IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

GARY ALLEN GLIDDEN — APPELLANT

V. — NO. 2009-KA-01061-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Gary Allen Glidden
4 Honorable Cono Caranna, and the Harrison County District Attorney's Office
5. Honorable Roger T. Clark

THIS 11th day of December, 2009.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Gary Allen Glidden, Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Harrison County, Mississippi, and a judgment of conviction for one count of possession of a controlled substance (Marijuana)[1], against the appellant, Gary Allen Glidden. Tr. 142, C.P. 72, 75, R.E. 24-25. Glidden was subsequently sentenced as an habitual offender under Miss. Code Ann. §99-19-81, to four (4) years in the custody of the Mississippi Department of Corrections. Tr. 150, C.P. 76-77, R.E. 26. This sentence followed a jury trial on December 8, 2008, with a sentencing hearing on December 18, 2008, Honorable Roger T. Clark, Circuit Judge, presiding. Glidden is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the testimony presented at trial, on September 18, 2006, the Gulfport Police Department was conducting saturation patrols in an area of the city. Tr. 75. Gulfport Police Sergeant Greg Goodman testified he was assisting in the saturation along with

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[1]Although indicted for possession with intent to transfer or distribute, the trial judge entered a directed verdict in favor of Glidden on the issue of intent to distribute. Tr. 105-06.

Detective Steve Compston, a Gulfport Police narcotics officer. Tr. 68. Compston was driving and they were in an unmarked car. Tr. 75. Sergeant Goodman observed the appellant, Gary Glidden, make a right turn from Hewes Avenue onto 31st Street without using his turn signal. Glidden was driving a blue and gray 1987 Dodge Ram truck. Tr. 68. Detective Compston turned on his blue lights and Glidden immediately pulled over to the left hand side of the road on 31st Street. Tr. 68, 82.

Both officers testified the Glidden exited the truck and walked to the rear of his vehicle to meet officers. Tr. 68, 82. As Detective Compston advised Glidden of why he was stopped, Sergeant Goodman approached the vehicle to make sure no other occupants were inside.[2] Tr. 69, 82. Sergeant Goodman testified he then observed a large zip-lock bag of what he believed was marijuana lying on the driver's side floorboard, only partially concealed under the driver's seat. Tr. 69-70. Sergeant Goodman than signaled to Detective Compston to take Glidden into custody. Tr. 69, 83.

After Glidden was handcuffed and secured, Detective Compston looked in the vehicle and also saw the zip-lock bag. He opened the door to photograph the bag. Tr. 83-84, Ex. 2 and 3. Both officers testified the bag was not moved prior to being photographed. Tr. 71, 85. No other drug paraphernalia was found in the truck. Tr. 73-75, 89.

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[2] Glidden would note Detective Compston's testimony was contrary to the testimony he provided at an earlier suppression motion, in that Compston stated the officers knew before Glidden was pulled over that no one else was in the truck. Supp. Tr. 12-13.

Detective Compston admitted that he called in the tag information for the truck after the stop, and that it was not registered to Glidden, but to one Joseph Buckner.[3] Tr. 92. Detective Compston was unaware of any prior convictions for drug offenses on Joseph Buckner. Tr. 93. No effort was made to fingerprint the zip-lock bag. Tr. 94-95.

Forensic scientist Timothy Gross of the Mississippi Crime Laboratory testified he tested the zip-lock bag sent by the Gulfport Police Department. His testing indicated the bag contained 450 grams of marijuana. Tr. 98-99.

