IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

REGINALD SHELTON
AND CALVIN P. SHELTON, JR. — APPELLANT

VS.

NO. 2009-KA-0694
- consolidated with -
NO. 2009-KA-0695

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

I. THE SUBSTANTIAL CREDIBLE EVIDENCE PRESENTED AT THE SUPPRESSION HEARING SUPPORTS THE TRIAL COURT'S DECISION TO DENY THE APPELLANTS' MOTION TO SUPPRESS.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE BLACK DUFFLE BAG CONTAINING MARIJUANA INTO EVIDENCE AS THE STATE SUFFICIENTLY ESTABLISHED THE PROPER CHAIN OF CUSTODY.

III. THE TRIAL COURT PROPERLY REFUSED PROPOSED JURY INSTRUCTIONS D-10 AND D-11.

IV. THE TRIAL COURT PROPERLY DENIED THE APPELLANTS' MOTION FOR NEW TRIAL AS THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE FACTS

At approximately 2:00 a.m. on February 20, 2006, Officer Robert Sanders of the Madison County Sheriff's Department pulled over a vehicle rented and driven by the Appellant, Calvin Shelton, on Interstate 55 for careless driving. (Transcript p. 143 - 145 and 147). Shelton's brother the Appellant, Reginald Shelton, was a passenger in the vehicle. (Transcript p. 150). During the stop, Officer Sanders used the narcotics trained canine traveling with him to scan the vehicle and received a positive alert. (Transcript p. 152 - 153). The trunk of the vehicle was searched and a black bag containing what was later determined to be eighteen pounds of marijuana was found. (Transcript p. 153 - 154, 218, and 220). The men were arrested, tried, and convicted of possession of more than five kilograms of marijuana. Both men were sentenced to serve twenty-five years, with five years suspended, in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The trial court properly denied the Appellant's motion to suppress. Substantial credible evidence was presented establishing not only that the stop was valid and legal but also that the detention did not exceed the scope of the stop. The officer articulated specific facts supporting his decision to stop the Appellants for careless driving. As he had probable cause to believe that a traffic violation had occurred, the stop was reasonable. Additionally, the detention did not exceed the scope of the stop as each of the officer's actions taken during the detention were reasonably related to the purpose of the stop.

The trial court did not abuse its discretion in allowing the black duffle bag containing marijuana into evidence as the State sufficiently established the proper chain of custody. The Appellants failed to meet their burden on appeal of proving that the bag in question and its contents were anything other than what they were purported to be.

The trial judge properly denied proposed jury instructions regarding unreasonable searches as it is the trial judge's responsibility, not the jury's responsibility, to determine the legality of searches. Additionally, the verdict was not against the overwhelming weight of the evidence.

ARGUMENT

I. THE SUBSTANTIAL CREDIBLE EVIDENCE PRESENTED AT THE SUPPRESSION HEARING SUPPORTS THE TRIAL COURT'S DECISION TO DENY THE APPELLANTS' MOTION TO SUPPRESS.

The Appellants first argue that the black duffle bag containing marijuana should have been suppressed from the evidence as "there was no probable cause to stop [the Appellants] and as the scope of the stop was exceeded." (Appellants' Brief p. 17). The standard of review for "suppression hearing findings is whether or not substantial credible evidence supports the trial court's findings considering the totality of the circumstances." *Price v. State*, 752 So.2d 1070, 1073 (Miss. Ct. App. 1999). "The appellate review should disturb the findings of the lower court only where there is an absence of substantial credible evidence supporting it." *Id.* (*emphasis added*). Further, "the proponent seeking to overturn a denial of a motion to suppress has the burden of proving, by a preponderance of the evidence, that the confession or evidence in question were obtained in violation of his Fourth Amendment rights." *Walker v. State*, 913 So.2d 198, 225 (Miss. 2005).

The Appellants claim that "there was not justification for the stop of [their] vehicle from the outset." (Appellants' Brief p. 9). The Mississippi Supreme Court has noted that there is no "concrete rule to determine what circumstances justify an investigatory stop." *Floyd v. City of Crystal Springs*, 749 So.2d 110,115 (Miss. 1999) (citing *Green v. State*, 348 So.2d 428, 429 (Miss. 1977)). The Court also noted that the "question is approached on a case by case basis." *Id.* However, as a general rule, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* (quoting *Whren v. United States*,

517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996)). In the case at hand, the officer clearly articulated his reason for observing the Appellants' vehicle in the first place and for ultimately stopping the Appellants' vehicle:

Q: . . . So you pulled out behind them at [mile marker 112]?
A: Yes, sir.
Q: Okay, why?
A: To observe their driving.
Q: Was there any particular reason?
A: Yes, sir. Generally, vehicles, we observe vehicles at that time of the morning, a lot of times, the drivers, if they're traveling for some distance, they're either tired or possibly intoxicated or something of that nature.

