COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2009-KA-00552-COA

ARVIN PHILLIP JOHNSON — **APPELLANT**

VERSUS

STATE OF MISSISSIPPI — **APPELLEE**

APPEAL FROM THE CIRCUIT COURT
OF MARION COUNTY, MISSISSIPPI

CAUSE NO. K07-0372P

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

1. The search of the vehicle was not reasonable under the circumstances because there were no exigent emergency circumstances at the time of the search. The search was not incident to a lawful arrest of Johnson and once Johnson was handcuffed and laying face down on the ground at the rear of the vehicle and guarded by two other armed officers Johnson nor Teddy presented a danger to officer safety nor did Johnson present a danger of the destruction of evidence.

2. The evidence was insufficient to prove possession of a controlled substance by Johnson once it was established that the vehicle at the scene did not belong to Johnson and there was no evidence offered that Johnson was aware of the presence of the bag over the sun visor and had knowledge that the bag contained drugs and exercised dominion and control over the drugs.

ARGUMENT

I. ILLEGAL SEARCH AND SEIZURE ARGUMENT REPLY

The United States Supreme Court's holding in ***Arizona v. Gant***, 129 S. Ct. 1710, (U. S. 2009) further explains when the police may search a vehicle, more particularly, the passenger compartment. Specifically the court holds

> "Police may search a vehicle incident to a recent occupant's arrest only if the ***arrestee*** (emphasis added) **is within reaching distance** of the passenger compartment **at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest**. (Emphasis added). When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies."

According to the testimony of Agent Harless Johnson was place on the ground and then handcuffed with his hands behind his back. R. 79-80. There is no question that the passenger compartment was no longer in reaching distance of the Johnson because he was on the ground

and his hands were cuffed behind his back. Further, Johnson was not under arrest at the time of the search, so the search of the vehicle's compartment was not a search incident to an arrest and the vehicle could not be searched on the basis that it was believed to have contained evidence of the offense of arrest since there was no arrest of the Appellant until after the search was conducted.

The State argues that the search falls under another exception to the warrantless search that being there were exigent circumstances and the search was necessary for officer safety and the preservation of evidence. (Appellee's Brief pages 8-9). This argument of the State is without merit because there were three (3) officers on the scene and Johnson was secured and handcuffed without incident. R. 79-80. The State attempts to distinguish the facts surrounding the search of the vehicle in this instance from the search of the vehicle in the case of ***Ferrell V. State***, 649 So.2d 831 (Miss. 1995) and ***Anderson v. State***, 16 So.3d 756 (Miss. Ct. App. 2009). Appellee points out that in ***Ferrell*** the defendant had been secured and placed into the back of the patrol car and that in this matter the Appellant was not in the back of the patrol car but rather remained outside of the vehicle. However, the fact remains that in this matter there was two (2) armed officers standing guarded Johnson, a non-arrestee, while the third officer conducted the search. Since Johnson was not under arrest, there was no probable cause to search the vehicle.

The State makes the argument that the search was necessary and reasonable under the circumstances because of emergency circumstances. However, the U. S. Supreme Court in reaching its decision in ***Gant***, id., limited the application of ***New York v. Belton***, 453 U.S. 454 (1981) in vehicle searches by holding that

> "***Belton*** does not authorize a vehicle search incident to a recent occupant's arrest after the ***arrestee*** has been ***secured*** and cannot access the interior." (Emphasis added).

There was no question that Johnson and Teddy had both been secured prior to the search being conducted. Agent Harless on direct examination testified as follows:

BY MR. SWEATT: (R. 68. Begin Line 13)

Q. "All right. We go back to your narrative and your chronological events. You had him on the ground, I think, and that's procedure, right?