After the court directed a verdict on the intent to distribute portion of the indictment, Glidden took the stand in his own defense. Tr. 106-07. Glidden explained that he was working for Comfort Air Conditioning in Gulfport. He was living at the shop located on 21st Street while his boss was in the hospital. Joseph Buckner lived at 334 31st Street in Gulfport. Since Glidden's boss was in the hospital, Buckner came and picked Glidden up in his truck in order to enable Glidden to finish an air conditioning job for Buckner. Tr. 108

Glidden testified that while working at Buckner's house, he received a service call from a customer located a few blocks away. Since Glidden was without transportation, Buckner allowed him to use Buckner's truck to go to the service call. Tr. 109, 114. He found a broken thermostat which took about 15 minutes to fix. Tr. 109. On the way back to Buckner's house, he was stopped by police. He pulled over in front of the house where Buckner lived on 31st Street. Tr. 110. He was alone in Buckner's truck for a total of about

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[3]Again, this is contrary to the testimony he provided at the suppression hearing when he stated the tag information was called in prior to the stop. Supp. Tr. 13-14.

30 minutes. Tr. 113. Glidden had only known Buckner for about 3 years as a customer of Comfort Air Conditioning. Tr. 113-14. Glidden denied the bag of marijuana was in plain view, as he would have seen it. In fact, he would not have been able to drive with the bag right on the floorboard. Tr. 115-116. The bag had to have been under the seat, as he never saw it while driving the truck. Tr. 116.

The defense then called Ms. Paula Olson with the Harrison County Circuit Clerk's Office. Ms. Olson produced a certified copy of a sentencing order showing that Joseph Buckner had nine prior convictions for sale of a controlled substance. Tr. 118-19. Eight of the convictions were from 1984 and one was dated 1979. The trial judge excluded evidence concerning a current indictment on Joseph Buckner. Tr. 121-22.

SUMMARY OF THE ARGUMENT

The facts of this case simply did not justify a conviction of constructive possession of a controlled substance. The evidence was insufficient to establish beyond a reasonable doubt that Glidden was aware of the presence and character of the substance and was intentionally and consciously in possession of it. The drugs were found in a truck he had borrowed for 30 minutes. Proximity to the substance alone is insufficient to show constructive possession without other incriminating circumstances. The State presented absolutely no additional incriminating circumstances. The trial judge erred in failing to grant Glidden's motion for judgment notwithstanding the verdict.

Furthermore, the trial judge also erred in failing to grant a circumstantial evidence instruction. There was no direct evidence presented to show Glidden constructively possessed the marijuana found in a borrowed truck.

Finally, the trial judge abused his discretion in not allowing Glidden the opportunity to prove the owner of the truck where the contraband was found was pending two current indictments for sale of a controlled substance. In a constructive possession case such as this, the exclusion of the indictments deprived Glidden of his constitutional right to present a meaning defense.

ARGUMENT

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

Trial counsel requested a directed verdict at the close of the State's case regarding the evidence concerning intent to distribute. Tr. 101-04. After the court researched the issue, the trial judge granted the defense motion. Tr. 105-06. The motion was not renewed, but the trial counsel submitted a peremptory instruction (D-1) which was refused.[4] Tr. 126, C.P. 63, R.E. 21. After the verdict, counsel submitted a Motion for Judgment Non Obstante Verdicto or for a New Trial in the Alternative, challenging the sufficiency of the evidence. C.P. 78-80, R.E. 28. This motion was denied. C.P. 83, R.E. 31. As this was the last challenge to the sufficiency of the evidence, this Court must consider the sufficiently of all the evidence

[4] Counsel on appeal would note that the transcript is slightly confusing, as it indicates trial counsel may have tried to withdraw either D-1 or D-2. However, D-1 is clearly marked "Refused." Tr. 126, C.P. 63.

presented during the entire trial. *Gibson v. State*, 731 So.2d 1087 (¶12) (Miss. 1998). Glidden submits that the trial judge erred in not granting this motion, as even when viewing the evidence is the light most favorable to the prosecution, the State failed to show constructive possession beyond a reasonable doubt.

The standard of review regarding the sufficiency of the evidence is well-established.

> In reviewing whether the evidence supporting a jury verdict is legally sufficient, this Court does not determine whether from the evidence we would have voted to convict or acquit. *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005). Rather, we view the evidence in the light most favorable to the prosecution and determine whether a rational juror could have concluded beyond a reasonable doubt that all elements of the crime were satisfied. *Id.* The proper remedy for insufficient evidence is for the Court to reverse and render. *Id.*

Readus v. State, 997 So.2d 941 (¶ 3) (Miss.App.2008).

