IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00948 COA

WILLIAM ROGER THOMAS, CHRIS MILLER AND GREG HOFLING

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. JAMES W. BACKSTROM

COURT FROM WHICH APPEALED: GEORGE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

WILLIAM T. BAILEY, SR., JAMES L. FARRIOR, III, AND DAVID MICHAEL ISHEE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: NARCOTICS: POSSESSION OF SCHEDULE I CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

TRIAL COURT DISPOSITION: THOMAS AND HOFLING CONVICTED OF POSSESSION OF CONTROLLED SUBSTANCE AND MILLER CONVICTED OF POSSESSION WITH INTENT TO DISTRIBUTE

EN BANC:

KING, J., FOR THE COURT:

On July 30, 1993, William Thomas, Greg Hofling, and Chris Miller were tried in the Circuit Court of George County for the possession of more than one kilogram of marijuana with intent to distribute. The jury found both Thomas and Hofling guilty of possession of more than one kilogram of marijuana and found Miller guilty of both possession and possession with intent to distribute more than one kilogram of marijuana. Thomas and Hofling were individually sentenced to serve twelve year terms in the custody of the Mississippi Department of Corrections and fined $5,000.00. Miller was sentenced to serve twenty-five years in the custody of the Mississippi Department of Corrections and fined $100,000.00. Aggrieved by the convictions and sentences, each of the Defendants appeal and argue for the reversal of their conviction. We affirm the convictions.

FACTS

During the early morning hours of October 4, 1992, Ronald Hollingsworth discovered a U-Haul trailer parked in the front of the house he shared with Thomas and Thomas's mother. Hollingsworth became curious about the contents of the trailer and proceeded to break the lock on the trailer. Upon peering inside the trailer, Hollingsworth discovered a large quantity of marijuana. Hollingsworth immediately notified the George County Sheriff's Department, and Deputy George Miller responded. Upon his arrival, Hollingsworth escorted Deputy Miller to the trailer containing the marijuana, and Deputy Miller telephoned the George-Greene County Metro Narcotics Task Force and requested assistance. Agents of the narcotics task force responded and commenced surveillance of the trailer from a nearby location.

After approximately nine hours of surveillance, Defendants Hofling and Thomas arrived and proceeded to unload and spread the marijuana unto a tarpaulin in an area adjacent to the residence. Shortly thereafter, Hofling and Thomas were arrested by the task force agents and transported to the George County jail.

The agents' surveillance of the trailer continued after the arrests of Hofling and Thomas, and one hour later, Miller arrived in a truck and proceeded to park his vehicle in proximity to the trailer. The agents immediately commenced pursuit of Miller. Miller fled, traveled a short distance in the truck, and then stopped the truck. Thereafter, the agents arrested and charged Miller with possession of a controlled substance. Upon the arrest of Miller, the agents searched Miller's truck and found a U-Haul trailer rental contract bearing Miller's signature. Miller states that he had rented the trailer to haul equipment from Nebraska and upon his return to Mississippi, he allowed Thomas to borrow the trailer so that Thomas could move the evening before the arrests.

DISCUSSION

This opinion involves three cases which were consolidated for appeal. The opinion has been divided into separate sections, which discuss the various issues raised by each Defendant in their appeal to this Court.

HOFLING'S APPEAL

I.

DID THE TRIAL COURT ERR IN DENYING THE MOTION FOR WITHDRAWAL AND CONTINUANCE?

On the morning of the trial, Hofling's counsel moved to withdraw from the case because he had discovered during the suppression hearing held a day earlier that he had previously represented the confidential informant, Hollingsworth on a DUI charge. The court denied the motion.

