IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROY LEE JOHNSON — APPELLANT

VS. — NO. 2009-KA-0499-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2009-KA-0499-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

In this criminal appeal the appellate camcorder is focused primarily upon the sufficiency of the State's evidence to establish that appellant, Roy Lee Johnson, possessed, either actually or constructively, a 22 caliber rifle found by authorities while searching for narcotics inside a mobile home occupied by Johnson and a woman named Ava Ward.

A second issue focuses upon the sufficiency of a search warrant affidavit based upon information supplied by a confidential source. Johnson has filed a short and reasonably effective brief containing the rules of law applicable to his case. In our opinion, he simply reaches the wrong conclusions.

ROY LEE JOHNSON, a 41 year old African-American male and resident of Philadelphia (C.P. at 44), prosecutes a criminal appeal from the Circuit Court of Neshoba County, Mississippi, Marcus D. Gordon, Circuit Judge, presiding. It appears that Johnson seeks a new trial.

Following a trial by jury conducted on the 11th day of March, 2009, Johnson, in the wake of

an indictment returned on September 3, 2008, charging him with possession of a firearm by a convicted felon, was convicted and sentenced to serve ten (10) years in the custody of the MDOC.

Two (2) issues are raised on appeal to this Court, *viz.*,

(1) "The Court erred in denying the motion for a directed verdict, in refusing request for a peremptory instruction and in denying the motion for a new trial."

(2) "The Court erred in denying the motion to suppress the result of the search."

STATEMENT OF FACTS

Roy Lee Johnson is a forty-one (41) year old resident of Philadelphia, Mississippi. (C.P. at 44) He lives in a mobile home located in Neshoba County and has a very turbulent criminal history which, according to Judge Gordon, consists of ". . . 38 misdemeanor violations and convictions, resulting from cases such as violence, larceny, drug violations, [and] assault cases." (R. 65-66)

On February 21, 2008, at 5:25 p.m., Donnie Adkins, Sheriff of Neshoba County, executed a search warrant at a mobile home occupied at the time by Johnson and a lady identified by name as Ava Ward. Adkins, who was searching for cocaine and marijuana following information supplied by a confidential informant, found none. He and investigator Sciple did, on the other hand, seize a .22 Remington rifle loaded with ten (10) cartridges during a security sweep of the mobile home. (R. 39-40) The .22 was propped in plain view against a love seat located inside the living room. This location was approximately eight (8) feet from a couch upon which Johnson was reclining at the time the officers entered the home. (R. 30-31, 36)

On February 21, 2008, Sheriff Adkins received certain information from a confidential source who had given him "creditable information" in the past. The source claimed to have personally seen marijuana and crack cocaine not only for sale but being used inside the white trailer occupied by Johnson. Adkins immediately applied for a search warrant. A separate sheet containing underlying

facts and circumstances was attached to the affidavit for search warrant. On February 21st, Steve Cumberland, a justice court judge, issued the search warrant which was received by Adkins at 5:25 p.m. (R. 22)

During the suppression hearing conducted prior to Johnson's first trial which ended in a mistrial, Judge Cumberland testified as follows:

> Q. [CROSS-EXAMINATION BY DEFENSE COUNSEL:] You being the judge who issued this search warrant, what did you understand the word "creditable" to mean?
>
> A. [BY JUDGE CUMBERLAND:] To me creditable would be someone that [t]he [affiant] has put trust in or has had dealings with in the past, and he felt that they were telling the truth in what they had told him would be my definition of creditable. (R. 24)

On February 22, 2008, at 7:35 a.m., Adkins and Sciple executed the warrant. They seized the .22 rifle during an initial security sweep of the mobile home. (R. 29-30) No drugs were found.

It is undisputed in this case that Roy Lee Johnson is a convicted felon. Although Johnson did not testify, the State introduced, without objection, Johnson's prior conviction in 2004 for burglary of an automobile. (R. 48)

Two (2) witnesses testified for the State of Mississippi during its case-in-chief, including **Sheriff Donnie Adkins** who testified during direct examination as follows:

> Q. What did you observe as you went in the door?
>
> A. As I went inside the home, Mr. Johnson was laying on a couch just inside the home.
>
> Q. After you entered, other officers followed you?
>
> A. Yes.
>
> Q. Where did you proceed after you saw Mr. Johnson?

A. I saw Mr. Johnson and, like I said, the first priority is to secure the scene. As I was going in, a young lady by the name of Ava Ward was coming out of a hallway or a bedroom entrance in the hallway, coming into the living area where Mr. Johnson was at.