(Transcript p. 14).

Q: All right, tell the jury exactly where you were, where the Dodge was and what happened that led to the stop?
A: I observed the vehicle as it was traveling south on Interstate 55. I conducted a traffic stop for careless driving. The vehicle came to rest at approximately the 108 mile marker, which is the Madison exit, southbound on Interstate 55.
Q: All right, you said that you pulled them over for careless driving. If you can remember, I need you just to specifically tell this jury what you observed the driver of the white Dodge doing that led you to pull them over for careless driving.
A: The vehicle was stopped for careless driving. Failure to maintain a single lane due to the vehicle going off of what we term the fog line, which could be the white stripe on the interstate, and then crossing back over to the center line.

(Transcript p. 144 - 145).

Q: Approximately how many times did he fail to maintain a single lane. . . ?
A: Twice.

(Transcript p. 8).

Q: . . . you had already determined that you were going to give him a ticket for careless driving?
A: That I had witnessed careless driving, yes, sir.
Q: And you were going to ticket him for it? That's the purpose for stopping him?
A: That's correct.

(Transcript p. 19). Additionally, Officer Sanders testified regarding their normal procedure for

"working the interstate":

> We monitor the flow of traffic. A lot of times, due to the time of night and all that we work, we have had several instances where you might pull out and you may follow someone and monitor their speed, their travel, whether or not they're weaving off the shoulder of the road. We generally - - well, we do. We conduct traffic stops. We have had several people that will tell you, yes, I have been traveling for several, for great distances, I am getting tired, and we'll direct them to the closest motel, or somewhere like that, or off the exit to where they can rest for a while, and we'll generally follow them to make sure they get there all right. In the same instance, we'll stop people for careless driving or whatever, and they have had too much to drink, and the sheriff's department has a DUI enforcement unit, we'll call them out to the scene and turn the case over to them, or we may monitor their travel and they're traveling fine, and we don't do anything. We don't conduct a traffic stop.

(Transcript p. 210).

Nonetheless, the Appellants claim the stop was pretextual. (Appellants' Brief p. 9). The Mississippi Supreme Court previously dealt with the issue of an alleged pretextual stop by quoting the Fifth Circuit as follows:

> The traffic stop may have been pretextual. But under *Whren v. United States*, [517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)], a traffic stop, even if pretextual, does not violate the Fourth Amendment if the officer making the stop has "probable cause to believe that a traffic violation has occurred." This is an objective test based on the facts known to the officer at the time of the stop, not on the motivations of the officer in making the stop. On the other hand if it is clear that what the police observed did not constitute a violation of the cited traffic law, there is no "objective basis" for the stop, and the stop is illegal.

Walker, 913 So.2d at 225-26 (quoting *United States v. Escalante*, 239 F.3d 678, 680-81 (5th Cir. 2001)). Officer Sanders testified at the suppression hearing that the basic reason for the traffic stop was "failing to maintain a single lane" and explained that the vehicle was "weaving off the shoulder of the road and crossing the center line." (Transcript p. 7 - 8). This certainly qualifies as belief that a traffic violation, i.e., careless driving occurred. Mississippi Code Annotated §63-3-1213 states that "any person who drives any vehicle in a careless or imprudent manner, without due regard for the width, grade, curves, corner, traffic and use of the streets and highways and all other attendant

circumstances is guilty of careless driving." As this Court held in *Henderson v. State*,"carelessness is a matter of reasonable interpretation, based on a wide range of factors." 878 So.2d 246, 247 (Miss. Ct. App. 2004). Moreover, the *Henderson* Court also noted that "failure to have regard for the width and use of the street by swerving off the side of the road or crossing the marker lines constitutes probable cause for a traffic stop." *Id.* (citing *Saucier v. City of Poplarville*, 858 So.2d 933, 935 (Miss. Ct. App. 2003)). *See also Tran v. State*, 963 So.2d 1, 13 - 14 (Miss. Ct. App. 2006) (holding that "crossing a fog line" can be a reasonable basis for a stop); *Adams v. City of Booneville*, 910 So.2d 720 (Miss Ct. App. 2005); and *Guerrero v. State,* 746 So.2d 940, 943 (Miss. Ct. App. 1999). Thus, there was certainly substantial credible evidence that Officer Sanders believed that Calvin Shelton was guilty of careless driving. As such, a legal stop was made.

