IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GARY ALLEN GLIDDEN — APPELLANT

VS. — NO. 2009-KA-1061

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Procedural History

Gary Allen Glidden was tried in the Circuit Court of the First Judicial District of Harrison County on a charge of possession of more than 30 grams but less than a kilogram of marijuana with the intent to transfer or distribute. (C.P.8) After the trial court directed a verdict on the issue of intent, Glidden was convicted of simple possession of a controlled substance and thereafter was sentenced to a term of four years in the custody of the Mississippi Department of Corrections. (T.106, 142, 150) Aggrieved by the judgment rendered against him, Glidden has perfected an appeal to this Court.

Substantive Facts

Sergeant Greg Goodman of the Gulfport Police Department testified that he and Detective Steve Compston were on patrol on September 18, 2006. A few minutes before 5:00 p.m., they observed a 1987 Dodge Ram pickup truck turning without a signal. They stopped this vehicle at 31st Street and Hewes Avenue. Once the truck stopped, the officers

got out of their car. According to Sergeant Goodman, "The driver of the pickup truck exited the vehicle and met Detective Compston at the rear of the vehicle, and I approached the passenger side of the truck."[1] Officer Goodman testified that he saw no one else running from the truck, and no one else was inside it. When he was asked, "And what happened from there?" Sergeant Goodman testified, "At that time is when looking through the passenger window I saw a large Zip-lock bag which I believed to contain marijuana, and I advised Detective Compston to go 1015, signal 30 green," which meant, "Take the driver into custody" for "possession of marijuana." (T.66-69)

Sergeant Goodman went on to testify that the stop occurred on a "bright sunny afternoon" and that he had a clear view inside the truck from the passenger window. He "could see right through to the driver's floorboard," where the bag rested with "[p]robably not even an inch of it ... under the driver's seat. The remainder of the bag was "[s]ticking out into the floorboard of the truck." He saw this bag "immediately" upon approaching the vehicle. The bag was not moved before it was photographed. (T.69-71)

Detective Compston corroborated Sergeant Goodman's testimony about the stop, as well as the fact that the defendant was the sole occupant of the truck. (T.82, 83) He went on to testify as follows:

> I initiated my blue lights, and the truck, instead of pulling to the right side of the road, pulled to the left side of the road and stopped in front of a residence. Mr. Glidden exited his vehicle– immediately exited the vehicle and started toward the rear of his vehicle. I exited mine, made contact with him at the rear of

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[1]Officer Goodman identified the driver as the defendant. (T.67)

> the vehicle and advised him why I stopped him and asked for his driver's license and proof of insurance.
>
> (T.82)[2]

When Detective Compston "started talking to Mr. Glidden," Sergeant Goodman "walked up to the ... right side of the vehicle, passenger's side, and once he got to the passenger door of the vehicle" he turned to Detective Compston and gave the "signal 30, 1015." Detective Compston then "placed Mr. Glidden under arrest and handcuffed him." (T.83) Thereafter, Detective Compston looked inside the truck and "saw a Zip-lock bag full of green leafy substance ... " on the floorboard of the driver's side. He photographed the bag before anyone moved it. (T.84-85)

The state's expert witness identified the substance in question as marijuana in the amount of 450 grams. (T.99)

The defendant testified that he had been employed by Yuki's Restaurant for approximately five and a half years. (T.107) When asked to recount the events leading up to the traffic stop, Glidden testified as follows:

> I was working for Comfort Air Condition at that time, and my boss had went to the hospital here because he had cancer. He checked in on September the 10th and everything kind of shut down. But I lived in the shop here on 21st Street. Joseph Buckner and his wife Janice at that address, 334 31st Street, were putting an air conditioner in their house, and that's what I was doing. He came and picked me up to finish the job because he learned that my boss was going to be in the hospital for a while, so it was shut down. So he came and picked me up, and I had my tools in his truck. I went to his house and I was working on a 5-ton system in his house there.

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[2]Officer Goodman identified the driver as the defendant. (T.67)

* * * * *

> There was an emergency service call, which I had a beeper, and it was on 26th Street. Mrs. McMillan had a house right off Hewes Avenue and 26th.
>
> (T.108)

Buckner allowed Glidden to use his truck to make the service call. Glidden testified that he went immediately to Mrs. McMillan's house and made the repair in about 15 minutes. (T.109)

After he was stopped, he "met Mr. Compston at the back of the truck, you know, asking the questions why he pulled me over." Detective Compson told him that he had been stopped for failing to make a right turn signal. (T.110)

Defense counsel then asked Glidden "to tell these people right here, did you know what was in that truck?" (T.110) Glidden testified as follows:

> No, sir. And it wasn't like that when I was driving the truck. It's a very little truck. My feet won't even fit in there. I would be stepping all over that. I don't know if it came out when I hit the brakes. It might have come out then, but I did see one of the officers on the passenger side with a bag of pot, and there were six more police cars there, and they were passing it around. It got back in the truck. That's the only way. I would have saw something like that, I would have never got in the truck, point blank. But it was not like that.
>
> (T.110-11)

Glidden elaborated that he would not have been able to drive the truck "if it were like that." (T.111)

On cross-examination, Glidden acknowledged that at the time of the stop, he had been driving the drive alone for about 30 minutes. (T.113) Thereafter, prosecutor conducted a colloquy set out below in pertinent part:

Q. So you were immediately arrested as soon as he went up there, right?

A. Yes, sir.

Q. So he didn't have to dig around for this pot, did he?

A. Evidently he didn't.

* * * * *

Q. Okay. Well, this is a stick shift truck?

A. Yes, sir.

Q. Got a little bitty floorboard?

A. Yes, sir.

Q. Would you agree this is in the floorboard, right, this picture.

A. I see it. Yes, sir.

Q. Okay. There is no way you could be driving that truck– that stick shift truck with that?

A. No way.

Q. I mean, there is no way that you wouldn't have been able to see that, right?

A. Oh, exactly.

Q. Okay. So if it's like this right here, then you would have known it was there?

A. Oh, you. You would have to step on it. I'm saying if it was in that truck while I had it, it was up under the seat. I did not detect it. I went and did a quick service call and came right back.

(T.114-16)

The defense finally called Paula Olson, who was employed by the Harrison Count Circuit Court Department, charged with maintenance of public court records. Through the testimony of Ms. Olson, the defense introduced certified documents showing that Joseph Buckner had nine convictions on charges of sale of a controlled substance. (T.118-19)

SUMMARY OF THE ARGUMENT

The evidence is legally sufficient to support the verdict. The state proved more than mere proximity between the defendant and the marijuana.

Moreover, the state submits he trial court did not err in refusing the circumstantial evidence instruction. The state's case was not based entirely on circumstantial evidence.

Finally, the state contends the trial court did not err in excluding evidence that the owner of the truck was under indictment for a drug offense. Such proof was not evidence of third-party guilty, and Glidden had no constitutional right to present it.

PROPOSITION ONE:

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE VERDICT; THE TRIAL COURT PROPERLY DENIED THE MOTION FOR J.N.O.V.

Glidden first contends the evidence is legally insufficient to sustain the verdict. To prevail, he must satisfy the following formidable standard of review:

> "If there is sufficient evidence to support a verdict of guilty, this Court will not reverse." *Meshell v. State*, 506 So.2d 989, 990 (Miss.1987). [other citations omitted] This Court should reverse only where, "with respect to one or more elements of the offense charged, the evidence so considered is such that reasonableand fair minded jurors could only find the accused not guilty." *Alexander v. State*, 759 So.2d 411, 421(¶ 23) (Miss.2000) (quoting *Gossett v. State*, 660 So.2d 1285, 1293 (Miss.1995)).
>
> *Carle v. State*, 864 So.2d 993, 998 (Miss. App. 2004).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss.2000).

The state was bound to prove beyond a reasonable doubt, *inter alia*, that Glidden knowingly, wilfully, unlawfully and feloniously possessed the contraband. (Instruction S-1B) (C.P.57) The state was not obligated to prove actual physical possession; rather, proof of guilt could be established by showing that "the substance involved was subject to the defendant's dominion and control, and that he was aware or reasonably should have been aware, of its presence and character." (Instruction S-2) (C.P.58) See *Lewis v. State*, 17 So.3d 618 (Miss. App. 2009), quoting *Dixon v. State*, 953 So.2d 1108, 1112 (Miss.2007), and *Curry v. State,* 249 So.2d 414, 416 (Miss.1971). "[W]hat 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 to a specific rule." *Lewis*,17 So.3d at 620, quoting *Curry*. There must, however, "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." *Id.* "Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances."

Id. Where, as here, the defendant was the driver but not the owner of the vehicle in which the contraband was found, the prosecution is obligated to prove additional incriminating facts to link the defendant to the contraband. *Stingley v. State*, 966 So.2d 1269, 1273 (Miss. App. 2007), citing *Ferrell v. State*, 649 So.2d 831, 835 (Miss.1995).

In this case, the state proved more than mere proximity between the defendant and the marijuana. Specifically, the state introduced evidence from which rational jurors could have found that the defendant could not have driven this truck without, essentially, stepping on the bag of marijuana.[3] Moreover, the green leafy substance was visible through the clear plastic bag in which it was packaged. *Contrast Ferrell*, 649 So.2d at 961 (contraband was found in a matchbox next to the driver's seat in a borrowed car driven by the defendant); and *Fultz v. State*, 573 So.2d 689 (Miss.1990) (marijuana was found in the trunk of a car driven by the defendant but owned by his sister).