Q. Okay. After that, did you return into the room where Mr. Johnson was?

A. Yes. I really never did leave the room where Mr. Johnson was at, because it was all right there together.

Q. Did you observe anything else in the room?

A. I did.

Q. Tell us what that was.

A. It was a firearm, a black barrel, long barrel, leaning up against, it looked like, a love seat on the opposite side of the room where Mr. Johnson was laying.

Q. The gun was propped against the wall?

A. I believe it was propped against the couch.

Q. Okay. How far away from Mr. Johnson was the gun?

A. Almost as close as from me to you.

Q. It was in the same room?

A. Yes.

* * * * * *

Q. Sheriff, I'm going to ask if you can identify this.

A. Yes, sir.

Q. Please, tell us what it is.

A. It is a Remington .22 rifle.

* * * * * *

Q. Sheriff, is that the gun you saw that day?

A. Yes, sir, it is. (R. 30-31)

According to Sheriff Adkins, the rifle and love seat were eight (8) feet away from the couch upon which Johnson was reclining. (R. 36) **Ralph Sciple**, an investigator who accompanied Sheriff Adkins, testified he recovered the .22 rifle which was loaded with ten (10) live cartridges. (R. 39-40)

At the close of the State's case-in-chief, Johnson moved for a directed verdict on the ground the State " . . . has failed to prove its case beyond a reasonable doubt . . ." (R. 50) That motion was overruled. (R. 50)

After being personally advised of his right to testify or not to testify, Johnson told the circuit judge he had decided "not to testify." (R. 49)

The State produced no rebuttal. (R. 49-50)

At the close of all the evidence, peremptory instruction was denied. (R. 50; C.P. at 20)

The jury retired to deliberate at 11:36 a.m. (R. 61) Twenty (20) minutes later at 11:56 a.m. it returned with a numerical division of ten and two. (R. 62)

Following a recess at noon for lunch, the jury retired at 1:02 p.m. to continue its deliberations. (R. 62) At 1:18 p.m. it returned with the following verdict: "We, the jury, find the Defendant, Roy Lee Johnson, guilty as charged." (R. 63; C.P. at 28) A poll of the jury reflected the verdict was unanimous. (R. 64)

The following day, March 12th, 2008, Johnson was sentenced to serve a term of ten (10) years in the custody of the MDOC with a recommendation by Judge Gordon that Johnson be confined at the Parchman facility " . . . because I consider you a risk to the general public." (R. 66-67; C.P. at 31-32)

Johnson's motion for a new trial filed on March 23, 2009, was subsequently denied. (C.P. at 33-35)

Shawn Harris, felony indigent counsel, represented Johnson very effectively at trial. He

timely perfected Johnson's appeal to this Court by filing a notice of appeal on March 23rd, 2009. (C.P. at 38-39)

Edmund J. Phillips, Jr., a practicing attorney in Newton, has been equally effective on appeal as well.

SUMMARY OF THE ARGUMENT

I. Sufficiency and Weight of Evidence.

Johnson's motion for new trial alleged in ground number 2. "[t]he Court erred in refusing to grant peremptory instruction for the Defendant and further erred in refusing to direct a verdict for the Defendant at the conclusion of the State's case." (C.P. at 33)

This Court reviews the trial court's denial of a post-trial motion under the abuse of discretion standard. **Flowers v. State,** 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State,** 566 So.2d 1240, 1242 (Miss. 1990).

No abuse of judicial discretion has been demonstrated here because Johnson's identity as the one who knowingly, intentionally, and constructively, if not actually, possessed a firearm was supplied by the testimony of both Sheriff Adkins and Investigator Sciple. Both testified that Johnson was the usual and long time occupant of the mobile home, and the rifle was observed in the same room in plain view approximately eight (8) feet away from the couch upon which Johnson was lying. According to Sheriff Adkins, the rifle was not hidden; rather "[i]t was out in plain wide open." (R. 37)

There need not be actual physical possession of the rifle; constructive possession may be shown by establishing the firearm involved was subject to Johnson's dominion or control.

The proof was sufficient to establish that Johnson, a convicted felon, was aware of the presence and character of the weapon and was intentionally and consciously in possession of it.

