

IN THE COURT OF APPEALS

8/26/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00204 COA

ONE 1987 CHEVROLET TRUCK, VIN  
#1GCDR14K4HS165171;SIX THOUSAND  
FIVE HUNDRED DOLLARS (\$6,500) IN  
UNITED STATES CURRENCY AND ONE (1)  
ROSSI .38 CALIBER PISTOL, SN # D411569 APPELLANT

v.

STATE OF MISSISSIPPI EX REL.  
MISSISSIPPI BUREAU OF NARCOTICS APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: CLAY COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: THOMAS M. BRAHAN

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: LISA L. BLOUNT

NATURE OF THE CASE: CIVIL - ASSET FORFEITURE

TRIAL COURT DISPOSITION: ORDER FORFEITURE OF \$6500, 1987 CHEVROLET TRUCK, ROSSI .38 CALIBER PISTOL

MANDATE ISSUED: 9/16/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

HINKEBEIN, J., FOR THE COURT:

The Circuit Court of Clay County ordered six thousand five hundred dollars (\$6,500), one 1987 Chevrolet truck, and one Rossi .38 caliber pistol forfeited to the Mississippi Bureau of Narcotics pursuant to Section 41-29-177 of the Mississippi Code. John H. O'Bryant [O'Bryant], claimant to the seized property, appeals only the forfeiture of the currency on this basis:

I. THE COURT ERRED IN ALLOWING SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500) IN UNITED STATES CURRENCY TO BE FORFEITED TO THE STATE OF MISSISSIPPI.

Holding this assignment of error to be without merit, we affirm the judgement of the circuit court.

#### FACTS

On the morning of October 16, 1994, Clay County Sheriff's Deputy Joe Huffman [Huffman] responded to a drunken driving call and discovered John O'Bryant perched in his Chevrolet truck alongside the road. As O'Bryant exited his vehicle, Huffman observed a plastic bag containing what appeared to be marijuana protruding from his pocket. Huffman arrested O'Bryant immediately for misdemeanor possession of marijuana and transported him to the Clay County Sheriff's Department. Upon arrival, \$6,500 cash, a marijuana pipe, and more marijuana were found on O'Bryant's person. Deputy Huffman then searched his patrol car's rear seat, finding various drug paraphernalia discarded by O'Bryant. Sheriff's deputies and Mississippi Bureau of Narcotics officers thereafter searched O'Bryant's truck. The officers found the following: (1) a paper sack lying in the vehicle's floorboard containing three heat-shrunk plastic bags of marijuana with a combined weight of one pound, (2) a

marijuana joint in the center console, (3) false-bottomed containers, four sets of scales and a .38 caliber pistol (all behind the seat), and (4) another paper sack containing crystal methamphetamine (also behind the seat).

## PROCEEDINGS BELOW

O'Bryant was convicted during September 1995 in the United States District Court for the Northern District of Mississippi on several counts stemming from the arrest. Among these were possession of marijuana and crystal methamphetamine with intent to sell as well as possession of a firearm in commission of a drug trafficking crime.

Opting not to pursue criminal charges, the Mississippi Bureau of Narcotics instead petitioned for forfeiture of the items seized during the arrest. At trial, in December 1995, O'Bryant offered speculation as to the source of the seized currency. John Simmons testified to having employed O'Bryant as a farmhand between March 1994 through July 1994. Kenneth O'Brian recalled loaning O'Bryant \$2,500 a few weeks before the arrest. The day of his arrest O'Bryant allegedly phoned his long-time friend, claiming he was prepared to repay the loan. O'Bryant also submitted to the court documents reflecting two \$400 disbursements received from the Clay County Circuit Clerk and an order of the same court requiring return of \$2,005 seized in a previous and unrelated incident. Unpersuaded, the trial judge, sitting without a jury, ordered the forfeiture of O'Bryant's Chevrolet truck, pistol and \$6,500. From this order O'Bryant appeals only the forfeiture of the currency.

## ANALYSIS

### I. THE COURT ERRED IN ALLOWING SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500) IN UNITED STATES CURRENCY TO BE FORFEITED TO THE STATE OF MISSISSIPPI.

O'Bryant contends the circuit court erred in ordering forfeiture of the currency to the Mississippi Bureau of Narcotics. He claims the State did not meet its burden of proof pursuant to the Mississippi Uniform Controlled Substance Law because an insufficient nexus existed between the cash found on his person and the contraband discovered inside his vehicle. The State argues that the decision of the trial judge, sitting as sole trier of fact, may not be characterized as clearly erroneous and thus should not be disturbed. We agree with the State.