This Court must determine whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Bush, supra*, at ¶16 (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). Taking the evidence in the light most favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements beyond a reasonable doubt. *Bush, supra* at ¶16 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

The evidence clearly established that Glidden did not own the truck where the drugs were found. Tr. 92. To prove constructive possession "[w]here the premises upon which contraband is found is not in the exclusive possession of the accused, the accused is entitled to acquittal, absent some competent evidence connecting him with the contraband." *Powell v. State*, 355 So.2d 1378, 1379 (Miss.1978). The burden was on the State to show by competent evidence that the marijuana was subject to the dominion or control of appellant. *Sisk v. State*, 290 So.2d 608, 610 (Miss. 1974).

The Mississippi Supreme Court established in *Curry v. State*, 249 So.2d 414, 416 (Miss. 1971), that to constitute constructive possession, the facts must 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. "Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances." *Id.*

Glidden submits that there were absolutely no additional incriminating circumstances shown other than the appellant's proximity to the bag. Other than proximity, the only remotely incriminating evidence shown was circumstantial, in that Glidden got out of the vehicle to meet the officers.[5] This is simply insufficient to show constructive possession. In *Henderson v. State*, 453 So.2d 708, 710 (Miss.1984), the Mississippi Supreme Court reversed a constructive possession case where the defendant was found near syringes and cocaine.

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[5]Glidden requested but was denied two circumstantial evidence instructions. Tr. 127, C.P. 68. See Issue II, *infra*.

> From the record, it is plain that the state attempted to prove the elements of constructive possession through evidence that was entirely circumstantial. The principal facts constituting the crime all had to be inferred from other facts proven by the state. First, the state relied upon the fact that Henderson was seen standing before a chest of drawers on which the syringes and spoon were found in order to prove that he was aware of the presence and character of the contraband. Officer Gorenflo admitted that he could not testify to his own knowledge that Henderson actually saw the syringes and spoon. The proof that the drugs were under his dominion and control was likewise indirect because the state established merely that he was standing in front of the chest of drawers where the drugs were found. Finally, the state depended upon the fact that there were three prepared syringes in the room with Henderson and two others for the additional incriminating evidence necessary to turn his proximity to the drugs into a connection amounting to constructive possession.

Henderson, 453 So.2d at 710.

As in *Henderson*, the State simply relied on the fact that the bag of marijuana was found on the floorboard of the driver's seat only partially hidden. Neither officer could testify Glidden actually saw the marijuana or handled it directly. In fact, in *Henderson*, the defendant actually tried to push past police and eventually dove out of a window. *Id.* at 709. The Supreme Court still held the evidence was insufficient. The only suspicious action Glidden took, according to the officers, was to get out of his truck to meet them.

This is not the type of case, such as in *Boches v. State*, 506 So.2d 254 (Miss. 1987), where the State had other evidence to show the defendant must have been aware of the drugs found in a vehicle he did not own. In *Boches*, the defendant had exclusive possession and control of the automobile for over eight hours traveling over 1000 miles. There was testimony by officers that they smelled marijuana. Boches flew to Miami on short notice, immediately drove back and made no stops along the way. Boches did not even know who

owned the vehicle. Additionally, Boches attempted to evade a roadblock. *Id.* at 258-59. Nothing of the sort happened in the case at bar.

"Essentially, considering the totality of the circumstances, *Berry v. State*, 652 So.2d 745, 750-51 (Miss.1995), 'there must be evidence, in addition to physical proximity, showing the defendant consciously exercised control over the contraband, and absent this evidence, a finding of constructive possession cannot be sustained.'" *Dixon v. State*, 953 So.2d 1108, 1112 -1113 (Miss. 2007), quoting *Berry*, 652 So.2d at 748.