"Constructive possession may be shown by establishing that the [firearm] involved was subject to [the defendant's] dominion or control." **Gavin v. State,** 785 So.2d 1088, 1093 (Ct.App.Miss. 2001) quoting from **Curry v. State,** 249 So.2d 414, 416 (May 1971). A reasonable and fairminded juror could have found that the .22 rifle involved here was subject to the defendant's dominion and control and that Johnson knowingly and intentionally, albeit constructively, possessed the weapon.

Although there was no proof of ownership of the premises in which the firearm was found, Johnson had been residing in the mobile home for quite some time. (R. 34, 41-42) Indeed, the presence of ten (10) pair of shoes that Johnson admitted belonged to him would lead a reasonable juror to conclude that Johnson was living there. (R. 33)

A jury was entitled to infer from all of the testimony that Johnson possessed, constructively if not actually, the loaded .22 rifle which was observed in plain view propped against a love seat located eight (8) feet away from the couch where Johnson was reclining. (R 30-31, 39) Had the contingency of the situation required him to do so. Johnson would have had time to retrieve the rifle prior to the officer's entry. (R. 36)

Johnson suggests the mobile home was not in his exclusive possession because Ava Ward, a female, was present inside. We argue there was insufficient evidence of joint possession of the mobile home or evidence of Ava Ward's connection, if any, to the rifle. At best Ava Ward was a mere occupant who neither owned nor possessed the firearm. In any event, this was a question for the jury to determine from all the evidence presented.

Even if otherwise, there were other incriminating factors - at least a "scintilla of evidence of possession" - in addition to proximity. *See* **Fultz v. State,** 573 So.2d 689, 690 (Miss. 1990).

In short, Johnson's conscious and intentional possession of the rifle, constructive, if not

actual, is a reasonable and logical inference flowing from all the evidence in the case. For the purpose of appellate review, these inferences must be accepted as true and/or viewed in the light most favorable to the prosecution's theory of the case. **Bush v. State,** 895 So.2d 836, 843-44 (¶ 16) (Miss. 2005).

II. The Search Warrant.

There is substantial evidence in the record supporting the magistrate's conclusion that probable cause existed for the issuance of the search warrant. **Roach v. State,** 7 So.3d 911, 917 (¶¶ 11, 12) (Miss. 2009).

The circuit judge did not err in denying Johnson's motion to suppress the rifle for want of a constitutional search. *See* **Barker v. State,** 241 So.2d 355 (Miss. 1970), which held the warrant issuing magistrate must be informed, *inter alia*, of "some of the underlying circumstances from which the officer concluded that the informer was credible or his information reliable."

It is implicit in the affiant's sworn affidavit that "creditable information [received] in the past" from a confidential source who personally observed the contraband that was the object of the search points unerringly to credibility and/or informational reliability.

Defense counsel argued during the suppression hearing that the word "creditable" " . . . doesn't mean that [the information is] reliable; it just means credit was given for it." (R. 27)

Not according to Judge Cumberland, the issuing magistrate, who testified during the suppression hearing that "[t]o me creditable would be someone that [t]he [affiant] has put trust in or has had dealings with in the past, and he felt that they were telling the truth in what they had told him would be my definition of creditable." (R. 24)

Judge Gordon did not abuse his judicial discretion in thereafter finding as a fact and concluding as a matter of law that giving credit to the information received from a confidential

source is the equivalent of informational reliability. "I don't see how you can give credit without considering it being reliable . . ." (R. 27)

ARGUMENT

ISSUE I.

THE STATE'S EVIDENCE, EVEN IF "SLIM," WAS LEGALLY SUFFICIENT TO SUPPORT JOHNSON'S CONVICTION FOR THE KNOWING AND INTENTIONAL POSSESSION OF A FIREARM.

Miss.Code Ann. section 97-37-5 (1) reads as follows:

> (1) It shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States **to possess any firearm** or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm unless such person has received a pardon for such felony, has received a relief from disability pursuant to Section 925 © of Title 18 of the U.S. Code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section. [emphasis supplied]

Jury instruction (S-1), the State's substantive charge, required the jury to find beyond a reasonable doubt " . . . that at the time and place charged in the indictment and testified about, that the Defendant, Roy Lee Johnson, did willfully, unlawfully and feloniously have in his possession and under his conscious control a firearm, namely a .22 caliber rifle, at a time when he, the said Roy Lee Johnson, was a convicted felon, . . ." (C.P. at 10)

Jury instruction (S-3), which was also given, defined the concept of "possession." It reads as follows:

> The Court instructs the Jury that to constitute a possession, there must be sufficient facts to warrant a finding that the Defendant was aware of the presence and character of the particular firearm 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 firearm involved was subject to the defendant's

dominion or control. (C.P. at 12)

