

CERTIFICATE OF INTERESTED PERSON

ROY LEE JOHNSON

v.

STATE OF MISSISSIPPI

NO. 2009-KA-00499-COA

T

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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

Roy Lee Johnson
Appellant

Hon. Jim Hood
Attorney General
State of Mississippi

Hon. Mark Duncan
District Attorney



Edmund J. Phillips, Jr.
Attorney of Record for Roy Lee Johnson

TABLE OF CONTENTS

	<u>Page No.:</u>
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2-6
SUMMARY OF THE ARGUMENT	7
ARGUMENT	7-9
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

Constitution

Fourth Amendment of the United States Constitution	Page 9
Mississippi Constitution, Article 3, Section 23 (1890).	Page 9

Cases

Barker v. State, 241 So. 2d 355 (1970).	Page 9
Fultz v. State, 573 So. 2d 689 (Miss. 1990);	Page 7
Hudson v. State, 362 So. 2d 645 (Miss. 1978);	Page 8
Powell v. State, 355 So. 2d 1378 (Miss. 1978);	Page 7

STATEMENT OF THE ISSUES

- (1) The Court erred in denying the motion for a directed verdict, in refusing the 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 THE CASE

The Appellant, Roy Lee Johnson, appeals his conviction by the Circuit Court of Neshoba County, Mississippi, on the charge of possession of firearm by convicted felon and his sentence to serve ten (10) years in the custody of the Mississippi Department of Corrections.

The case before the Court was a retrial of a case that had resulted in a mistrial because the jury was unable to agree on a verdict. At that mistrial the Court denied a motion to suppress the result of the search at a hearing outside the presence of a jury. In the trial of the case before the Court the prosecution requested and the defense consented to the transfer of the said motion to the retried case before the Court so that the motion would not have to be reheard.

Copies of the Affidavit for Search Warrant and the Search Warrant are attached.

Appellant was found inside a mobile home on a living room couch, by Neshoba County Sheriff Donnie Adkins who was executing a search warrant for contraband narcotics. Leaning against a love seat on the other side of the room was a .22 caliber Remington rifle (T-30, 31).

Also in the mobile home at the time was at least one other person, a woman named Ava Ward. No other evidence linking Appellant to the rifle was introduced into evidence. No evidence that Appellant owned the mobile home was introduced, although it seemed likely that he and Ava Ward were among the persons who lived there and that they occupied the same bedroom. There was a second bedroom, and no evidence was introduced about who occupied it.

Appellant had previously been convicted of auto burglary.

AFFIDAVIT FOR SEARCH WARRANT

STATE OF MISSISSIPPI

COUNTY OF NESHOPA

This day personally appeared before me, the undersigned judicial officer of said County, Sheriff Donnie Adkins, known to me to be a credible person, who after been first duly sworn, depose and say,

1. That affiant has good reason to believe and do believe that certain things hereafter described are now being concealed in or about the following place in this county:

Turn right off of Columbus Avenue onto Old Indian Hospital Road/Road 610, go
East 1 mile to a white trailer
Facing the road on the left behind a house that is being torn down or falling down

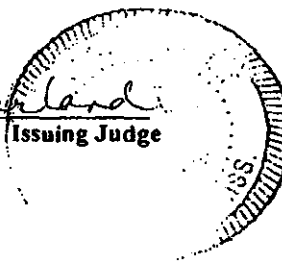
2. That the place described above is occupied and controlled by:
Person or Person(s) unknown
3. That said things are particularly described as follows: Possession of Controlled Substance Crack Cocaine and Marijuana
4. That possession of the above things is in itself unlawful, or the public has a primary interest in, or primary right to possession of the above-described things, and said things are in violation of the Mississippi Code of 1972 Annotated, Section 41-29-139.
5. The facts tending to establish the foregoing grounds for issuance of a search warrant are shown a sheet headed "Underlying Facts and Circumstance", which is attached hereto, made a part of, and adopted herein by reference.
6. Wherefore, the affiant request that a Search Warrant issued directing a search of the above described place and seizure of the above described things.

Donnie Adkins
AFFIANT

Sworn to and subscribed before me, the 21 day of Feb, 2008



Steve Cumberland
Issuing Judge



STATE OF MISSISSIPPI
NESHOPA COUNTY
I, PATTON LEE SIRCUM, CLERK IN AND FOR SAID
STATE AND COUNTY, HEREBY CERTIFY THAT THE ABOVE
AND FOREGOING IS A TRUE AND CORRECT COPY,
GIVEN ME BY THE AFFIANT, IN THE CLERK'S OFFICE.
THIS THE 21 DAY OF Feb, 2009
BY Patton Lee Sircum CLERK

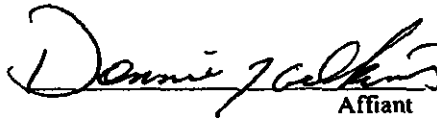
UNDERLYING FACTS AND CIRCUMSTANCES

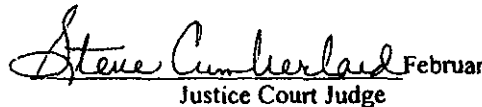
Affiant, Donnie Adkins has been in law enforcement since 1984 and has been an Investigator with the Neshoba County Sheriff's Department and with the Philadelphia Police Department for a total on 12 years. Donnie had been Justice Court Judge in Neshoba County for 11 years and is currently Sheriff of Neshoba County. Donnie Adkins is a certified law enforcement officer, and a graduate of the Laurel Police Training Academy, and attended numerous schools on the subject of criminal investigations, and effected numerous felony arrests.