The State bears the initial burden of proving by a preponderance of the evidence that property has been obtained through or is intended for use in illegal narcotics trafficking. *Jones v. Miss. ex. rel. Miss. Dep't of Pub. Safety*, 607 So. 2d 23, 29 (Miss. 1991) (citing *Saik v. Miss. ex. rel. Miss. Bureau of Narcotics*, 473 So. 2d 188, 191 (Miss. 1985)); *Reed v. State*, 460 So. 2d 115, 118 (Miss. 1984). Forfeiture can be based entirely on circumstantial evidence and inference. *Reed*, 460 So. 2d at 118 (stating that sheer quantity of currency may serve as basis for forfeiture). The State is aided in carrying this burden by a rebuttable presumption that money found in close proximity to illegal narcotics is forfeitable. "Close proximity" in essence means "very near." *Jones*, 607 So. 2d at 29 (quoting Arkansas Supreme Court's decision in *Limon v. State*, 685 S.W.2d 515 (Ark. 1985)).

The standard of review is the substantial evidence/clearly erroneous test. *\$107,000.00 v. Harrison County Sheriff's Dep't*, 643 So. 2d 917, 920 (Miss. 1994). The question is not how we would have resolved the evidentiary and ultimate fact disputes had we been the triers of fact, but whether, given the record, a reasonable fact-finder may have done as was done. *See \$107,000.00*, 643 So. 2d at 920. With this standard in mind, we review the assigned error.

O'Bryant questions the applicability of the "close proximity" presumption in the case sub judice. Alternatively, he contends that testimony of other plausible sources of the money successfully overcame the presumption. In support of his arguments, O'Bryant directs our attention to *Neely v. State ex. rel. Tate County*, 628 So.2d 1376, 1382 (Miss. 1993).

In that case, law enforcement officers discovered two rocks of crack cocaine inside a matchbox lodged between the passenger seat and console of Mr. Neely's vehicle. Police also found \$1,270 in Neely's pocket. The Mississippi Supreme Court examined the totality of the circumstances, paying particular attention to the size of the package and its accessibility. The court questioned the presumption of close proximity, implying the facts suggested possession for personal use. However, the court made no final determination, concluding that the presumption had in any event been sufficiently rebutted. Neely did so with his testimony. He claimed to have been en route to a motorcycle repair shop to which he owed \$600. He produced the bill. He also produced a recently cashed paycheck for approximately \$300 evidencing gainful employment.

The court concluded differently in *Jones v. State*, 628 So. 2d at 1376. There, large amounts of marijuana and marijuana residue were found throughout Jones' vehicle. In particular, police detected the controlled substance within a suitcase containing \$149,700. Since the currency and marijuana were "very near" one another, the burden rested upon Jones to rebut the proximity presumption. Jones never offered an explanation.

The case at hand lies closer on the continuum to *Jones*. Unlike Neely, O'Bryant had both marijuana and the claimed \$6,500 cash in his pocket when arrested. We consider currency carried on the person as being in close proximity to anything also on the person. The sheer amount of narcotics, the various forms of paraphernalia, the shrink-wrap packaging of the marijuana and the non-accessibility of the crystal methamphetamine stash behind the truck seat serve to bolster our determination. We therefore conclude these facts on whole indeed raise the presumption of forfeitability.

O'Bryant's attempt to rebut the presumption failed. As was the case in *Jones*, he never offered a credible explanation as to the source of the seized \$6,500. For a minimum of one and a half months prior to his arrest on October 16, 1994, O'Bryant had no source of income. His employment with John Simmons lasted only from March 1994 through July 1994. O'Bryant's claim that the money was returned to him from a prior seizure also fails. Any money due O'Bryant from the Clay County Circuit Clerk's Office would have been disbursed in July of 1994 at the latest date. And whether the previously seized money was in fact returned is unknown. Moreover, no evidence corroborated Kenneth O'Brian 's alleged \$2,500 loan. The trial court was free to reject O'Brian's testimony regarding the loan as the product of a twenty year friendship.

On these facts the trial court found a connection between the currency and narcotics trafficking more likely than not. We are unable to characterize this determination as clearly erroneous. Because the funds fall within the purview of forfeitable assets pursuant to Mississippi law, we affirm the forfeiture

as ordered by the lower court.

**THE JUDGMENT OF THE CLAY COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**