Johnson assails the sufficiency of all the evidence linking him to the rifle unmistakably found propped against a love seat inside the mobile home where Johnson was known by the authorities to reside. **First**, Johnson, much like he did at trial, claims he was not charged with being in the same room as the .22 rifle; rather, he's charged with possession of a firearm. (R. 57) Johnson suggests that even if he was aware of the presence of the firearm and had access to it, there was no evidence indicating he intentionally and consciously possessed it. (Brief for Appellant at 7-8)

Second, Johnson argues that in cases of joint possession of the premises where the contraband is found, an accused's nearness or proximity to the contraband is insufficient to justify a conclusion he possessed it absent some other competent or incriminating evidence connecting him with it. (Brief for Appellant at 8)

In short, Johnson claims the proof was insufficient to demonstrate beyond a reasonable doubt he knowingly, i.e., consciously, and intentionally possessed the firearm.

The ground rules governing the concept of constructive "possession" appear to be applicable here.

Those ground rules are articulated in **Gavin v. State,** 785 So.2d 1088, 1093 (Ct.App.Miss. 2001), where we find the following language:

> Gavin argues that the evidence of possession of the various other weapons was insufficient to sustain his conviction. A reviewing court must accept all the evidence and reasonable inferences in the light most favorable to the verdict. *Holloman v. State,* 656 So.2d 1134, 1142 (Miss. 1995). With that view in mind, then we must determine whether evidence on any element of the charge is lacking. *Id.* Only if a reasonable juror had to reach a verdict of not guilty will we reverse. *Id.*
>
> As there is no evidence that the defendant had actual possession of any of the weapons, the State was proceeding under the

> theory of constructive possession. For that, "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." *Curry v. State,* 249 So.2d 414, 416 (Miss. 1971). "Constructive possession may be shown by establishing that the [item] involved was subject to his dominion or control." *Id.* Proximity is usually an essential element, but by itself is not enough in the absence of other incriminating circumstances. *Id.*
>
> The owner of the premises where the contraband is found is rebuttably presumed to be in possession of the contraband. *Hamburg v. State,* 248 So.2d 430 (Miss. 1971). Charlie Gavin was not the owner. Thus, in cases where the defendant is not the owner of the premises or in exclusive possession, then the State must prove some "competent evidence connecting him with the contraband." *Powell v. State,* 355 So.2d 1378, 1379 (Miss. 1978).

The burden is upon the State of Mississippi to prove the defendant had knowledge of the character of the firearm and that he was either in actual or constructive possession of same. These elements may be proved by circumstantial evidence. **Martin v. State,** 413 So.2d 730, 732 (Miss. 1982). *See also* **United States v. Pigrum,** 922 F.2d 249 (5th Cir. 1991).

Admittedly, ownership of the mobile home was never established. It is clear, however, that Johnson was a long time occupant of the mobile home and that he had continuously lived there. Stated differently, Johnson, save for the unexplained presence of Ava Ward, appears to have been in exclusive possession of the premises. The relationship between Johnson and Ava Ward was never fully brought to light. At best she was a temporary occupant or visitor who had no connection whatever with either the mobile home or the rifle. In the absence of sufficient rebuttal, Johnson's constructive possession of the rifle was presumed.

Assuming otherwise, there are other incriminating factors - albeit but a "scintilla" of evidence of possession, if you please - in addition to proximity, *viz.*, shoes and loaded rifle propped in plain view.

(1) According to the officers, they knew beforehand that Roy Johnson lived or stayed in the white mobile home. (Adkins: R. 34; Sciple: R. 43) They had known him to live at no other place. (R. 42) According to Sheriff Adkins, "[o]ver a period of years, probably as long as I've been sheriff, that address is the place or the places where I've known him to stay at." (R. 34)

Investigator Sciple testified that "[w]hen we got to the residence, I knew whose residence it was, yes." (R. 47)

(2) No one else was observed in the living room with the rifle when Adkins went inside. (R. 32) Although Ava Ward was seen emerging from the bedroom to the left, she did not testify and claim ownership of either the rifle or the mobile home.