In *Augustine v. State*, our supreme court determined that no prejudice resulted from the trial court's denial of defense counsel's motion to withdraw because of a close business, professional, and personal relationship with a robbery victim. *Augustine v. State*, 201 Miss. 277, 293-94, 28 So. 2d 243, 247 (1946). The test espoused by the *Augustine* court is "whether the accused has been protected, so far as counsel can do so, in all of his legal rights." When a similar conflict of interest question arose in *Harris v. State*, the same test was applied by the supreme court. *Harris v. State*, 386 So. 2d 393, 395 (Miss. 1980). Stare decisis requires us to apply the same test.

When Hollingsworth was called to testify by co-Defendant Miller, Hofling's counsel conducted the following cross-examination:

Counsel: Mr. Hollingsworth, did you know my client, Greg Hofling, before October 5, 1992

Witness: Yes.

Counsel: How did you know him?

Witness: By Billy--William

Counsel: Okay. How long had you known him?

Witness: I don't know it wasn't very long. Just about -- Billy, you Billy would be in

on weekends and we'd stop by there. That's how I knew him -- met him.

Counsel: All right. And, in fact, isn't it true that you and he had an altercation not

not very long before this incident occurred?

Witness: Yes.

Counsel: Tell us about that, please.

Witness: Hell, it was just about Billy, trying to get him and keep him in trouble and stuff.

Counsel: Well, isn't it true that you and he got into a fight not long before October the 5th?

Witness: Yes.

Counsel: And that Billy had to break y'all up?

Witness: Yeah.

Counsel: What was that fight about?

Witness: It was about him messing with Billy, you know, trying to keep him in trouble and all this, and it just led, one thing led to another.

Counsel: Are you saying that Greg Hofling was trying to keep Billy in trouble?

Witness: No. Billy knew better hisself.

Counsel: All right. The end result was that you and Mr. Hofling don't like each other very much do you?

Witness: No.

Hofling's counsel's zealous attack on Hollingsworth's credibility during cross-examination leaves Hofling no room to complain. Therefore, we find that Hofling's legal rights were protected in so far as possible by counsel. There is no merit to this assignment of error.

II.

Pursuant to Rule 28(I) of the Mississippi Rules of the Supreme Court, Hofling has adopted by reference each and every applicable issue raised in the briefs of the co-Defendants. The merits of these issues will be addressed in our review and discussion of the separate appeals of Thomas and Miller.

THOMAS'S APPEAL

I.

DID THE TRIAL COURT ERR IN OVERRULING THE MOTION TO SUPPRESS INTRODUCTION OF THE MARIJUANA?

Thomas argues that the trial court erred in denying his motion to suppress the introduction of the marijuana because the marijuana was obtained in violation of the Fourth Amendment. Deputy Miller was the only witness to testify at the suppression hearing. Deputy Miller testified to the following during the suppression hearing:

> 1. At approximately 2:00 A.M. on the morning of October 5, 1992, he received a call from an unidentified caller;

2. The caller advised Deputy Miller that he had something to show him, and he wanted him

to come to a location in the Bexley Community;

3. The caller gave Deputy Miller directions to the location in the Bexley Community;

4. Deputy Miller followed the caller's instruction and drove to the location.

5. Upon arriving at the location, Deputy Miller observed a U-Haul trailer parked in front

of a house and a gentleman standing by a fence near the trailer.

6. Deputy Miller exited his vehicle and identified himself to the gentleman, and the

gentlemen identified himself as Ronnie Hollingsworth.

7. Ronnie Hollingsworth told Deputy Miller that he discovered the trailer in front of his house and broke the lock on the trailer. When he looked inside, he found the marijuana.

8. Then, Hollingsworth went to the trailer and opened it before Deputy Miller. When Hollingsworth opened the trailer, Deputy Miller saw the marijuana, and he called the narcotics task force. When Agent Tommy Carroll Miller of the task force arrived, he introduced him to Hollingsworth, and he departed.