The Appellants assert, however, that even if there was probable cause to stop their vehicle, the officer's "detention of them exceeded the purpose of the initial stop and there was no legal basis to expand the investigation." (Appellants' Brief p. 13). The State of Mississippi disagrees. In looking at the reasonableness of an investigatory stop, "the appropriate inquiry is 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the inference in the first place.'" *Boches v. State*, 506 So.2d 254, 264 (Miss. 1987) (quoting *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 1573, 84 L.Ed.2d 605 (1985)). At the hearing on the Sheltons' motion to suppress, Officer Sanders testified in detail regarding exactly what transpired during the stop and about how the stop was conducted:

> I approached the vehicle, spoke to the driver [Calvin Shelton]. I asked the driver to please step to the rear of the vehicle with his driver's license and other paperwork. . . . once I made that request, I went back to the back of the vehicle and observed the occupants of the vehicle. They sat there for a moment, apparently looking for the rental agreement because they were shuffling papers around and conversing in the vehicle. Mr. Calvin Shelton, he came to the rear of the vehicle, and he was identified as the driver through his Georgia driver's license, and then he was also identified as

> the renter of the vehicle, which was verified. He handed me an Avis rental agreement. . . . After speaking with the driver, he had stated that they had been in New Mexico at a wedding of a family member. And I told him I would be with him in just one moment. I went up and spoke to the passenger, Reginald Shelton. And when I walked up to the vehicle, he was staring straight ahead, he didn't really want to make eye contact with me, but he was identified as the brother, or he stated he was Mr. Shelton's brother. I asked him where they had been. He said also that they had been in New Mexico, but he said just visiting some friends. . . . I did go ahead and ask for consent to search. And Calvin Shelton told me, he said, there's nothing in the vehicle. He didn't want me to search the vehicle. . . . I did run a records check through the sheriff's department. And I was waiting on that to return. And while doing so, I asked for another unit to come to the scene. . . I had a patrol canine with me, or he is a narcotics trained canine, and I used the dog to scan the exterior of the vehicle, and the dog did give a positive alert on the vehicle. . . . Mr. Shelton, being Calvin Shelton, was advised of the alert. The dog was returned to the vehicle. And by that time, or prior to the scan of the vehicle, Sergrant Pecu had arrived, and a check of the vehicle was conducted. . . . Whenever we opened the trunk of the vehicle, there was a duffle bag in the back portion. Their luggage was up, was on the front portion of the trunk and then up next to, I guess you'd say, the back of the rear seat, there was a duffle bag, and it was approximately 25 pounds of marijuana was located in the duffle bag.

(Transcript p. 8 - 13). Additionally, Officer Sanders testified that he did issue Mr. Calvin Shelton a ticket for careless driving during the stop. (Transcript p. 8).

As set forth above, Officer Sanders was justified in making the initial stop. So the inquiry becomes whether the detention exceeded the scope of the stop. In this regard, the Appellants question Officer Sanders' decision to question them about where they were going and where they had been. (Appellants' Brief p. 13). However, Officer Sanders testified during cross examination that some of the things he looks for while monitoring the flow of traffic at this time of night are overly tired drivers and intoxicated drivers. (Transcript p. 14). During trial when asked on cross examination what his purpose was in asking these questions, Officer Sanders replied:

> Well, sir, my purpose of it was to, and the reason I asked him where he was coming or where they had been, I always determine maybe if there weaving was due to him being tired, possibly intoxicated or some other means. So I wanted to talk to him for a while to see if in fact he was tired or if had been drinking. . . . my purpose was to make sure that he would be okay to continue down the road. The last thing I would

> want to do is let him go and then he have a wreck down the road because he was too tired to continue.

