IN THE COURT OF APPEALS 10/01/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01087 COA

EDWARD LEON SMITH & ALLAN DALE TUCKER

APPELLANTS

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT G. EVANS

COURT FROM WHICH APPEALED: JASPER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

TRAVIS BUCKLEY

ATTORNEYS FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: MICHAEL C. MOORE, WAYNE SNUGGS, DEWITT T. ALLRED III

DISTRICT ATTORNEY: DEWITT L. FORTENBERRY JR.

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: POSSESSION WITH THE INTENT TO MANUFACTURE A SCHEDULE I CONTROLLED SUBSTANCE, TO-WIT MARIJUANA IN AN AMOUNT GREATER THAN ONE OUNCE, BUT LESS THAN ONE KILOGRAM; SENTENCED TO SERVE 6 YEARS IN MDOC

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

BRIDGES, P.J., FOR THE COURT:

Edward Smith and Allan Tucker were convicted of possession of marijuana with intent to manufacture, and each were sentenced to six (6) years in the custody of the Mississippi Department of Corrections. Smith and Tucker argue on appeal that the trial court erred in denying their motions for directed verdict. We find no merit in the Appellants' argument and therefore, affirm.

FACTS

On June 1, 1992, a deputy pursued an automobile containing Smith, Tucker, and Patrick Russell, after the driver ran a stop sign. They at first evaded the deputy. Jeff Crumpton then witnessed a duffel bag being thrown from the vehicle when it was out of eyesight of the pursuing deputy. After noticing that the same automobile was being chased by a deputy, Crumpton phoned the authorities and reported the duffel bag.

The vehicle was subsequently stopped, and the three men were held while the duffel bag was retrieved and brought to the scene. The three men were arrested after it was determined that the duffel bag contained marijuana. Smith, Tucker, and Russell were jointly indicted for possession with intent to manufacture marijuana in violation of section 41-29-139 of the Mississippi Code.

The men were to be tried jointly, and Russell agreed to plead guilty and testify for the State. Russell testified that on the day in question, he drove to Smith's home where Tucker and Smith had been waiting. The three men then drove to a place in Jasper County where the three men had jointly cultivated a "patch" of marijuana for a few months. Tucker waited with the car while Smith and Russell went and "topped off" or harvested the marijuana and placed it in the duffel bag which was the one later ejected from the car. Tucker then picked up Smith and Russell, and the three men left in the automobile with the duffel bag containing the marijuana. The three were stopped by the sheriff's deputy shortly thereafter. Smith and Tucker were subsequently convicted of possession with intent to manufacture and were sentenced each to a term of six years.

ARGUMENT AND DISCUSSION OF THE LAW

> I. WHETHER THE TRIAL COURT ERRED BY REFUSING TO DIRECT A VERDICT OF NOT GUILTY ON THE CHARGE OF POSSESSION OF MARIJUANA WITH THE INTENT TO MANUFACTURE.

Smith and Tucker (hereinafter the "Appellants") both argue on appeal that the trial court erred in denying their motions for directed verdict. Their argument centers around the contention that they could not be guilty of possession with intent to manufacture because, in fact, they were apprehended

with the finished product, and there was no manufacturing left to be done. We disagree with this contention and therefore, affirm.

This Court's standard of review for a denial of a motion for directed verdicts is as follows:

> In passing upon a motion for a directed verdict, all evidence introduced by the state is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, the motion for directed verdict must be overruled.

Gray v. State, 549 So. 2d 1316, 1318 (Miss. 1989) (citing *Guilbeau v. State*, 502 So. 2d 639, 641 (Miss. 1987)).

The Appellants were charged with a violation of section 41-29-139(a)(1) of the 1972 Mississippi Code which reads in pertinent part:

> (a) Except as authorized by this article, it is unlawful for any person knowingly or intentionally:
>
> > (1) To sell, barter, transfer, manufacture, distribute, dispense or *possess with intent to* sell, barter, transfer, *manufacture*, distribute or dispense, a controlled substance;

Miss. Code Ann. § 41-29-139(a)(1) (1972) (emphasis added). In order to support our application of the above standard, it is necessary that we examine section 41-29-139(a)(1). We find the statutory meaning of "manufacture" in section 41-29-105(q) of the 1972 Mississippi Code, which reads in pertinent part:

Manufacture means the *production, preparation, propagation, compounding, conversion or processing* of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

Miss. Code Ann. § 41-29-105(q) (1972) (emphasis added). Further, we find "production" defined by section 41-29-105(z) of the 1972 Mississippi Code as including:

[T]he manufacture, *planting, cultivation, growing or harvesting* of a controlled substance.

Id. § 41-29-105(z) (emphasis added).

Our review of the record reveals ample testimony that the Appellants *planted, cultivated, grew, and harvested* the marijuana in question. Accordingly, there is substantial evidence that they *produced* marijuana pursuant to section 41-29-105(z) of the 1972 Mississippi Code. If the Appellants *produced* marijuana, they may correctly be found to have *manufactured* it pursuant to section 41-29-105(q) of the 1972 Mississippi Code.

The supreme court has previously wrestled with the interpretation of section 41-29-105(q) in *Boring v. State*, 365 So. 2d 960, 961-62 (Miss. 1978). In *Boring*, the defendant raised on appeal the question of how to interpret section 41-29-105(q). *Id.* at 961. After conceding some confusion as to the wording of the section, the court, as does this Court, found further guidance in the definition of "production" in subsection (z). *Id.* at 962. The supreme court resolved the question stating:

Manufacturing embraces production and production embraces manufacturing and planting, cultivation, growing or harvesting. Construing the two sub-sections [105(q) and 105(z)] together, it becomes apparent that the Legislature prohibited the growing of marijuana...

Id. We feel that this Court's interpretation is consistent with that of the supreme court in *Boring.*

The record further reveals that the Appellants went to their "patch" of marijuana on June 1, 1992, to "top off" the marijuana plants. Russell explained at trial that "topping" meant picking the tops off the plants and removing the leaves. He later explained that the process was not complete at this point. The leaves had to be dried before they would be ready for consumption. The testimony reveals that the Appellants were involved in the ongoing process of planting, cultivating, harvesting, and further converting the raw marijuana into a usable form. When the testimony is viewed in total, the intent to manufacture can be inferred. We therefore affirm the trial court's denial of the Appellants' motions for directed verdict.

THE JUDGMENT OF THE JASPER COUNTY CIRCUIT COURT OF CONVICTION OF EDWARD LEON SMITH OF POSSESSION OF MORE THAN AN OUNCE OF MARIJUANA WITH INTENT TO MANUFACTURE AND SENTENCE OF SIX (6) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.

THE JUDGMENT OF THE JASPER COUNTY CIRCUIT COURT OF CONVICTION OF ALLAN DALE TUCKER OF POSSESSION OF MORE THAN AN OUNCE OF MARIJUANA WITH INTENT TO MANUFACTURE AND SENTENCE OF SIX (6) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.

ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.