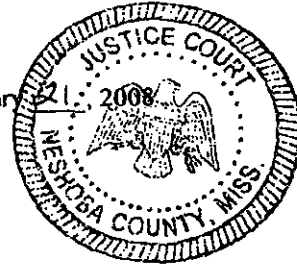
The affiant states the following facts to wit.

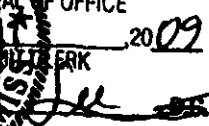
On Thursday 21st day of February 2008 a confidential informant that is known to Donnie Adkins and has given creditable information in the past told Donnie that he/she saw Crack Cocaine and Marijuana for sale and being used in a white trailer 1 mile from Columbus Avenue East onto Old Indian Hospital Road/Road 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.

It is based on these facts that your affiant respectfully request a search warrant be issued for this residence, go East 1 mile from Columbus Avenue onto Old Indian Hospital Road/Road 610 to a white trailer facing the road behind a house that is being torn down or falling down to include all outbuildings and vehicles.


Affiant


Justice Court Judge



STATE OF MISSISSIPPI
NESHOPA COUNTY
I, PATTI DUNN, CLERK IN AND FOR SAID
STATE AND COUNTY, DO HEREBY CERTIFY THAT THE ABOVE
AND FOREGOING IS A TRUE AND CORRECT COPY.
GIVEN UNDER MY HAND AND SEAL OF OFFICE
THIS 21st DAY OF FEBRUARY, 2008
BY 
PATTI DUNN, CLERK
NESHOPA COUNTY, MISS.

SEARCH WARRANT

STATE OF MISSISSIPPI

COUNTY OF NESHOBA

TO ANY LAWFUL OFFICER OF NESHOBA COUNTY

WHEREAS SHERIFF DONNIE ADKINS KNOWN TO ME TO BE A

CREDIBLE PERSON, HAS THIS DAY MADE COMPLAINT ON OATH BEFORE

ME AS FOLLOWS:

1. That affiant has good reason to believe that certain things hereafter described are now being concealed in or about the following place in this county:

Turn right off of Columbus Avenue onto Old Indian Hospital Road/Road 610, go East 1 mile to
A white trailer facing the road on the left behind a house that is being torn down or falling down

2. That the place described is occupied and controlled by:

Person or person's unknown

3. That said things are particularly described as follows:

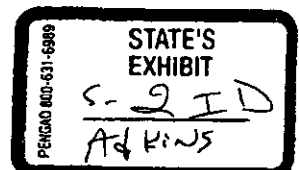
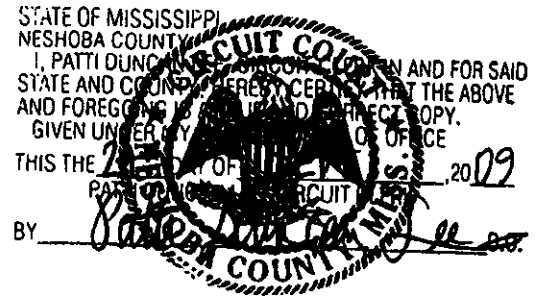
Possession of Controlled Substance, Crack Cocaine, Marijuana

4. That possession of the above described things is in itself unlawful, or the public has a primary interest in, or primary right to possession of the above described things, and that said things are:

In Violation of the Mississippi Code of 1972 Annotated 41-29-139

5. The facts tending to establish the foregoing grounds for issuance of a search warrant were shown on a sheet headed "Underlying Facts and Circumstances" which were reviewed by this Court.

6. This Court, having examined and considered the Affidavit, and also having heard all considered evidence in support thereof from the affiant named therein does find that probable cause for the issuance of a Search Warrant does exist. **THEREFORE**, you are hereby commanded to proceed at any time in the day or night to the place described above and to search forthwith said place for the things described above, making known to the person occupying or controlling said place, if any, your purpose and authority for so doing, and if the things specified above be found there to seize them, leaving a copy of this Warrant and a receipt for the things taken; and bring an inventory receipt of the things taken before this Court instantler; and have then and there this writ, with your proceedings noted thereon.



7. Do not interpret this writ as limiting your authority to seize all contraband and things the possession of which itself is unlawful which you find incident to your search, or as limiting your authority to make otherwise valid arrest at the place described above.