(Transcript p. 187). The Fifth Circuit stated in *United States v. Davis*, that it had "rejected the notion that mere questioning during a traffic violation stop, even on a subject unrelated to the initial purpose of the stop itself, is a violation of the Fourth Amendment." 61 F.3d 291, 300 (5th Cir. 1995) (citing *U. S. v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993)). The Court further held that "such questioning is reasonable if the detention continues to be supported by the facts justifying the initial stop." *Id.* Officer Sanders' purpose in making the stop was two-fold: to issue a ticket for careless driving and to make sure the driver was not intoxicated or too tired to drive. Certainly, asking questions about where the driver was coming from and where he was headed were related to this purpose.

The Appellants also question Officer Sanders's decision to ask for consent to search their rented vehicle. However, the Fifth Circuit found no constitutional violation where the officer asked for consent to search a vehicle while waiting for results of a routine computer check after stopping a car for speeding. *U. S. v. Shabazz*, 993 F.2d 431, 437 (5th Cir. 1993). After being denied consent, Officer Sanders used the canine traveling with him to scan the vehicle. As noted in *Jaramillo v. State*, "[e]ven without reasonable articulable suspicion, the performance of a dog sniff of the outside of a vehicle by a trained canine during a routine, valid traffic stop is not a violation of one's Fourth Amendment rights against unreasonable searches and seizures." 950 So.2d 1104, 1107 (Miss. Ct. App. 2007). The canine gave a positive alert at the trunk of the car; therefore, the search of the trunk was valid. *See Millsap v. State,* 767 So.2d 286, 292 (Miss. Ct. App. 2000) (holding that "once the dog 'alerted' to the trunk of the car, probable cause to search the vehicle was established").

Nonetheless, the Appellants argue that their situation in identical to that of *United States v. Dortch*, 199 F.3d 193 (5th Cir. 1999), a case wherein the conviction was ultimately reversed because

the Court found that the defendant was illegally detained. However, the case is easily distinguished from the situation at hand. In *Dortch*, the defendant was detained until the canine team arrived. In the case at hand, the Appellants were not forced to wait on the canine to arrive. The dog was traveling with Officer Sanders. While the specific time line of events is not entirely clear from the record, Officer Sanders's testimony indicates that while he was waiting on the results of the record check he asked for consent to search, called for another unit to come to the scene, and allowed the canine to scan the vehicle. (Transcript p. 11 - 12).[1] In *Dortch*, the Court noted that the justification for the stop ended when the results of the computer check came back negative and the dog sniff occurred after the completed check. Id. at 200. The *Dortch* Court went on to hold that the dog sniff, "if performed during the detention, would not have violated [the defendant's] constitutional rights." *Id.* Furthermore, the United States Supreme Court held:

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. (*citations omitted*). A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. (*citations omitted*). A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But the fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable. (*citations omitted*). The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.

U.S. v. Sharpe, 470 U.S. 675, 686-87, 105 S.Ct. 1568, 1575-76, 84 L.Ed.2d 605 (1985). Accordingly, the detention did not exceed the scope of the stop.

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[1] Officer Sanders did testify that he did not know at the time of the actual search whether he had received the results of the record check. (Transcript p. 11).

The evidence presented clearly establishes that a valid legal stop was made. The evidence further establishes that the detention did not exceed the scope of the stop. Thus, the Appellants failed to prove by a preponderance of the evidence that the black duffle bag containing marijuana was obtained in violation of their Fourth Amendment rights. As such, the trial court properly denied their motion to suppress.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE BLACK DUFFLE BAG CONTAINING MARIJUANA INTO EVIDENCE AS THE STATE SUFFICIENTLY ESTABLISHED THE PROPER CHAIN OF CUSTODY.

The Appellants next question "whether the State proved chain of custody of the alleged drug evidence." (Appellant's Brief p. 17). The Mississippi Supreme Court has previously held that "[t]he chain of custody of evidence in control of the authorities is usually determined within the sound discretion of the trial judge, and unless this judicial discretion has been so abused as to be prejudicial to the defendant, this Court will not reverse the rulings of the trial court." *Nix v. State*, 276 So.2d 652, 653 (Miss. 1973) (citing *Wright v. State*, 236 So.2d 408 (Miss. 1970)). The burden of producing evidence of a broken chain of custody is on the defendant. *Hemphill v. State*, 566 So.2d 207, 208 (Miss. 1990). "The test for chain of custody is to ascertain whether there is any indication of tampering or substitution of evidence." *Wells v. State*, 604 So.2d 271, 277 (Miss. 1992). Furthermore, "the presumption of regularity supports the official acts of public officers." *Nix*, 276 So.2d at 653.