(3) Investigator Sciple testified he had been to the mobile home on previous occasions "[t]o question Roy Lee Johnson" and that on each occasion he found Johnson to be present. (R. 42) "That's where he was at every time I went there. . ." (R. 42)

(4) Sheriff Adkins testified that during his search he observed a row of shoes - approximately 10 pair. "I just asked Mr. Johnson whose shoes it was, and he said they were his." (R. 33)

(5) The loaded rifle was only eight (8) feet away propped in plain view where Johnson, a convicted felon and the only person in the room when the officer entered, could easily see it and retrieve it should the need arise. (R. 36-37)

At trial Johnson assailed the sufficiency of the evidence via his motion for a directed verdict (R. 49) and his request for peremptory instruction. (R. 50; C.P. at 20) These motions test legal sufficiency as opposed to weight.

In judging the "sufficiency" of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences

that may be drawn therefrom, *and to disregard evidence favorable to the defendant*. **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State**, 667 So.2d 599, 612 (Miss. 1995); **Hart v. State,** 637 So.2d 1329, 1340 (Miss. 1994); **Edwards v. State**, 615 So.2d 590, 594 (Miss. 1993); **Clemons v. State**, 460 So.2d 835, 839 (Miss. 1984); **Forbes v. State**, 437 So.2d 59, 60 (Miss. 1983); **Bullock v. State**, 391 So.2d 601, 606 (Miss. 1980).

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict and request for peremptory instruction should be overruled. **Brown v. State**, 556 So.2d 338 (Miss. 1990); **Davis v. State,** 530 So.2d 694 (Miss. 1988). A finding the evidence is insufficient results in a discharge of the defendant. **May v. State**, 460 So.2d 778, 781 (Miss. 1984).

In this case, a reasonable, fair-minded juror was warranted in finding from all the evidence, including the proximity factor, that Johnson was well aware of the presence and character of the rifle because it was in plain view of his two eyes inside the living room of his mobile home which he had occupied for quite some time.

If the jury believed the testimony of Adkins and Sciple, this is constructive possession of the firearm which was only eight (8) feet from Johnson's reach and clearly subject to Johnson's dominion and control.

Where, as here, the defendant tests the *legal sufficiency* of the evidence supporting the verdict of guilty, as opposed to the weight of the evidence, " . . . the trial court must consider all of the evidence - not just the evidence which supports the State's case - in the light most favorable to the State." **Winters v. State**, 473 So.2d 452, 459 (Miss.1985). *See also* **Tait v. State**, 669 So.2d 85 (Miss. 1996). The phrase "all of the evidence" refers also to the defendant's evidence supporting

his own theory of the case. Evidence favorable to the defendant must be disregarded. **Edwards v. State**, 615 So.2d 590, 594 (Miss. 1993); **Clemons v. State**, 460 So.2d 835, 839 (Miss. 1984).

Admittedly, a jury had failed to reach a verdict during Johnson's first trial, and a mistrial was declared. When the testimony at the second trial is construed in a light most favorable to the State, it is clear the evidence, even if slim, was legally sufficient for the jury to find that Johnson was aware of the presence and character of the firearm and that he constructively, if not actually, possessed the weapon.

We submit the identity of Johnson as the possessor, constructively, if not actually, of a firearm was demonstrated both directly and by reasonable inferences to be drawn from all the facts in evidence. This is not a case where reasonable jurors could not have found beyond a reasonable doubt the defendant was guilty. *See* **Bush v. State,** 895 So.2d 836, 843 (Miss. 2005), which contains the correct legal standard for evaluating the sufficiency of the evidence.

Even where the evidence is "slim", this Court will accept all reasonable inferences as true when reviewing the sufficiency of the evidence. **Rainer v. State,** 438 So.2d 290, 292 (Miss. 1983) ["Slim" evidence passed muster with respect to the question of evidentiary sufficiency.]

The evidence, together with all reasonable inferences to be drawn therefrom, was, in our opinion, legally sufficient to support Johnson's conviction because the proof demonstrated he constructively possessed it. The rifle was in plain view eight (8) feet away and clearly in Johnson's line of sight. He need only to have opened his two eyes for an awareness of its character and presence. A fair-minded juror could have found it was under Johnson's conscious control.

