IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-00327-SCT

IVAN RUSSELL McCLELLAN — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S REPLY BRIEF

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

none

OTHER AUTHORITIES

none

REPLY ARGUMENT

Issue No. 1: *Motion To Supress.*

Appellant finds fault with the state's factual assertion that "the Fred's employee advised Hawkins that the vehicle the couple left in was an older model blue Mustang with an Alabama tag." [State's Brief p. 4]. This representation by the state is an attempt to make the testimony supporting the stop of the defendant's vehicle appear more reliable than it actually was.

The Fred's clerks here did not give a detailed description of a particular automobile model nor any information about the license plate, or the direction of travel. [redacted]. A more accurate reading of the testimony shows that the couple were described by Fred's personnel as driving off in "a blue older model vehicle," subsequently deduced by police to be a Ford Mustang spotted nearby with an Alabama tag. [redacted]. So the information that the vehicle was a Ford Mustang with an Alabama tag was from police, not the independent source. Hence, the Fred's information was unreliable and could not be made reliable by police hunches.

This point is made to show that the facts of this case are different from *Williamson v. State*, 876 So. 2d 353 (Miss. 2004), rather than similar as suggested by the state. A correct understanding of the source of the information about the vehicle being a blue Mustang is crucial for the Court's required analysis under *Terry v. Ohio*, 392 U. S. 1, 30, 88 S. Ct. 1868 (1968). Under *Terry* there is a two-tiered "reasonable suspicion" inquiry

under which the court asks whether an officer's conduct was (1) justified *at its inception*; and, (2) whether the search and seizure were reasonably related in scope to the circumstances which initially justified the stop. *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 114 (¶ 17) (Miss.1999).

Otherwise, McClellan relies on his original argument under this issue.

Issue No. 2: Weight of Evidence / Constructive Possession

Once again, the state misreads the testimony relevant to this issue. In its brief, the state claims that, when McClellan and Katina left the Dutch Village store, an officer "went in and inquired about their purchases" and confirmed "that the pair purchased more pseudoephedrine from Dutch Village", thus urging that police "had sufficient cause to pull McClellan over." [State's brief p. 2]. This suggested misreading of the facts makes it appear that McClellan knew what occurred in the Dutch Village store and serves to fallaciously bolster the constructive possession argument.

However, the evidence actually shows that McClellan did not enter the Dutch Village store. McClellan waited in the parking lot as Katina went in the store. [redacted]. Officers went in the convenience store and were allegedly informed that Katina had purchased a pseudoephedrine/ephedrine product. *Id.* There is no proof that "the pair" made the Dutch Village purchase. Only Katina made the purchase there.

The state relies on *Grant v. State*, 788 So. 2d 815, 817 (Miss. Ct. App. 2001). One key difference between *Grant* and the present case on the point of constructive possession is that Grant stated in her confession that her male companion informed her of the marijuana in his luggage. [redacted]

It does not follow from McClellan's purported statement that he was going to "cook meth," that he knew of, and exercised some control over, the content of Katina's luggage. Nor does McClellan's alleged comment lead to the conclusion that he knew what Katina purchased when she went alone into the Dutch Village store.

* [redacted]

The *Wall* court relied on the opinion from *Hamburg v. State,* 248 So. 2d 430, 432-33 (Miss. 1971). The *Hamburg* case involved the reversal of a possession of LSD conviction of the driver of a vehicle who allegedly constructively possessed dope over which his passenger had exclusive dominion.

The *Hamburg* opinion does not support the state's argument under this issue regarding constructive possession. As here, the state in *Hamburg* argued constructive

possession, but, the *Hamburg* court said the "the rebuttable presumption of constructive possession does not relieve the State of the burden to establish defendant's guilt." 248 So. 2d 432-33.

It takes more than the presumption to convict, as recognized in *Wall, supra*:

> [t]here must be sufficient facts to warrant a finding that 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 due to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances. 718 So. 2d 1107, 1111 citing *Curry v. State*, 249 So. 2d 414 (Miss.1971).

The state also offered the case of *Barker v. State*, 826 So. 2d 103, 106 (Miss. Ct. App. 2002), in support of it's position. However, *Barker* is not comparable to the present facts. Barker was a passenger in his own car and contraband was found "on the floor board below him" and on "the passenger side floor board" not in luggage in a trunk.

Neither is *Stingley v. State*, 966 So. 2d 1269, 1273 (Miss. Ct. App. 2007), cited by the state, analogous either. Stingley was driving a family member's car "which contained a duffle bag full of marijuana in the trunk." Stingley admitted he knew about the marijuana and that he was going to use it "to have a Cheech and Chong party." McClellan never admitted knowing what Katina had in her luggage or what she purchased at the Dutch Village.

Otherwise, McClellan relies on his original argument under this issue.

Issues No. 3 and 4

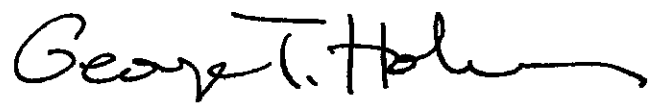
On the remaining issues 3 and 4, McClellan relies on his original arguments and authorities.

Conclusion

McClellan respectfully requests to have his convictions reversed with remand for a new trial or requests to be resentenced.

Respectfully submitted,

IVAN RUSSELL McCLELLAN

By: 

George T. Holmes,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 3d day of September, 2009, mailed a true and correct copy of the above and foregoing Reply Brief to Hon. James T. Kitchens, Jr., Circuit Judge, P. O. Box 1387, Columbus MS 39703, and to Hon. Forrest Allgood, Dist. Atty. , P. O. Box 1044, Columbus MS 39703, and to Hon. LaDonna Holland, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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