In the case at hand, chain of custody was established through the following testimony:

Q: Sergeant Sanders, I have rolled you what appears to be a black suitcase duffle bag and ask if you could recognize that?
A: Yes, sir. That is the bag that was in the trunk of the car.
Q: How do you know that?
A: Because it was secured in the evidence at the Madison County Sheriff's Department.

(Transcript p. 154).

Q: Officer Sanders, I believe I was asking you about that bag and how you knew that was the same bag?
A: Yes, sir, it's got an evidence tag on it, which indicates the case number, the approximate weight of what the substance is, the date that it was seized and whom the evidence was recovered by.
Q: Who recovered that evidence?
A: I did.
Q: You did? What did you do with the evidence?
A: It was logged in at the sheriff's department.
* * *
Q: . . . When did you retrieve the evidence for this case today?
A: Yesterday.
Q: Where did you retrieve it from?
A: From the evidence locker.

(Transcript p. 157 - 158).

Q: . . . do you recognize the contents inside that bag?
A: Yes, sir.
Q: How do you recognize it?
A: They're secured with evidence tape, and it also has the stickers on it where it was taken to the State Crime Lab.
Q: All right, let me ask you about the duffle bag there before you pull anything out. Is that bag in the same or substantially the same condition as when you last saw it?
A: Yes, sir.

(Transcript p. 160).

Q: . . . Now the marijuana, when you turned it in, where did you say you turned it in to?
A: The sheriff's department
Q: Where in the sheriff's department?
A: The narcotics unit.
Q: Where does it go then?
A: Into evidence storage.

(Transcript p. 161 - 162).

Q: And you say this was the bag you found; is that correct?
A: That's correct.
* * *
A: Sergeant Pecu filled out the tag, sir, and then I turned it in to Lieutenant

Tucker.

* * *

A: I carried it to Lieutenant Tucker, sir, who logged it in, or who actually carried it to the evidence vault. I do not have a key to the evidence vault.

(Transcript p. 195 - 197).

Q: Who submitted the dope, according to that?
A: I did.
Q: Where did you submit it?
A: To the State Crime Lab
* * *
Q: All right, you're receiving the evidence, meaning the marijuana?
A: Yes, sir.
Q: From the State Crime Lab?
A: That's correct.

(Transcript p. 204). This testimony establishes that Officer Sanders recovered the evidence from the trunk of the Appellant's vehicle, Officer Pecu filled out the evidence tags, and Officer Sanders submitted the evidence to Lieutenant Tucker who actually placed the evidence into the evidence locker. Officer Sanders later retrieved the evidence and submitted it to the State Crime Lab for testing. He retrieved the evidence after testing and returned it to the evidence locker. The day before trial Officer Sanders again retrieved the evidence from the evidence locker so it could be presented at trial. There is nothing in the above-referenced testimony or in any other testimony at trial which reflects that the black bag containing marijuana presented at trial is any other bag than the one found in the Appellants' vehicle.

Nonetheless, the Appellants argue that "missing drugs and missing labels clearly establish more than an inference of probable tampering." (Appellant's Brief p. 19). First, there were no missing drugs. Officer Sanders testified that he found a black bag in the Appellants' trunk containing approximately twenty-five pounds of marijuana. (Transcript p. 13 and 175). There was no testimony evidencing that Officer Sanders actually weighed the drugs at the scene. He merely

estimated the weight. When the drugs were later weighed at the Mississippi Crime Lab, it was determined that the weight was actually eighteen pounds. (Transcript p. 220). Clearly, this is not a case involving missing drugs. Furthermore, "a small discrepancy [in weight] does not indicate tampering that would affect a substantial right of the defendant." *Milliorn v. State,* 755 So.2d 1217, 1225 (Miss. Ct. App. 1999). Second, there were no missing labels. Officer Sanders testified that they did not place labels on anything except the black bag. (Transcript p. 196 - 199). The label on the bag was still intact. The Appellants seem to take issue with the fact that the marijuana found in the bag did was not labeled by the sheriff's department. However, there is nothing in Mississippi law which requires investigating officers to label the evidence they collect. The only requirement with regard to chain of custody is that the trial court believe that the evidence is that which it is purported to be and found no evidence of tampering or substitution. The trial judge obviously found this bag to be the bag Officer Sanders found in the Appellants' trunk.