In **Curry v. State,** 249 So.2d 414, 416 (Miss. 1971), a prosecution for the possession of marijuana, this Court defined, within the context of controlled substances, the contours of the possession rule, 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 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 was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances. In the instant case, all of the circumstances and these criteria were sufficient to warrant the jury in finding that appellant was in possession of the marijuana. [citations omitted]

In **Powell v. State,** 355 So.2d 1378, 1379 (Miss. 1978), this Court reaffirmed its view that " . . . there is no rigid rule that can be stated to govern every conceivable case, but each case must be decided upon its peculiar facts." This Court further noted in **Powell** that

> "[t]he correct rule in this jurisdiction is that one in possession of premises upon which contraband is found is presumed to be in constructive possession of the articles, but the presumption is rebuttable. We have held that where contraband is found upon premises not in the exclusive control and possession of the accused, additional incriminating facts must connect the accused with the contraband. Where the premises upon which contraband is found is not in the exclusive possession of the accused, the accused is entitled to acquittal, absent some competent evidence connecting him with the contraband. *Sisk v. State,* 290 So.2d 609 (Miss. 1974).

See also **Berry v. State,** 652 So.2d 745 (Miss. 1995), and the cases cited therein; **Arnett v. State,** 532 So.2d 1003 (Miss. 1988); **Guilbeau v. State,** 502 So.2d 639 (Miss. 1987); **Kinzey v. State,** 498 So.2d 814 (Miss. 1986); **Pool v. State,** 483 So.2d 331 (Miss. 1986).

Admittedly, the proof fails to show ownership of the mobile home. The proof, on the other hand, is sufficient to show Johnson had been residing there for quite some time and was in exclusive, as opposed to joint, possession of the premises.

The owner of premises or one in exclusive possession of premises where articles are found

is presumed to be in constructive possession of the articles found in or on the property possessed. **Fultz v. State,** *supra,* 573 So.2d 689, 690 (Miss. 1990), note 3 citing **Poole v. State,** 482 So.2d 331, 336 (Miss. 1986), quoting **Hamburg v. State,** 248 So.2d 430, 432 (Miss. 1971). This is a rebuttal presumption. *See also* **Roach v. State,** *supra,* 7 So.3d (¶38) at 926-27.

"Possession of contraband may be actual or constructive, and may be joint or individual. Two or more persons may be in possession where they have joint power of control and an inferable intent to control jointly." **Wolf v. State,** 260 So.2d 425, 432 (Miss. 1972).

The only evidence tending to rebut the presumption of constructive possession is testimony that Ava Ward was observed emerging from a back bedroom. This was not enough to convince a reasonable and fair-minded juror that Ava Ward was in joint control or possession of the rifle.

In any event, the proximity factor is accompanied by other incriminating factors, a "scintilla of evidence of possession," if you please. Mississippi is among the jurisdictions in which "proximity" coupled with "any other scintilla of evidence of possession establishe[s] constructive possession." **Fultz v. State,** *supra,* 573 So.2d 689, 690 (Miss. 1990).

In this case we have the shoe testimony, a loaded rifle in plain view, and the absence of any testimony connecting Ava Ward with the firearm or identifying Ms Ward as anything other than a bedroom occupant or casual visitor.

Accepting as true the testimony elicited during the State's case-in-chief, and accepting as true all reasonable and logical inferences flowing therefrom, we submit the proof, in its entirety, was sufficient to establish beyond a reasonable doubt that on the date testified about Roy Lee Johnson constructively possessed a .22 rifle loaded with ten (10) cartridges.

We respectfully submit the testimony elicited during the trial of this case was sufficient to prove, both directly and by reasonable inference, beyond a reasonable doubt that Roy Lee Johnson

was consciously and intentionally in possession of a loaded firearm within his dominion and control. The rifle was not hidden underneath a bed or stashed inside a closet. Rather, it appears that Johnson was lying on a couch looking right at it.

In denying Johnson's motion for a directed verdict and request for peremptory instruction Judge Gordon found the evidence sufficient to sustain a conviction. Great deference must be given to the decision of the trial judge who has taken the time to stop, look, and listen. No abuse of judicial discretion has been demonstrated here.

Finally, the jury verdict was not against the overwhelming weight of the evidence which does not preponderate in Johnson's favor. Indeed, Johnson produced no evidence to weigh.

In **Bush v. State,** *supra,* 895 So.2d 836, 844 (¶18) (2005), the Supreme Court penned the following language articulating the true rule:

> 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. *Herring v. State,* 691 so.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial,
>
> > The court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.
>
> *Amiker v. Drugs for Less, Inc,* 796 So.2d 942, 947 (Miss. 2000)/2 However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror" the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal

> any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial./3
>
> Sitting as a limited "thirteenth juror" in this case, we cannot view the evidence in the light most favorable to the verdict and say that an unconscionable injustice resulted from this jury's rendering of a guilty verdict. * * * " [text of notes 2 and 3 omitted]

See also **Chambliss v. State,** 919 So.2d 30, 33-34 (¶10) (Miss. 2005), quoting *Bush*, 895 So.2d at 844 (¶18).