A. Yes, sir.

Q. What did you do then?

A. We placed him on the ground. We would place them in handcuffs. We performed a pat-down of their persons for weapons. And then we would do what we call a wing-span search, which would be areas around them that had a struggle ensued they could easily get to to obtain a weapon, which in this case included, you know, the areas around the store, around the front of the store on the ground and the front passenger compartment of the car where Mr. Johnson would have had access to."

On cross-examination Agent Harless testified that Johnson was handcuffed behind his back and the search was conducted while Johnson was still on the ground in handcuffs. Specifically, he testified,

BY LAWRENCE (R. 79-80. Begin Line 20)

Q. "Okay. If I recall correctly, you all placed him on the ground; is that right?

A. Yes, sir.

Q. All right. And handcuffed him?

A. Yes, sir. That would be standard procedure and what was done in this case.

Q. All right. And were they handcuffed in front of them or behind them?

A. It would be behind them.

Q. Okay. And did they remain on the ground after they were handcuffed?

A. We got them back up off the ground. You know, we did not leave them there indefinitely. We got them back up off the ground to continue the investigation.

Q. While you were doing the wing-span search, were they on the ground or up off the ground at that time?

A. I believe they were on the ground.

Q. All right. So they were still on the ground while the wing-span search was being conducted?

A. Yes, sir. That would be my recollection of it."

The Supreme Court in reaching a decision in ***Gant, id.***, looked to its previous decision in ***Chimel v. California***, 395 U. S. 752 (1969) regarding when a warrantless search may be made incident to arrest and the area that may be searched. The court stated,

> "In ***Chimel***, we held that a search incident to arrest may only include "the arrestee's person and the area within his immediate control – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Ibid. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purpose of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. See ibid. ... **If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justification for the search-incident-to-arrest exception are absent and rule does not apply.** (Emphasis added) E.g., ***Preston v. United States***, 376 U.S. 364, 367-368 (1964)"

It would have been physically impossible for Johnson, while lying on the ground with his hands handcuffed behind his back, to reach into the area of the closed passenger compartment of the vehicle above the sun visor.

Further, the Supreme Court in ***Gant, id.***, explains the rationale in ***Chimel, id.***, and states:

> "the ***Chimel*** rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."

According to this rationale of ***Chimel*** as explained by the Supreme Court in ***Gant***, first Johnson was not an arrestee and even though he was not an arrestee he had been secured and the inside passenger compartment of the car was not within his reach from the ground.

The broad construction and interpretation of ***Belton, id.***, only authorizes the search of the vehicle after there has been an arrest. Johnson was not under arrest and there was no evidence presented by the State that he consented to a search.

The testimony of Agent Harless on cross-examination regarding whether Johnson was under arrest at the time of the search of the vehicle was as follows:

BY LAWRENCE (R. 80-81. Begin Line 22)

Q. "All right. Now, at the time that my client, Arvin Johnson, was placed on the ground and cuffed, was he under arrest?

A. No, sir. Not at that time.

Q. All right. And he was not under arrest because there was - - he was not the focus of this buy-bust; is that correct?

A. That's correct.

Q. Had no information that he had done anything improper or violated the law whatsoever?

A. No, sir."

There was no reason for Johnson to be placed under arrest at the time the agents arrived at the store because there was no evidence and no probable cause to reasonably believe that he had participated in the commission of a crime. This fact is further evident by Agent Harless testimony regarding the fact that nothing incriminating was found on Johnson. When questioned, Agent Harless testified as follows:

BY LAWRENCE (R. 81-82. Begin Line 8).

Q. When you conducted the pat-down search of my client, Arvin Johnson - - let me rephrase. Who conducted the search?

A. I did.

Q. Okay. When you conducted the pat-down search of Arvin Johnson what, if anything, did you find on his person?

A. Nothing that would be construed as a weapon. I can't remember. I believe there was a wallet and the general pocket-type things, but nothing that, you know, would have been evidence or a weapon.

BY LAWRENCE (R. 82. Begin Line 20)

Q. Okay. Now, the buy money, the marked money that you all provided to the confidential informant, that money wasn't taken off of my client, was it?

