time for changing addresses and providing false affidavits. (*Id.*).

**Count II:** Gooden claims that the State failed to introduce evidence to meet its burden of proof for the charge of fraud in Count II. Gooden contends that because Bernard Marsalis failed to identify her as the person who sold him the tag in question and because Marsalis signed the affidavit in another part of the courthouse the State did not meet its burden of proof.

However, the evidence at trial included Investigator Karl Pree's testimony that Gooden admitted she had given Bernard Marsalis a false form which stated his truck had not been driven for over a year. (T.93;108; 123). Pree also testified to his investigation of Moore's Auto Repair, the

business where Marsalis's vehicle was supposedly in the shop for the year in question; that the name and address of the business as indicated on the form did not exist; that the owner of Moore's Auto, a shop at another address, denied that Marsalis's vehicle had been at his shop; and that Pree himself inspected the meticulously kept shop records and found no record of Marsalis's vehicle having been at the shop. (T. 109; 119-120; 123).

Marsalis testified the information in the subject affidavit was false. While Marsalis failed to identify Gooden on cross examination as being the clerk who gave him the affidavit, on redirect he admitted the clerk who gave him the form affidavit and the clerk who gave him the receipt for purchase of the tag were one in the same, and that person signed the receipt "DG." (Tr. 172-6).

The jury could infer from, Exhibit S-9, the registration receipt, that the clerk who initialed the receipt is the clerk who completed the transaction and entered the information into the Tax Collector's system. The jury could also infer that the initials "DG" as noted on the receipt stand for Diann Gooden.

**Count III:** Next Gooden contends the State failed in its burden of proof in Count III because Marcus never saw Gooden actually change his taxing district nor see her prepare the tax and registration receipt in issue, being Exhibit S-5. Gooden also argues the State failed to offer any proof of the monies lost as a result of the fraud.

Again, the State submits Karl Pree's testimony concerning Gooden's admissions and Marcus Cannon's testimony along with Exhibits S-8 and S-9 provide overwhelming evidence of Gooden's guilt.

Pree testified with being familiar with the Mississippi tax regulations, the Washington County taxing districts and the workings of the Washington County Tax Collector's Office. (Tr. 89-90). The prosecution established through Pree's testimony that a person living inside a city pays

higher taxes than a person living in the county and a person pays an additional fee or penalty when purchasing a tag late, unless he can establish the vehicle was not driven because it was being repaired. (Tr. 89-90). Pree testified the State of Mississippi receives money from all tag sales in a county and therefore loses money if it is not collected correctly at the tax collector's office. The State is not required to prove the exact amount of money lost through Gooden's fraud. It is sufficient to prove that money was lost.

In viewing the evidence in the light most favorable to the verdict, this Court cannot say that the guilty verdict in Counts II and III is so contrary to the overwhelming weight of the evidence that to allow the conviction to stand would sanction an unconscionable injustice. The trial court did not abuse its discretion in denying the motion for a new trial. This assignment of error is without merit.

**PROPOSITION II: The jury's verdict is supported by legally sufficient evidence.**

Motions for a directed verdict and judgment notwithstanding the verdict challenge the legal sufficiency of the evidence, and the standard of review for a directed verdict and judgment notwithstanding the verdict are identical.” *Nelson v. State*, 10 So.3d 898, 905 (Miss.2009). “[T]he critical inquiry is whether the evidence shows ‘beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.’ ” *Jones v. State*, 904 So.2d 149, 153-54 (Miss.2005) (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). In *Moore v. State*, 996 So.2d 756, 760-61 (Miss.2008) the supreme court held “This Court “accept[s] as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and ... disregard[s] evidence favorable to” [the defendant].