In short, the jury's verdict was not against the overwhelming weight of the credible evidence which does not preponderate in favor of Johnson. No fair-minded juror could have concluded that Johnson was not aware of the presence and character of the loaded rifle and did not intentionally and consciously possess it.

ISSUE II.

THE CIRCUIT JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN OVERRULING JOHNSON'S MOTION TO SUPPRESS THE RIFLE BASED UPON AN UNCONSTITUTIONAL SEARCH BECAUSE THERE WAS A SUBSTANTIAL BASIS FOR THE WARRANT ISSUING MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE.

The Supreme Court of Mississippi has adopted a "totality of the circumstances" test for determining whether or not probable cause exists for the issuance of a search warrant." **Roach v. State,** *supra,* 7 So.3d 911, 917 (¶11) (Miss. 2009), citing **Lee v. State,** 435 So.2d 674, 676 (Miss. 1983).

In reviewing the finding of probable cause by a warrant issuing magistrate, the Supreme Court does not make a *de novo* determination of probable cause; rather, it only determines if there was a substantial basis for the magistrate's determination of probable cause. **Roach v. State,** *supra*, 7 So.3d at 917 citing **Petti v. State,** 666 So.2d 754, 757-58 (Miss. 1995).

The issuance of a search warrant will not be reversed on appeal where there is substantial evidence supporting the magistrate's determination that probable cause existed. **Phinizee v. State,** 983 So.2d 322 (Ct.App.Miss. 2007), reh denied, cert denied 981 So.2d 298 (Miss. 2008).

Conversely, an appellate court will overturn the trial court where there is no substantial evidence to support the issuance of the search warrant. **Bailey v. State,** 981 So.2d 972 (Ct.App.Miss. 2007), reh denied.

When the integrity of a search warrant is assailed on appeal, the duty of a reviewing court is to ensure that the warrant issuing magistrate had a substantial basis for concluding that probable cause existed for the issuance of the warrant. **Zinn v. City of Ocean Springs,** 928 So.2d 915 (Ct.App.Miss. 2006).

In the case at bar there is substantial evidence supporting the magistrate's determination of probable cause.

Attached to the search warrant affidavit was a separate sheet containing underlying facts and circumstances reading, in part, as follows:

> "On Thursday 21st day of February 2008 a confidential informant that is known to Donnie Adkins and has given creditable information in the past told Donnie that he/she saw Crack Cocaine and Marijuana for sale and being used in a white trailer 1 mile from Columbus Avenue East onto Old Indian Hospital Road/Road 610 Philadelphia, MS 39350 in Neshoba County. On Thursday February 21st 2008, Sheriff Donnie Adkins began preparing an Affidavit for Search Warrant, Search Warrant, with supportive Underlying Facts and Circumstances, this all being within the past 24 hours."

Johnson argued in the lower court, and argues on appeal as well, that the rifle should have been suppressed because "[a]n affidavit for search warrant based on a statement by a confidential informant . . . must assert the accuracy and reliability of information about criminal activity that the informant has supplied in the past." (Brief for Appellant at 7)

The decisional authority cited by Johnson in support of this argument is **Barker v. State,** 241 So.2d 355, 356-57 (Miss. 1970), where we find the following oft-cited language originating in **Strode v. State,** 231 So.2d 779 (Miss. 1970):

> The two-part test of **Aguilar [v. Texas,** 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)] requires a magistrate to be informed of (1) some of the underlying circumstances from which the informer concluded that the defendant was the one guilty of the offense, and (2) some of the underlying circumstances from which the officer concluded that the informer was credible or his information reliable. In short, under the basis-of knowledge test, the informer must have obtained his knowledge by personal observation or in some other dependable manner rather than through casual rumor. The second reliability test is an attempt to guard against tips provided by untruthful or unreliable informers, and suggest that an informer is credible if he has provided truthful tips in the past. Moreover, the information may be deemed reliable if corroborated by independent investigation. Both tests require only that some of the underlying circumstances be sworn to. Furthermore, in *Spinelli*, the Court indicated that the basis-of-knowledge test could be fulfilled without a statement of the circumstances from which the informer derived his information; i.e., if a tip is sufficiently detailed, it may be self-verifying, and one may conclude that the informer was not relying on mere rumor. (231 So.2d at 783)

Argument presented at trial by both litigants, as well as the ruling made in its wake by the circuit judge, is found in the following colloquy:

> BY MR. COLLINS [DEFENSE COUNSEL]: Your Honor, the definition of credible would be a definition that would be reliable, trustworthy, all those kinds of words. But, Your Honor, the word that appears in this affidavit, which is all the Judge has to rely on is creditable.
>
> BY THE COURT: That's what I'm asking. Are you arguing c-r-e-d-I-t-a-b-l-e?
>
> BY MR. COLLINS: Yes, sir. I'm arguing that that word means to give credit to the account of. It doesn't mean that it's reliable; it just means credit was given for it. That's my argument, Judge.