The Fourth Amendment prohibition against unreasonable searches and seizures applies only to the government. *Lucas v. State,* 381 So. 2d 140, 144 (Miss. 1980). The Fourth Amendment is not violated when a private individual conducts a search for a purely private reason. The suppression hearing testimony clearly indicates that Hollingsworth initially searched the contents of the U-Haul

upon finding it in front of his residence and subsequently called Deputy Miller to the residence to view the trailer's contents. Police views which occur subsequent to searches conducted by private citizens do not constitute a "search" within the meaning of the Fourth Amendment if the view is confined to the scope and product of the initial search. *Lucas,* 381 So. 2d at 144 (citing *United States v. Bomengo,* 580 F.2d 173, 175 (5th Cir. 1978)). Therefore, we do not find that the trial court erred in denying the motion to suppress. Thomas's assignment of error lacks merit.

II.

Pursuant to Rule 28(I) of the Mississippi Rules of the Supreme Court, Thomas has also adopted each and every applicable issue raised in the briefs of Hofling and Miller. Thomas has no standing to object to the trial court's refusal to allow counsel for Hofling to withdraw. Discussion of the other issues raised by Miller follows.

MILLER'S APPEAL

I.

DID PROSECUTORIAL MISCONDUCT DEPRIVE THE DEFENDANT OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL?

Miller argues that prosecutorial misconduct deprived him of his right to a fair and impartial trial. In support of his argument, he catalogues a number of instances where the prosecution's conduct "exceeded the boundaries of aggressive cross-examination." The record indicates that during the course of the trial, the prosecution made several objectionable remarks which were objected to by counsel for Miller. The court sustained the objections and on one occasion, the court admonished the jury to disregard the following examination of Hollingsworth: "Would you rather hang out with the guys you got in trouble and that are facing charges here for marijuana, or would you rather be over there with the cops where you can get some protection?" Any errors created by the prosecution's examination and commentary were effectively cured when the court sustained Miller's objections and admonished the jury. *Walker v. State,* 671 So. 2d 581, 616 (Miss. 1995) (citing *Foster v. State,* 639 So. 2d 1263, 1282 (Miss. 1994)). Therefore, we find this assignment of error to be lacking in merit.

II.

DID THE PROSECUTION IMPROPERLY QUESTION JURORS DURING VOIR DIRE?

Miller argues that the prosecution improperly questioned individual jurors on the second and third rows on whether they could return a verdict of guilty. The record indicates that the prosecution inquired of the jury:

> Now, if the State of Mississippi proves to you beyond a reasonable doubt that, on October 5th, 1992, these three individuals, Chris Miller, Greg Hofling, and William Thomas, possessed some thirty-five thousand grams or possessed over a kilo, a kilogram of

> marijuana, with their intent to distribute that marijuana, if we prove that to you beyond a reasonable doubt, is there any reason why you cannot find them guilty?

In response to the question, the jurors nodded. Apparently, the prosecution did not see the nods of jurors seated on the second and third rows; therefore, he posed a similar question to the second and third row jurors. Neither Miller nor the co-Defendants objected.

Miller recognizes that a prosecuting or defending attorney should not attempt to obtain a promise from each juror as to what he would do under any given circumstance. *Murphy v. State*, 246 So. 2d 920, 922 (Miss. 1971). In addition, examinations should be in the abstract as to the class of case about to be tried and not as to what the prospective juror might or might not do in the particular case about to be tried. *McCaskill v. State*, 227 So. 2d 847, 852 (Miss. 1969).

In the instant case, the prosecution did not attempt to force a committal from the jury, but merely tried to determine whether sociological factors would impair the jury's ability to be fair and impartial. Even though the prosecution's examination was less than abstract, we find the error to be harmless, if not actually waived by the failure of the Defendants to object. *Murphy,* 246 So. 2d at 922. This assignment of error lacks merit.

III.

> DID THE TRIAL COURT ERR IN OVERRULING DEFENDANT'S MOTION FOR NEW TRIAL WHEN THE PROSECUTION SOLICITED FROM ONE OF ITS WITNESSES HEARSAY STATEMENTS MADE BY THE CO-DEFENDANTS SUBSEQUENT TO THEIR ARREST?