The proof in this case gives rise to a reasonable conclusion that the marijuana seized from the truck driven by the defendant was not secreted; rather, it was in a clear container in plain view literally under his feet. The state's position, supported by the evidence, was that Glidden could not have driven this truck without

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[3]As the the prosecutor asserted during closing argument, "A pound of marijuana lays [sic] at your feet in the floorboard of a car that by your own admission you've been driving for 30 minutes. That, ladies and gentlemen, constitutes reasonably should have been aware of his substance and it's [sic] character." (T.133) This argument aptly summarized Sergeant Goodman's testimony that the marijuana was immediately visible from the passenger side window and that it was not, as the defendant claimed, hidden under the driver's seat. The defendant's testimony to the contrary simply created a jury issue.

being cognizant of the bag. A most rational inference is that the contraband was subject to his dominion and control and that he was aware or reasonably should have been aware of its presence and character. Accordingly, the trial court acted properly in submitting this case to the jury and in refusing to disturb its verdict. Glidden's first proposition should be denied.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ERR IN REFUSING THE CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS

The defense tendered two circumstantial evidence instructions, D-6 and D-8, which were denied upon the trial court's observation, "[T]his is a direct evidence case." (T.127-28) (C.P.68, 69) Glidden now claims the court's ruling constitutes reversible error.

It is axiomatic that a circumstantial evidence instruction is not required unless the state's case is "wholly circumstantial." *Starks v. State*, 798 SO.2d 562, 565 (Miss.2001), quoting *Keys v. State*, 478 So.2d 266, 267 (Miss.1985). In other words, "the existence of any direct evidence eliminates the need for a circumstantial evidence instruction." *Arguelles v. State*, 867 So.2d 1036, 1042 (Miss. App. 2003), quoting *Sullivan v. State*, 749 So.2d 983, 992 (Miss.1999).

Here, as in *Ivy v. State*, 589 So.2d 1263, 1266 (Miss.1991), the state's case was "based on a theory of constructive possession," but it was "not solely supported by circumstantial evidence." Rather, the officers testified that they observed and seized the bag of marijuana on the driver's side floorboard of the truck, driven and solely occupied by the defendant at the time of the stop. This testimony constituted direct evidence, obviating the requirement of a circumstantial evidence instruction.

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Ivy, 589 So.2d at 1266. Accord, *Boches v. State*, (testimony of the officers concerning bales of marijuana found in the automobile constituted direct evidence of the offense.) The trial court did not err in ruling that the case against Glidden was not entirely circumstantial. No error has been shown in the refusal of Instructions D-6 and D-8. Glidden's second proposition should be denied.

PROPOSITION THREE:

THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF A PENDING DRUG INDICTMENT AGAINST THE OWNER OF THE TRUCK

As the state set out in its Statement of Substantive Facts, the defense was allowed to introduce evidence of prior drug convictions of Joseph Buckner, the owner of the truck which was being driven by Glidden at the time of the stop. At the conclusion of the state's cross-examination of Ms. Olson, the defense, outside the presence of the jury, argued that it should be allowed to introduce evidence of a pending indictment charging Buckner with a drug offense. The court maintained its ruling that while the prior convictions were admissible, the indictment was not. (T.121) Glidden now contends this ruling constitutes reversible error.

The state submits the fatal flaw in this argument is the premise that painting Buckner as a drug possessor/dealer would exonerate Glidden. This is simply not the case. Had the defense introduced eyewitness proof that Buckner had purchased the marijuana and placed it in the vehicle, Glidden still would not have been absolved because the state's case did not hinge on showing the origin and/or "ownership" of

the marijuana.[4] The state was bound to prove only that Glidden had dominion and control over the contraband and that he was aware or reasonably should have been aware of its presence and character. Buckner's status as a drug offender was extraneous to this issue; it certainly would not have exonerated Glidden under these circumstances. In other words, this indictment was not evidence of "third party guilt." Accordingly, *Holmes v. South Carolina,* 547 U.S. 319 (2006), has no application here. Concomitantly, the state submits that for the same reasons, the exclusion of evidence of the indictment did not affect a substantial right of the defendant. Glidden's third proposition should be denied.

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[4]"Possession of a controlled substance may be actual or constructive, individual or joint." *Dixon v. State*, 953 So.2d 1108, 1112 (Miss.2007). One found to be in constructive possession of contraband, as the jury found Glidden to have been in this case, may not absolve himself by putting on proof to show that, in effect, "that was Joe's marijuana."

CONCLUSION

The state submits the arguments presented by Glidden have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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