Witness my hand this 21 day of Feb 2008, at 5:25 am/pm

Steve Cumber
Issuing Judge



RETURN

I received this Warrant on the 21 day of Feb 2008, at 5:25 am/pm

And have executed it as follows:

On the 22 day of Feb 2008, at 7:35 am/pm, I searched
the place described in this warrant and left a copy of the Warrant with Roy Lee Johnson

The person occupying and controlling said place, together with a receipt for the items seized.

The following is an inventory of the things taken pursuant to the warrant:

SEE ATTACHED INVENTORY

This inventory was made in the presence of

Donnie Adkins Ralph Sciple

I swear that this inventory is a true and detailed account of all things taken by me on this warrant:

Donnie Adkins
AFFIANT

Steve Cumber
OFFICIAL TITLE

STATE OF MISSISSIPPI
NESHOBA COUNTY
I, PATTI DUNN, CLERK OF THE COURT, DO HEREBY CERTIFY THAT THE ABOVE
STATE AND COUNTY ARE THE CORRECT COPY,
AND FOR NO OTHER PURPOSE.
GIVEN UNDER MY HAND AND SEAL OF OFFICE
THIS 22 DAY OF FEBRUARY, 2009
BY Patti Dunn CLERK

SUMMARY OF THE ARGUMENT

1. To prove possession of contraband by use of the doctrine of constructive possession the prosecution must prove beyond a reasonable doubt that the accused is in exclusive possession of the premises in which the contraband is found or must prove beyond a reasonable doubt additional evidence beyond proximity to the contraband connecting the accused to the contraband. If no evidence other than proximity is introduced the accused is entitled to an acquittal.

2. An affidavit for search warrant based on a statement by a confidential informant to the applicant must assert the accuracy and reliability of information about criminal activity that the informant has supplied in the past.

ARGUMENT

I.

THE COURT ERRED IN DENYING THE MOTION FOR A DIRECTED VERDICT, IN REFUSING THE REQUEST FOR A PEREMPTORY INSTRUCTION AND IN DENYING THE MOTION FOR A NEW TRIAL

The State relied on the doctrine of constructive possession to establish Appellant's possession of the rifle. To inject constructive possession of contraband into a case, the prosecution must prove beyond a reasonable doubt that the accused is in exclusive possession of the premises in which the contraband is found or is the owner of the premises. *Fultz v. State*, 573 So. 2d 689 (Miss. 1990); *Powell v. State*, 355 So. 2d

1378 (Miss. 1978); *Hudson v. State*, 362 So. 2d 645 (Miss. 1978); If neither is true, as in the case before the Court, the prosecution must prove additional evidence beyond proximity connecting the accused to the contraband. In the case before the Court, no evidence other than proximity was adduced.

Thus in cases of joint possession of premises on or in which contraband is found, an accused's nearness to the contraband is insufficient to justify a conclusion that he or she possessed the contraband, and the accused is entitled to an acquittal absent some other competent evidence connecting him or her with the contraband.

In the case before the Court no evidence of who owned or leased the premises was introduced, and it appeared that Appellant and Ava Ward lived there. If we can conclude from this that Appellant and Ava Ward jointly possessed the premises, we cannot conclude that there was proof beyond a reasonable doubt introduced that Appellant was in exclusive control of the premises.

Therefore, the doctrine of constructive possession was not available to prove Appellant's possession of the rifle. Because the use of that legal fiction (constructive possession) was necessary to make the prosecution's case, the proof was deficient and the trial court erred in denying the motion for a directed verdict, in refusing the request for a peremptory instruction and in denying the motion for a new trial.

The verdict should be overturned.

II.

THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE RESULT OF THE SEARCH

No contraband narcotics were found inside the trailer when it was searched. The facts and circumstances portion of the Affidavit for Search Warrant includes only the following pertinent information:

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

These allegations have two defects: the reliability of the information given in the past is not specifically asserted in that it is not shown what kind of information was given and the information was described by the Sheriff as “credible” rather than credible, accurate or reliable.

In the case before the Court the prior “credible” information is not further described in the affidavit and the sheriff gave no further testimony to the magistrate. It may not have related to other crimes (it may have been a weather forecast). Since credible and accurate are not synonymous, it may have been inaccurate. Credibility of search warrant confidential informants is an element of probable cause under the Fourth Amendment of the United States Constitution and under Mississippi Constitution, Article 3, Section 23 (1890). *Barker v. State*, 241 So. 2d 355 (1970). Here it is not shown.

The verdict should be overturned.

CONCLUSION

The verdict should be overturned.


RESPECTFULLY SUBMITTED,


EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney; the Marcus Gordon, Circuit Court Judge, P.O. Drawer 220, Decatur, MS 39327 and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: October 9, 2009.


EDMUND J. PHILLIPS, JR.
Attorney for Appellant