A. No, sir. It was not.

Q. And there's no allegations that the money was taken off my client?

A. No, sir.

Q. There's no allegation to your knowledge that my client, Arvin, even knew what had just occurred at the store; is that right?

A. No, sir.

Since Johnson was not under arrest and was not under suspicion to have participated in the crime in any way there was no reasonable basis or exigent circumstances that existed to allow a warrantless search of the vehicle.

II. CONSTRUCTIVE POSSESSION AND J.N.O.V. ARGUMENTS IN REPLY

For the purpose of this reply Johnson will combine his argument in response to the State's argument that there was sufficient credible evidence in support of constructive possession and sufficient evidence for denying Johnson's post conviction motions.

The State argues that under ***Simmons v. State***, 805 So.2d 452 (Miss. 2001), the MBN agents had a right to search the vehicle based upon and exception for a warrantless search and specifically because of an emergency or exigent circumstances that involved the safety of the officers and preservation of evidence. The court in ***Simmons, id.***, when addressing and articulating the elements of an emergency situation, held;

> "The basic elements of the emergency exception are: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) The search must not be primarily motivated by intent to arrest and seize the evidence; (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." ***Id.*** at 484.

This argument of the State that emergency or exigent circumstances existed at the time of the search fails for the following reasons. (1) Johnson and Teddy were in handcuffs with their hands behind their backs; R. 79.; (2) Johnson and Teddy are on the ground (presumably in the procedural face down position) and are guarded by two (2) armed officers while the search is being conducted by Agent Harless; R. 80-81, and (3) Neither, Johnson nor Teddy offered any resistance to being handcuffed. R. 53-86.

The State failed to prove based upon the standards set forth in ***Simmons, id.***, that an emergency or exigent circumstances existed. First, there are no reasonable grounds to believe that there is an emergency at hand and an immediate need for the assistance of law enforcement is required to protect life or property. No such reason was put forth by the State support by any of the evidence presented. Secondly, the search could not be primarily motivated by intent to arrest and seize evidence. Agent Harless testified exactly that the reason for the search was to seize evidence and only added officer safety when prompted by the prosecution. R 66. Finally, there was no reasonable basis, approximating probable cause, to associate the alleged emergency with the area or place to be searched. There was never any testimony or allegations that Teddy, the focus of the buy-bust operation, was seen sitting in the vehicle or exiting the vehicle or passing anything to a person in the vehicle or that he had any contact with the vehicle in any manner whatsoever. R. 53-90.

The State in making its arguments appears to rely heavily upon the fact that Johnson did not testify nor called any witnesses to prove that he was not the owner of the vehicle or who had permission to operate the vehicle. (Appellee's Brief pages 16, 17, 18, and 21) The burden of proof to prove every element of the offense charged beyond a reasonable doubt lies upon the State and not the accused. An essential element of proving constructive possession is proof of the

fact that the accused knew of the presence of drugs and exercised dominion and control over the drugs. ***See, Ferrell v. State, id.***; ***Cunningham v. State,*** 583 So.2d 960, 961 (Miss. 1991) and ***Gavin v. State,*** 785 So.2d 1088, 1093 (Miss. App. 2001).

The State argues that Johnson offered no proof of ownership of the vehicle. It was not necessary for Johnson to offer any proof as it was established through the State's witness, Agent Harless, that it was determined on the scene that Johnson was not the owner of the vehicle. Specifically, when asked about the vehicle Agent Harless testified as follows:

BY LAWRENCE (Transcript page 85 Line 10)

Q. Okay. All right. And were you able to establish whether or not the vehicle was registered in Arvin Johnson's name?

A. No sir. It was not.

Q. So there were no legal documents that said that he was the owner of the car?

A. No, sir.

Q. In fact, I believe just based upon your response a moment ago, the vehicle was actually released to someone else; is that correct?

