IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

GARY ALLEN GLIDDEN — APPELLANT

V. — NO. 2009-KA-01061-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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ISSUE NO. 1: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

In its brief, the State argues that the prosecution "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." Appellee Brief at 8. The State produced no such evidence. The basis for this assertion came from Glidden's own testimony, where he explained he could not have driven the truck had the marijuana been on the floorboard as officers found it after the stop.

> ...*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. If I would have saw something like that, I would have never got in the truck, point blank. But it was not like that.

Tr. 110-11 [emphasis added].

This was not evidence that Glidden had to see the marijuana at his feet. Glidden was only speculating that if the marijuana was easily seen after the stop, it must have come out when he applied the brakes to stop for police, or that the officers moved the bag prior to taking pictures of it. If anything, this testimony required the State to put on some additional proof that Glidden knew the bag was at his feet. Glidden was only testifying that he never saw the drugs. This was certainly not evidence to show that he was aware of the presence and character of the substance.

The State made no attempt to show the bag could or could not easily slide from under the seat.[1] There was no attempt to try and take fingerprints off of the bag. Tr. 94-95. The State is relying strictly on proximity. There was no independent incriminating evidence presented. This was insufficient to show Glidden consciously and intentionally possessed the marijuana. Neither officer could testify Glidden actually saw the marijuana or handled it directly.

Nowhere in its brief does the State attempt to distinguish the Mississippi Supreme Court's opinion in *Henderson v. State*, 453 So.2d 708, 710 (Miss. 1984). If anything, the facts in *Henderson* were worst for the defendant than those in the case at bar. Glidden never attempted to flee after being stopped by police. There was no marijuana or large amount of money found on his person. There was no testimony the truck smelled of marijuana. Glidden only had the truck for a brief period. The State failed to rebut Glidden's explanations. Justice demands that Glidden's conviction be reversed and rendered.

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS.

In its brief, the State cites the case of *Ivy v. State*, 589 So.2d 1263 (Miss. 1991), in support of its claim that Glidden was not entitled to a circumstantial evidence instruction. Appellee brief at 9. *Ivy* is clearly distinguishable. Ivy raised an ineffective assistance of counsel claim on direct appeal, alleging his counsel was ineffective in failing to ask for a circumstantial evidence instruction. The Supreme Court found counsel was not ineffective,

[1] In fact, there appears to be some sort of file folder under the bag. It is entirely possible the folder slid forward carrying the plastic bag with it. State's Ex. 2 and 3.

as officers gave direct evidence that the drugs were within Ivy's constructive possession. *Id.* at 1266.

However, the State fails to mention that the facts of *Ivy* are extremely different. Ivy rented a motel room where officers found thirteen pounds of "marijuana, cocaine, and paraphernalia commonly used in packaging narcotics for sale. Ivy was the occupant of the room when the contraband was discovered and had rented the room for the preceding three nights under a false name. Additionally, small amounts of marijuana and cocaine were found on Ivy's person at the time of his arrest." *Id.* at 1267. Clearly there was additional incriminating evidence not found in the case at bar.

Once again, *Henderson v. State, supra,* should control. As argued above, the State failed to acknowledge much less distinguish *Henderson* which is exactly on point.

> In the recent case of *Henderson v. State*, 453 So.2d 708 (Miss.1984), this Court addressed the quality and quantity of proof required to prove constructive possession. In that case Henderson had been found guilty of the constructive possession of cocaine. The facts under which the jury determined that Henderson had constructively possessed the drug were as follows: Henderson was standing next to a chest of drawers on top of which sat four hypodermic syringes and glasses of water. Three of the four syringes were discovered to contain cocaine. A spoon containing cocaine was found next to them. When the police arrived, Henderson attempted to push past them, and failing that, dove out a second floor window. This Court reversed Henderson's conviction because of the failure to grant him a circumstantial evidence instruction. *Certainly, proof of constructive possession is by its very nature circumstantial.*

Burnham v. State, 467 So.2d 946, 947 (Miss.1985) [emphasis added].

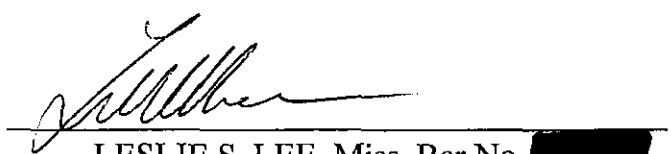
If the officers had seen Glidden handle the bag in any manner, this would be a different case. In *Givens v. State*, 618 So.2d 1313, 1319 (Miss. 1993), the Supreme Court

distinguished both *Henderson* and *Burnham.* The officer in *Givens* did provide direct evidence of the defendant's possession of the controlled substance. The officer actually saw the defendant throw a plastic bag containing cocaine to the ground. This was direct evidence placing the controlled substance within the physical possession of Givens. *Id.* Officers did not provide the same such direct evidence in Glidden's trial.

CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, Gary Allen Glidden, contends that he is entitled to have his conviction reversed and rendered, or at the very least, that he should be granted a new trial. The appellant would stand on his original brief in support of issues not responded to in this reply brief.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Gary Allen Glidden, Appellant

By: 

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CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 1st day of April, 2010, mailed a true and correct copy of the above and foregoing Reply Brief of Appellant, by United States mail, postage paid, to the following:

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So certified, this the 1st day of April, 2010.

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