> BY THE COURT: Well, I don't see how you can give credit without considering it being reliable when the affidavit states that information in the past has been reliable or credible. It has been evidence worth receiving and evidence established by the facts of the case. So I'm going to overrule your objection.
>
> Bring in the jury.
>
> I admire you for reaching where you can. That's a long arm argument there. (R. 26-27)

We point out initially that the basis of the informant's knowledge was personal, on-the-scene observation, a reasonably dependable means of ascertaining that an offense was being committed in the informant's presence. The affidavit passes the basis of the informant's knowledge prong of **Aguilar v. Texas** [citation omitted] with flying colors.

Moreover, the detailed description of the mobile home and the precise directions thereto where the informant personally saw the contraband makes his/her tip almost self-verifying. **Barker v. State,** *supra*, 241 So.2d at 356 citing **Spinelli.**

The second or "veracity" prong of **Aguilar** requires that the magistrate be informed of "some of the underlying circumstances from which the officer concluded that the informant was credible *or* his information reliable," i.e., informant credibility *or* informational reliability. The requirement, we note, is disjunctive.

Adkins, the affiant, swore before the magistrate his informant had given him "creditable" information in the past.

Webster defines the word "creditable" as "worthy of belief" or "worthy of esteem or praise."

Judge Cumberland, the warrant issuing magistrate, testified during the suppression hearing that "[t]o me creditable would be someone that [t]he [affiant] has put trust in or has had dealings with in the past, and he felt that they were telling the truth in what they had told him would be my

definition of creditable." (R. 24)

Thus, the issuing magistrate equated "creditable" with "credibility" and "trustworthiness." It is implicit in the affiant's sworn affidavit that "creditable information [received] in the past" from a confidential source who personally observed the contraband that was the object of the search points unerringly to the affiant's conclusion his informant was credible and trustworthy and/or his information reliable.

In the final analysis, there is substantial evidence in the record supporting the magistrate's conclusion that probable cause existed for the issuance of the search warrant.

CONCLUSION

Assuming the question of evidentiary sufficiency is close, we respectfully submit the testimony, viewed in its totality, was sufficient to support a finding by a reasonable and fair-minded juror that Roy Lee Johnson was guilty of the crime charged. This is not a case where " . . . a reasonable juror had to reach a verdict of not guilty . . ." **Gavin v. State,** *supra,* 785 So.2d 1088, 1093 (Ct.App.Miss. 2001).

There is substantial evidence in the record supporting the magistrate's conclusion that probable cause existed for the issuance of the search warrant.

Appellee respectfully submits that no reversible error took place during the retrial of this cause. Accordingly, the judgment of conviction of possession, as a convicted felon, of a firearm, together with the ten (10) year sentence imposed in its wake, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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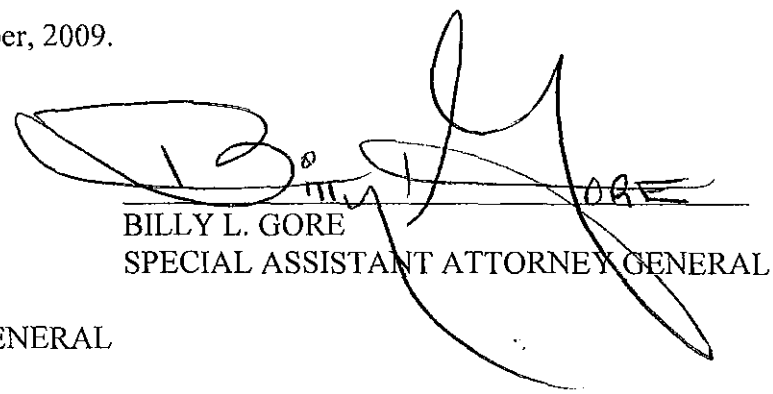
This the 5th day of November, 2009.



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