A. Yes, sir.

Q. And it was release there on the scene?

A. Yes, sir.

It was clearly established through Agent Harless testimony that Johnson did not own the vehicle as it was not registered in his name and it was established on the scene that he was not the owner of the vehicle. R. 85. Since Johnson was not the owner of the vehicle where drugs were found, the theory of his possession of the drugs would be based upon constructive possession. See, ***Fultz v. State,*** 573 So.2d 689, 690 (Miss. 1990). To prove constructive

possession of the drugs, the State would have to prove beyond a reasonable doubt that Johnson had knowledge of the presence of drugs in the car and therefore exercised a conscious dominion and control over the drugs. See, ***See, Ferrell v. State, id.***; ***Cunningham v. State, id.*** and ***Fultz id.***

According to the testimony of Agent Harless the search of Johnson did not yield any evidence that he had participated in any crime or was in any way engaged in any criminal activity. R. 81-82. Further, neither Agent Harless nor anyone at his request attempted to obtain any fingerprints from the plastic bag, which could have proven conclusively that Johnson had handled the piece of plastic and therefore presumably knew what was in it. R. 84.

Because no evidence was offered by the State to prove that Johnson knew of the presence of drugs in the car and exercised dominion and control over the drugs the jury was left to draw this assumption not based upon evidence presented but based upon speculation and the jury decision was therefore against the overwhelming weigh of the evidence.

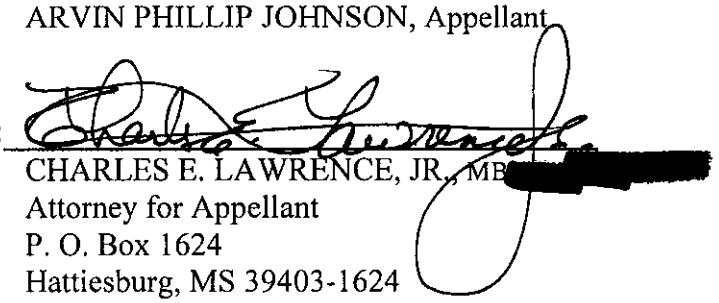
The State argues in its brief, Appellee's Brief page 17, that there was corroborated testimony that Johnson drove up to the place of the previous sale. Although the States points to the testimony of Agent Harless, R. 64-67, there was never any testimony that Agent Harless nor any of the other agents ever saw Johnson driving the vehicle or exiting the vehicle. As a matter of fact Agent Harless conducted the pat-down search of Johnson and when he was asked what, if anything, did he find on Johnson, he did not testify that he found the keys of the vehicle on Johnson. R. 81.

CONCLUSION

In reply to the brief filed by the State, Johnson renews his request that his conviction be reversed and rendered.

Respectfully submitted,

ARVIN PHILLIP JOHNSON, Appellant

BY: 

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CERTIFICATE OF FILING AND SERVICE

I, CHARLES E. LAWRENCE, JR., Attorney for Appellant, Arvin Phillip Johnson, do hereby certify that I have this day mailed by U.S. first class mail, postage prepaid, the original and three (3) copies of the Appellant's Reply Brief to the Clerk of the Supreme Court at P. O. Box 249, Jackson, MS 39205-0249 and a true and correct copy of the above and foregoing Appellant's Brief to the following:

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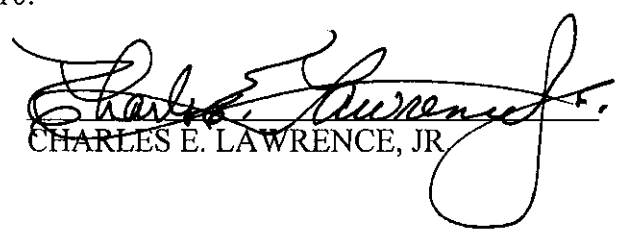
THIS the 10th day of March, A.D., 2010.



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