During direct examination, Rene Normand testified that after the arrests of Hofling and Thomas, he received information that the individual responsible for renting the U-Haul would return between 12:30 and 1:00 P.M. Normand also testified that he received a description of the person and a description of the vehicle driven by the person. Miller objected and moved for mistrial. The court overruled the motion stating that the testimony was not hearsay.

On appeal, Miller characterizes Normand's testimony as hearsay statements made by co-conspirators after the succession or failure of a conspiracy's objectives and argues that the admission of the testimony was prejudicial because it implicated him in the crime.

The supreme court has consistently held that the hearsay testimony of officers obtained by way of investigation is inadmissible. *Bridgeforth v. State,* 498 So. 2d 796, 800 (Miss. 1986); *Ratcliff v. State*, 308 So. 2d 225, 227 (Miss. 1975); *Agee v. State,* 185 So. 2d 671, 674 (Miss. 1966). However, in the instant case, we find the error harmless. Prior to Normand's testimony, Deputy Miller testified as follows without objection:

> Witness: I went back up there to the same location. I talked with Agent Miller. And at that time, through the investigation that was taking place, he asked me to help him do some

surveillance.

DA: For what purpose?

Witness: I was looking for a vehicle that was coming back there, a Dodge truck. And we were looking for a white male, an older type fellow with a beard, the nickname was Santa Claus.

Miller was not prejudiced by the admission of Normand's hearsay testimony because Deputy Miller had previously given testimony regarding the identity of the U-Haul lessee. There is no merit to this assignment of error.

IV.

DID THE UNSOLICITED TESTIMONY OF THE WITNESS RENE NORMAND PREJUDICE THE DEFENDANT?

Miller states that he was prejudiced by the following unsolicited opinion testimony of Rene Normand during cross-examination:

Counsel: Did you find any illegal substances in there?

Witness: No sir.

Counsel: Okay. Did you find anything at all in that truck that linked Mr. Miller to this U-Haul, other than that rental agreement?

Witness: If my opinion is acceptable--

Counsel: No, sir.

Witness: --I found a twenty-pound scale.

Counsel: No, sir. I'm asking you, did you find anything in there that directly linked Mr. Miller to the U-Haul?

Witness: To the U-Haul? No, sir.

Opinion testimony is what the witness thinks, believes, or infers in regard to facts in dispute, as

distinguished from his personal knowledge of the facts themselves. *Black's Law Dictionary* 1093 (6th ed. 1990). Normand's testimony that he found a twenty-pound scale in the truck does not fit the definition. Notably, we understand why Miller finds the testimony objectionable. However, Miller did not make a contemporaneous objection or move to strike the testimony. A contemporaneous objection is required to preserve an error for appeal. *King v. State,* 615 So. 2d 1202, 1205 (Miss. 1993) (citing *Smith v. State,* 530 So. 2d 155, 161-62 (Miss. 1988)). We find no merit in this assignment of error.

V.

DID THE COURT ERR IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS THE U-HAUL RENTAL CONTRACT?

Miller argues that the court erred in overruling his motion to suppress the introduction of the U-Haul rental contract because the probative value of the evidence was outweighed by unfair prejudice. Specifically, Miller argues that the contract unfairly linked him to the marijuana when it was only probative to show that he had exercised dominion and control over the trailer.

Miller's assignment of error recognizes that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. M.R.E. 403. However, the assignment does not acknowledge the broad discretion afforded trial courts in this arena. *Williams v. State*, 543 So. 2d 665, 667 (Miss. 1989) (citations omitted). If a trial court determines that the considerations of Rule 403 outweigh the probative value of evidence, it has the discretion to determine whether to exclude the evidence, since Rule 403 states not that the evidence *must* be excluded in such cases, but, rather, that it may be excluded. *Williams*, 543 So. 2d at 667.