Constructive possession is rebuttable when contraband is found on premises which are not owned by a defendant. "[M]ere physical proximity to the contraband does not, in itself, show constructive possession." *Fultz v. State*, 573 So.2d 689, 690 (Miss.1990). Glidden's explanations were reasonable and the State presented no rebuttal to his testimony. Glidden's conviction should be reversed and rendered.

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

During the instructions conference, trial counsel attempted to submit two circumstantial evidence instructions (Instruction D-6 and Instruction D-8) to the court. C.P. 68 and 69, R.E. 22 and 23. The State objected, arguing that each instruction was not an accurate statement of the law in this case. The court agreed, holding that this was a direct evidence case. Tr. 127-28. This was reversible error.

"[T]he rule in Mississippi is that a circumstantial evidence instruction should be given only when the prosecution can produce neither eyewitnesses or a confession to the

offense charged." *Stringfellow v. State*, 595 So.2d 1320, 1322 (Miss.1992), see also, *State v. McMurry*, 906 So.2d 43(¶13) (Miss.App.2004). "It is only in cases where the evidence is entirely circumstantial that the jury is required to exclude every other reasonable hypothesis than guilt." *Id.* at (¶15) (quoting *Whitlock v. State*, 419 So.2d 200, 204 (Miss.1982)). In the case at bar, there was no eyewitness testimony that Glidden possessed the marijuana. There was no confession from Glidden in the record. This was clearly a circumstantial evidence case.

Glidden would again submit that *Henderson v. State*[6], *supra*, is directly on point. "Certainly, proof of constructive possession is by its very nature circumstantial." *Id* at 947. However, the appellant would concede that not all constructive possession cases have been found to require circumstantial evidence instructions. In the recent case of *Pilgrim v. State*, 19 So.3d 148 (Miss.App.2009), this Court held that an officer's testimony that he saw the defendant throw contraband from his van was direct evidence of the offense. *Id.* at ¶21. However, in the case *sub judice*, neither officer saw Glidden handle the marijuana. Similarly, in *Keys v. State*, 478 So.2d 266 (Miss.1985), the Supreme Court found that evidence showing five grocery bags of marijuana found in the bathroom of the defendant's apartment was direct evidence of constructive possession. *Id.* at 268. Again, these facts are clearly distinguishable from the case at bar. Glidden did not have exclusive dominion and control over Buckner's truck.

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[6] The appellant would note that *Henderson* was overruled in *Goff v. State*, 14 So.3d 625 (¶162) (Miss. 2009), to the extent that it is no longer reversible error to fail to grant a "two-theory" instruction in a circumstantial evidence case.

In conclusion, this was a wholly circumstantial evidence case. Glidden was entitled to a circumstantial evidence instruction. The State's evidence required the jury to draw upon inferences and suspicious circumstances only. *Parker v. State*, 606 So.2d 1132, 1141 (Miss.1992). Accordingly, Glidden is entitled to a new trial.

ISSUE NO. 3: WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A PENDING DRUG INDICTMENT AGAINST THE OWNER OF THE VEHICLE WHERE THE CONTRABAND WAS FOUND, DEPRIVING THE APPELLANT OF RIGHT TO PRESENT A DEFENSE.

Prior to the beginning of trial, defense counsel sought to present evidence that the owner of the truck where the drugs were found, Joseph Buckner, was a known drug dealer. In support of his theory of defense, trial counsel stated his intention to admit the prior convictions of Buckner, as set forth in the habitual offender portion of Buckner's two current indictments then pending[7]. Tr. 54-58. The trial judge agreed that counsel could cross-examine the officers on whether or not they were aware that the owner of truck had prior convictions for selling drugs. Defense counsel stated he had no intention of going into his current indictments. Tr. 58.

When the officers stated on cross-examination that they were unaware of Buckner's priors, trial counsel then sought to admit Buckner's sentencing orders into evidence. Tr. 76, 93, 118-19.