Moreover, it is well-established that "[t]he purpose of requiring a chain of evidence gathered by law enforcement officials is to afford reasonable assurance that the evidence is genuine and that there has been no substitution through inadvertence or malfeasance." *Jones v. State*, 761 So.2d 907, 911 - 912 (Miss. Ct. App. 2000) (citing *Wells v. State*, 604 So.2d 271, 277 (Miss. 1992)) (*emphasis added*). The Appellant failed to meet their burden of proving that evidence in question is anything other than what its purported to be. Thus, the trial court did not abuse its discretion in allowing the black bag containing marijuana into evidence.

III. THE TRIAL COURT PROPERLY REFUSED PROPOSED JURY INSTRUCTIONS D-10 AND D-11.

The Appellants next argue that the trial court "wrongfully denied a theory of defense instruction." (Appellant's Brief p. 20). The instructions at issue are set forth below:

> Proposed Jury Instruction D-10
> Under the Fourth Amendment of the United States Constitution, the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be searched.

(Record p. 31).

> Proposed Jury Instruction D-11
> Under Article 3, §23 of the Mississippi Constitution, the people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

(Record p. 32). Jury instructions are within the sound discretion of the trial court. *Shumpert v. State,* 935 So.2d 962 (Miss. 2006) (citing *Goodin v. State,* 787 So.2d 639, 657 (Miss. 2001)).

As noted in their brief, the Appellants argue that "a main part of [their] theory of the defense in this case is that Officer Sanders conducted an illegal search and planted the dope evidence" and therefore, they "requested two instructions explaining the prohibition against unreasonable search and seizure. . ." (Appellant's Brief p. 20). However, this Court has previously held that "[i]t is the trial judge's responsibility, not the jury, to determine the admissibility of the fruits of the search." *Cagler v. State,* 844 So.2d 487, 492 (Miss. Ct. App. 2003) (citing *Holt v. State*, 348 So.2d 434, 439 (Miss.1977)). Further, "the evidence before the trial judge is not to be again offered before the jury." *Id.* (quoting *Salisbury v. State*, 293 So.2d 434, 438 (Miss.1974)). In the case at hand, the trial judge determined at the suppression hearing that the search was legal. The issue was not to be decided by the jury as it was a legal question already decided by the trial judge. Thus, the trial court properly

denied the instructions.

IV. THE TRIAL COURT PROPERLY DENIED THE APPELLANTS' MOTION FOR NEW TRIAL AS THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Lastly, the Appellants argue that the verdict was against the overwhelming weight of the evidence. (Appellant's Brief p. 21). The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

> [This court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice."

Pierce v. State, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)). On review, the Court must accept as true all evidence favorable to the State. *McClain v. State,* 625 So.2d 774, 781 (Miss.1993).

In this regard, the Sheltons argue that their case "came down to whether or not the jury believed Officer Sanders or the Sheltons." (Appellant's Brief p. 22). Specifically they argue that "the questionable testimony of the officer, the missing and unlabeled evidence are, at best, unreliable and insufficient to support the conviction." (Appellant's Brief p. 22). However, "[i]t is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief." *House v. State*, 735 So.2d 1128 (Miss. Ct. App.1999). The evidence in this case certainly justifies the verdict. Officer Sanders found a black bag containing marijuana in the trunk of the car rented to and driven by Calvin Shelton with Reginald Shelton as a passenger. Both men's luggage was found in the trunk of the car where the marijuana was found and Reginald testified that they put their bags in the trunk. (Transcript p. 244 - 246). Additionally, as noted earlier in this brief there were no missing drugs or labels. Accordingly,

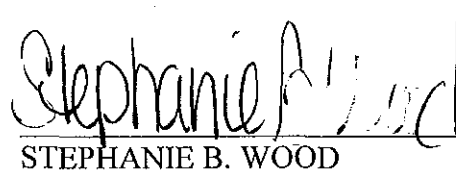
the trial judge properly denied the Sheltons' motion for a new trial.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the Sheltons' convictions and sentences as the black bag containing marijuana was properly admitted in to evidence, the jury was properly instructed, and as the verdict was not against the overwhelming weight of the evidence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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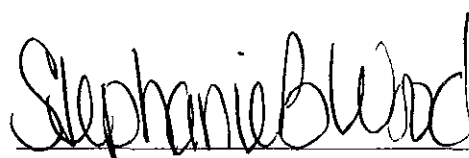
Jackson, MS 39215

This the 2nd day of September, 2009.



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