Because of the broad discretion vested in the trial court, our task as an appellate court is not to weigh the Rule 403 factors anew. *Id.* We simply determine whether the trial court abused its discretion in weighing the factors and admitting or excluding the evidence. *Id.* The rental contract was a factor to be considered in determining whether Miller constructively possessed the marijuana. *Cf. Pate v. State*, 557 So. 2d 1183, 1184 (Miss. 1990) (court considered defendant's renting of room in which contraband was found, but determined that it did not conclusively establish constructive possession). Therefore, we are unable to find any abuse of discretion by the trial judge in determining that the contract was admissible. The motion to suppress was correctly denied.

VI.

DID THE ARRESTING OFFICERS VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL?

Miller states that he was deprived of his Sixth Amendment right to counsel. In support of his contention, he alleges that Normand testified on direct examination that Miller refused to talk with

police officers without an attorney, but they persisted, and Miller eventually responded to their interrogation. This issue was not raised in the pleadings, transcript, rulings, or Miller's motion for new trial. In Mississippi, the broad rule governing preservation for review provides that if an appellant raises for review an issue not raised in the pleadings, transcript, or rulings, the appellant must have preserved the issue raising it in a motion for new trial. *Ahmad v. State,* 603 So. 2d 843, 846-47 (Miss. 1992) (citations omitted). Miller is procedurally barred from raising this issue on appeal because he failed to raise the issue in the motion for new trial. *Ahmad,* 603 So. 2d at 847. Therefore, this assignment of error lacks merit.

VII.

DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO INTRODUCE THE CONTROLLED SUBSTANCE INTO EVIDENCE UPON THE RE-DIRECT EXAMINATION OF STATE WITNESS CECIL BYRD?

On direct examination, the State extensively examined Cecil Byrd on the marijuana's chain of custody. Then, the State tendered the witness for cross-examination without requesting that the marijuana be introduced into evidence. On cross-examination, Miller's counsel asked Byrd if he had participated in the arrest of Miller and whether he had any knowledge regarding Miller's possession of the substance. Byrd answered, "No, sir." Thereafter, counsel for Hofling and Thomas declined further cross-examination, and the State moved to introduce the marijuana. Despite defense counsels' objections, the court allowed the marijuana to be introduced into evidence.

Miller argues that it was error for the court to allow the marijuana to be introduced because it exceeded the scope of cross-examination. Generally, the scope and extent of re-direct examination is within the discretion of the court. *Evans v. State,* 499 So. 2d 781, 782 (Miss. 1986) (citations omitted). Rulings of the trial court pertaining to re-direct will not be disturbed unless there has been a clear abuse of discretion. *Id.*

Although the scope of re-direct is within the discretion of the court, re-direct examination is limited to matters brought out on cross-examination. Unif. Crim. R. Cir. Ct. Prac. 5.08. The record indicates that there was a reference to the marijuana when counsel for Miller asked, "So, your only involvement with this case was just transporting this to the lab; is that correct?" Therefore, we find no abuse of discretion by the court in allowing the evidence to be introduced. This assignment of error is without merit.

BRIDGES, P.J. FOR THE COURT

VIII.

WHETHER THE TRIAL COURT ERRED IN DENYING MILLER'S MOTION FOR A DIRECTED VERDICT.

Miller contends that the State failed to prove that he was in actual or constructive possession of the marijuana and that the court should have granted his motion for a directed verdict. In reviewing a motion for a directed verdict, the rule is that when all of the evidence on behalf of the State is taken as true, together with all sound or reasonable inferences that may be drawn therefrom, if there is enough evidence to support a verdict of conviction, then the motion should be denied. A motion for a directed verdict attacks the sufficiency of the evidence to support the elements of a crime. To test the sufficiency of the evidence,

> [W]e must, with respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair minded jurors could only find the accused not guilty.

Wetz v. State, 503 So. 2d 803, 808 (Miss. 1987) (citations omitted).