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[7]Although not in the record, it is interesting to note that Joseph Buckner entered the Mississippi Department of Corrections system in June of 2009, after being convicted of two counts of possession with intent to distribute a controlled substance out of Harrison County (http://www.mdoc.state.ms.us/InmateDetails.asp?PassedId=34514).

The United States Constitution guarantees citizens accused of crimes "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683 at 689-690 (1986). In *Holmes v. South Carolina*, 547 U.S. 319 (2006), the U.S. Supreme Court held that South Carolina evidentiary rules could not be applied to bar Holmes, accused of capital murder, from presenting evidence that a third party may have confessed to the crime of which he was accused. The rule at issue was the South Carolina practice of prohibiting evidence a third party was criminally responsible in the face of strong forensic evidence indicative of the defendant's culpability. In *Holmes*, DNA evidence suggested his guilt and the trial court barred testimony showing another could have committed the crime. *Id.* at 324.

In the case at bar, the trial judge gave no reasoning on the record for his ruling. Based on trial counsel's original intention not to use the indictments, the trial judge found the convictions were public records but the indictments were not. Tr. 58. When the issue again surfaced after the State pointed out the dates of the prior convictions, the court simply refused to change his prior ruling.

> THE COURT: All right. Well, all Miss Olson testified about was convictions, and the indictment is not a conviction. I'm not going to let you get into that [Defense Counsel], and nothing has been said to change my ruling in that regard.[8]

Tr. 121.

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[8]The State declined the court's offer to admonish the jury to disregard the comments defense counsel made concerning whether the State had "opened the door on the indictments." Tr. 120.

It is clear the State opened the door to this testimony. The State was clearly trying to emphasize for the jury that these convictions were irrelevant because they were between 24 and 29 years old. Based on that inference, Glidden had the right to point out that Buckner actually had more recent charges lodged against him. The State should not be able to complain, as this Court has held that when a defendant opens the door "to otherwise improper testimony, the prosecution is permitted to enter and develop the matter in great detail." *Fleming v. State*, 604 So.2d 280, 291 (Miss.1992). The defense should have the same right.

Buckner was a non-party and admission of the fact that he was pending additional drug charges would not be prejudicial to him at this trial. This is analogous to the ability of a defendant to impeach a non-party witness under MRE 609. See *Young v. State*, 731 So.2d 1145, 1151 (Miss.1999). The jury should have been able to hear about these recent charges against the owner of the truck where the drugs were found. This was a constructive possession case (and based on circumstantial evidence). The jury's knowledge of these facts could very well have resulted in a different outcome. This is precisely why the State sought to exclude it.

The standard of review regarding admission or exclusion of evidence is the abuse of discretion standard. *Tate v. State*, 912 So.2d 919 (¶ 9) (Miss. 2005). The Court will not reverse a trial court's decision "unless a substantial right of the defendant is adversely affected by the improperly admitted or excluded evidence." *Young v. State*, 981 So.2d 308, 313(¶ 17) (Miss.App.2007). Glidden would submit the decision not to let the jury know

Buckner had current indictments for dealing drug substantially impaired his right to present a meaningful defense.

> State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. This latitude, however, has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

Eubanks v. State, No. 2007-KA-01201-COA (¶31) (Miss.App. June 2, 2009), citing *Holmes v. South Carolina*, 547 U.S. at 324-25.

The trial judge erred in not allowing the jury to hear the Buckner had drug charges pending that were much more recent than 24 years ago. Glidden is entitled to a new trial.

CONCLUSION

Given the evidence presented in the trial below, and based on the above argument, together with any plain error noticed by the Court which has not been specifically raised, Gary Allen Glidden is entitled to have his conviction reversed and rendered. At the very least, this Court should reverse and remand for a new trial.

Respectfully submitted,
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CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 11th day of December, 2009, mailed a true and correct copy of the above and foregoing Brief of Appellant, by United States mail, postage paid, to the following:

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So certified, this the 11th day of December, 2009.

Leslie S. Lee