Gooden claims the state's witnesses failed to identify her as the deputy clerk in the Washington County Tax Collector's office who perpetrated the fraud. Pree testified to the state and county procedures, laws and regulations for the issuing of license plates. Pree testified that the State lost money. Cannon and Marsalis both identified the documents in their respective tag transactions which contained a false statement. Both identified Gooden as the deputy clerk who completed the transaction for the purchase of their tag. Pree also testified to Gooden's admissions during their interview. Without reiterating all the evidence recited in Issues I and II above, and accepting as true all the evidence favorable to the verdict, the evidence was sufficient to sustain the guilty verdict.

**PROPOSITION III:            The trial court properly denied Gooden's Motion to Suppress her statements.**

This Court will reverse the denial of a motion to suppress only if the trial court's ruling is manifest error or contrary to the overwhelming weight of the evidence. *Palm v. State*, 748 So.2d 135, 142 (Miss.1999) (citing *McGowan v. State*, 706 So.2d 231, 235 (Miss.1997)). This Court will not reverse the lower court's finding that the confession was voluntary and admissible so long as the court applied the correct principles of law and the finding is factually supported by the evidence. *Palm*, 748 So.2d at 142 (citing *Greenlee v. State*, 725 So.2d 816, 826 (Miss.1998)). Once a trial judge determines admissibility, the defendant/appellant faces a heavy burden in trying to reverse on appeal. *Greenlee*, 725 So.2d 816, 826 (Miss.1998).

Gooden contends the trial court erred by failing to suppress statements she made to investigators from the Attorney General's Office during an interview. Gooden asserts she was a suspect at the time Pree interviewed her so he knew or should have known she would make self incriminating statements, and, therefore required to advise Gooden of her Miranda warnings prior to questioning. (Appellant's brief page 12).

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602; see also *Manix v. State*, 895 So.2d 167, 180(¶ 38) (Miss.2005) (citing *Tolbert v. State*, 511 So.2d 1368, 1374 (Miss.1987) (outlining application of *Miranda* in Mississippi)). Such custodial interrogation must "be preceded by advising the defendant that he has the right to remain silent and the right to the presence of an attorney." *Miranda*, 384 U.S. at 479, 86

S.Ct. 1602; *Balfour v. State*, 598 So.2d 731, 742 (Miss.1992).

“Custodial interrogation” has been defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 458, 86 S.Ct. 1602. “Any noncustodial statement given freely and voluntarily without coercion requires no Miranda warning for admissibility.” *Tolbert*, 511 So.2d at 1375 (citations omitted).

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 U.S. 436; *Wells v. State*, 913 So.2d 1053 (Miss.App. 2005). To be subject to “custodial interrogation” one must be both in custody and undergoing interrogation. One is in custody if a reasonable person would find their ability to freely leave restricted. *Id.*

A subject is in custody when their right to freely leave has been restricted. *Wilson v. State*, 936 So.2d 357 (Miss.,2006) The custody test for Miranda purposes has been described as follows: “Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. ” *Savell v. State*, 928 So.2d 961 (Miss.App.,2006.) quoting *Yarborough v. Alvarado*, 541 U.S. 652, 663, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). The factors

to be considered include "the place and time of the interrogation, the people present, the amount of force or physical restraint used by the officers, the length and form of the questions, whether the defendant comes to the authorities voluntarily, and what the defendant is told about the situation."

*Id.* The key point in determining whether a person is in custody as defined by *Miranda* is whether the person is deprived of his freedom of action in any significant manner and if he is aware of such a deprivation. *Woulard v. State*, 832 So.2d 561 (Miss.App.,2002).

The record reflects that a reasonable person would not have felt he was in custody during the interview between Pree and Gooden. The subject interview lasted about an hour and a half and took place in the Tax Collector's Office during office hours with people around. Gooden was unrestrained and advised she was free to leave. The investigators did not threaten Gooden, yell at her or apply any coercion or force. (Tr.116-22). Clearly the interview was given in a non-custodial environment so Gooden's rights as set forth in *Miranda* were not violated. This issue also lacks merit.



## 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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This the 29th day of January, 2010.

  
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