Once a jury has returned a verdict of guilty, the authority of this Court is restricted. It does not matter if our Court is not convinced beyond a reasonable doubt of the accused's guilt. We may not reverse so long as there is *credible evidence* in the record from which the jury could have found or reasonably inferred each element of the offense charged. *Davis v. State,* 586 So. 2d 817, 819 (Miss. 1991)(emphasis added).

To prove possession, the State must prove sufficient facts to warrant a finding that the accused was aware of the presence and character of the particular substance and intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the drug involved was subject to his "dominion or control." *Campbell v. State*, 566 So. 2d 475, 477 (Miss. 1990). Clearly, Miller was not found in actual possession of the marijuana, so the State bore the burden of proving that he constructively possessed the marijuana by showing it was subject to his "dominion or control."

A presumption of constructive possession arises against the owner of premises upon which contraband is found. When contraband is found on premises which are not owned by a defendant, mere physical proximity to the contraband does not, in itself, show constructive possession. The State must show *additional incriminating circumstances* to justify a finding of constructive possession. When contraband is found on premises, 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. *Cunningham v. State*, 583 So. 2d 960, 961 (Miss. 1991)(emphasis added).

The record revealed enough additional incriminating circumstances to justify a finding of constructive possession. These additional incriminating circumstances are as follows:

> 1. Subsequent to the arrest of Thomas and Hofling, the officers were tipped off that the owner of the U-Haul, who was paying the two to dry and bag the marijuana for sale, would be returning to pick up the trailer between 12:30 and 1:00 P.M. The officers were also told that the owner of the U-Haul was an older man who looked like and was called "Santa Claus" and would be driving a pickup truck.
>
> 2. The officers continued surveillance planning to arrest the owner of the marijuana.
>
> 3. At approximately 1:30 P.M., a man, fitting the description given to the officers and driving a pickup truck, pulled in front of the U-Haul as if to attach the trailer to his truck. The man, Chris Miller, saw the officers and sped away, only to be stopped a short distance away and arrested.
>
> 4. The search of Miller’s truck revealed a twenty-pound digital scoop scale on the front seat and a rental contract showing him as the lessee of the U-Haul that he had rented in Nebraska.
>
> 5. Miller was unable to pinpoint the date he left Nebraska, what day of the week it was when he left Nebraska, and how long the drive to Mississippi took him. He knew that he arrived in Mississippi on the day before he was arrested, but he did not know what day of the week it was.
>
> 6. While in the custody of the police, Miller was heard to tell the officers that they were in for a big surprise. When the officers asked Miller to clarify, he responded, "have you ever heard of hemp weed?"

We find that the above evidence, in conjunction with all other evidence elicited at trial, creates the sufficient additional incriminating circumstances connecting Miller to the marijuana in his U-Haul,

and that the jury was justified in finding that Miller constructively possessed the marijuana. We, therefore, affirm the trial court's denial of Miller's motion for a directed verdict. **THE JUDGMENT OF THE CIRCUIT COURT OF GEORGE COUNTY OF CONVICTIONS OF WILLIAM ROGER THOMAS AND GREG HOFLING OF POSSESSION OF MORE THAN ONE KILOGRAM OF MARIJUANA AND SENTENCES OF TWELVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF $5, 000 EACH IS AFFIRMED AND THE CONVICTION OF CHRIS MILLER OF POSSESSION WITH INTENT TO DISTRIBUTE MORE THAN ONE KILOGRAM OF MARIJUANA AND SENTENCE OF TWENTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF $100,000 IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED ONE-THIRD TO MILLER, ONE-THIRD TO HOFLING AND ONE-THIRD TO GEORGE COUNTY.**

BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, MCMILLIN, PAYNE AND SOUTHWICK, JJ., CONCUR. KING, J., DISSENTS TO ISSUE VIII JOINED BY FRAISER, C.J., AND COLEMAN, J.

IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00948 COA

WILLIAM ROGER THOMAS, CHRIS MILLER AND GREG HOFLING

APPELLANTS

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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KING, J., DISSENTING TO ISSUE VIII:

I would respectfully dissent from the position of the majority opinion, which affirmed the denial of Miller's motion for directed verdict.

Miller contends that the State failed to prove that he was in actual or constructive possession of the marijuana and that the court should have granted his motion for a directed verdict. In reviewing a motion for directed verdict, we accept as true all evidence introduced by the prosecution, 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 a directed verdict must be overruled. *Roberson v. State,* 595 So. 2d 1310, 1320 (Miss. 1992) (citing *Guilbeau v. State*, 502 So. 2d 639, 641 (Miss. 1987)). When the State rested and Miller moved for a directed verdict, the State had proved the following:

> 1. On October 2, 1992, Christopher Miller rented a U-Haul trailer, which was to be returned to a location in Biloxi, Mississippi on October 7, 1992.
>
> 2. During the early morning hours of October 5, 1992, Ronnie Hollingsworth discovered a trailer parked in front of his residence and broke into it. Upon breaking into the trailer, Hollingsworth discovered what he believed to be marijuana and telephoned Deputy George Miller of the George County Sheriff's Department.
>
> 3. Deputy Miller received Hollingsworth call at approximately 3:00 A.M. on the morning of October 5, 1992, and responded by driving to Hollingsworth's residence. Upon arrival, Deputy Miller viewed the contents of the trailer, and called the Metro George-Greene County Narcotics Task Force.
>
> 4. Members of the Metro George-Greene County Narcotics Task Force responded to Deputy Miller's call and began surveillance of the trailer. At approximately 11:00 A.M., Hofling and Thomas were seen removing the contents of the trailer and spreading it onto a tarpaulin in an area adjacent to Hollingsworth's residence.
>
> 5. Hofling and Thomas were arrested and surveillance of the trailer continued.
>
> 6. Approximately two hours after the arrests of Hofling and Thomas, Defendant Miller's pick-up truck was seen. The truck came within proximity of the trailer, and then, the truck proceeded to drive off. The officers pursued and the driver of the truck, later identified as the Defendant Miller brought his vehicle to rest within a few feet of the residence.

> 7. Miller was arrested and upon searching the truck, the officers found a U-Haul rental contract bearing Miller's signature.

> 8. A sample of the trailer's contents was taken to the state crime lab for analysis, and the results of the analysis indicated that the substance was marijuana.

The supreme court's position on the proof required to show possession is:

> There must 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. It need not be actual physical possession. Constructive possession may be shown by establishing that the drug involved was subject to his dominion or control.

Campbell v. State, 566 So. 2d 475, 476 (Miss. 1990) (citing *Pate v. State*, 557 So. 2d 1183, 1184 (Miss. 1990)). In the instant case, Miller's possession was not actual; therefore, the supreme court's position requires the State to prove constructive possession by establishing: (1) that the defendant was aware of the presence and character of the substance, and (2) that the defendant exercised dominion or control over the contraband. *Campbell,* 566 So. 2d at 476 (citing *Curry v. State,* 249 So. 2d 414, 416 (Miss. 1971)). When Miller moved for a directed verdict, the State's case against Miller showed (1) that Miller had leased the trailer and (2) that Miller had been seen within the trailer's proximity.

If 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. *Pate v. State,* 557 So. 2d 1183, 1184 (Miss. 1990). The following evidence presented during the State's case-in-chief established that Miller did not have exclusive possession of the trailer:

> (1) On October 5, 1992, between the hours of 2:00 A.M. and 3:00 A.M. Hollingsworth discovered the trailer, broke its lock and peered inside;

> (2) Shortly after Hollingsworth's discovery, Deputy George Miller arrived and was shown the contents of the trailer;

> (3) Members of the Metro George-Greene County Narcotics Task Force were called to the scene by Deputy George Miller. Upon arrival, the task force commenced surveillance of the trailer;

(4)At approximately 12:00 P.M., the task force saw Hofling and Thomas go to the trailer and remove its contents.

Therefore, additional competent evidence connecting Miller to the contraband was needed to sustain the finding of constructive possession.

Miller's momentary flight from the officers was insufficient to connect him to the contraband. Flight from the scene of an offense is not substantive evidence of guilt because it is consistent with innocence as well as guilt. *Howard v. State,* 182 Miss. 27, 35, 181 So. 525, 530 (1938). Standing alone, it is insufficient to establish guilt. *Id.*

Miller's proximity to the trailer is probative of his connection to the contraband, but it too was insufficient to sustain the finding of constructive possession. *Cunningham,* 583 So. 2d at 962 (explaining that evidence in addition to physical proximity showing the defendant exercised control over contraband is required for finding of constructive possession). Because the State's evidence established Miller's possessory interest in the trailer and failed to show that Miller exercised dominion and control over the marijuana, the motion for directed verdict should have been granted.

However, the record indicates that after the court denied Miller's motion for directed verdict, Miller proceeded to offer evidence on his behalf. When a defendant proceeds to offer evidence on his behalf after the denial of a motion for directed verdict, the waiver rule applies. *Smith v. State,* 646 So. 2d 538, 542 (Miss. 1994). The waiver rule does not obviate a defendant's right to challenge the sufficiency or weight of the evidence in the event of an adverse jury verdict. *Smith,* 646 So. 2d at 542. Instead, the waiver rule requires the defendant to proceed on the basis of the evidence before the court at the time the challenge is made and not in the limited state of the record which may have existed back when the motion for a directed verdict was originally made. *Id.* In essence, when the sufficiency of the evidence is challenged on appeal, this Court must review the trial court's ruling on the last occasion when the sufficiency of the evidence was challenged before the trial court. *Id.*

Miller's last challenge to the sufficiency of the evidence before the trial court arose in his motion for new trial or JNOV. We are required to review the evidence before the court at the time the motion for new trial or JNOV was denied. *Smith,* 646 So. 2d at 542 (explaining that the appeal is based upon the entire record, not just the State's case).

In addition to the evidence introduced during the State's case-in-chief, the following evidence was before the court when it denied Miller's motion for new trial or JNOV:

1. After their arrests, Hofling and Thomas gave the officers a description of Miller and informed the officers that Miller would be returning to pick-up the U-Haul around 1:30 p.m.

2. When Miller was arrested, the officer's searched his truck and recovered the U-Haul's rental agreement and a twenty-pound scale.

3. Miller rented the U-Haul to transport several engines and a log splitter that he purchased while visiting the State of Nebraska.

4. Miller raised and sold pedigreed rabbits prior to arrests. Miller used the scale to weigh the rabbits he sold.

5. The officers never saw Miller in physical possession of the marijuana, nor did the officers observe Miller peering into the trailer.

6. In rebuttal, Officer Normand testified that after Miller's arrest, Miller told them they were in for a big surprise later on. Then, Normand asked, "What do you mean?" Miller responded, "Have you ever heard of hemp weed before?"

When we review the evidence in a light most favorable to the State, together with all reasonable inferences therefrom, we find that the evidence does not support the jury's verdict. Miller's statement concerning the "hemp" support's the jury's conclusion that Miller was aware of the character and presence of the substance. However, *awareness of the controlled substance* is but one element of the offense. *Dominion and control* over the substance must also be exercised before a conviction based upon constructive possession can be sustained. The evidence does not establish beyond a reasonable doubt that Miller exercised dominion and control over the marijuana found in the trailer. Therefore, Miller's motion for JNOV should have been sustained, and his conviction reversed and rendered.

FRAISER, C.J., AND COLEMAN, J., JOIN THIS OPINION.