IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00825 COA

MITCHEL KELLER A/K/A MITCHEL N. KELLER

A/K/A "MITCH" APPELLANT

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. FRANK G. VOLLOR

COURT FROM WHICH APPEALED: WARREN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: RICHARD E. SMITH, JR.

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: G. GILMORE MARTIN

NATURE OF THE CASE: CRIMINAL-DRUG POSSESSION

TRIAL COURT DISPOSITION: POSSESSION OF OVER ONE KILOGRAM OF MARIJUANA; TEN YEARS IN MDOC

MANDATE ISSUED: 9/30/97

BEFORE McMILLIN, P.J., COLEMAN, DIAZ, AND PAYNE, JJ.

DIAZ, J., FOR THE COURT:

Mitchel Keller was convicted of possession of over a kilogram of marijuana in the Warren County Circuit Court on April 17, 1995. Keller was given a ten-year sentence to be served in the custody of the Mississippi Department of Corrections. Aggrieved, Keller appeals to this Court.

FACTS

On April 10, 1994, Deputy Mark Morgan and his drug-detection dog, Bruno, were patrolling Interstate 20 in Warren County when Morgan observed a Dodge pickup with an expired Georgia tag. After Morgan pulled the truck over, he smelled marijuana as he neared the truck. Raymond Reddick was the driver, and Keller was the passenger.

Deputy Morgan got Bruno and had him check the truck for drugs. Bruno immediately showed interest in the tool box in the back of the truck. Morgan asked Reddick if he had any drugs in his possession, and Reddick replied that he had about sixty pounds. Reddick signed a consent-to-search form, and Morgan and Detective Mark Culbertson, who had been called in as backup, searched the truck. The officers found two garbage bags with what turned out to be bricks of marijuana. Culbertson drove the truck with the marijuana to the Vicksburg police station, and Morgan followed him. There the drugs were packaged, labeled, and transported to the state crime laboratory by Officer Toney Green. Once tested and determined to be marijuana, the drugs were returned to the Vicksburg police station. A portion of the marijuana had to be destroyed because of lack of storage space at the Warren County evidence vault. Debra Butler, analyst at the state crime laboratory, testified to having received the marijuana from Warren County. Bernice Langston was the lab technician who put the marijuana in the crime laboratory's vault.

Reddick and Keller were to be tried together, but after the jury was chosen, Reddick pled guilty to the charge of possession with intent to distribute. Keller, the passenger in the truck, testified that he was just a passenger of Reddick's and was traveling to Texas with Reddick to help him deliver some equipment. Keller further stated that he knew nothing about the marijuana. Once it became known to Keller that the prosecution intended to call Reddick as a rebuttal witness, Keller's attorney requested a continuance. The request was eventually withdrawn by Keller when he decided he did not desire a

continuance. Reddick then testified, without any objection from Keller, that Keller was helping retrieve the marijuana from Texas to sell, and Keller was to receive his share of the profits.

ISSUES

A. Did the trial court err when it admitted into evidence the marijuana found in the truck?

Deputy Morgan found about sixty pounds of marijuana in the back of the truck driven by Reddick. Keller argues that the marijuana should not be admitted into evidence. Keller alleges there were breaks in the chain of custody and evidence of probable tampering. Keller suggests that because the tags that Morgan had placed on the evidence were no longer attached and because Toney Green, the person who transferred the evidence from the police station to the crime lab, did not testify, that there was a lack of continuous possession and therefore probable tampering.

Morgan claims that although his original identifying marks were not on the bags, the crime lab numbers were on the bags. Morgan also testified to the chain of custody from the scene of discovery of the marijuana to the delivery of it to the state crime lab where it was marked and sealed with the numbers with which it remains marked.

The chain of custody was not broken here. Morgan followed the truck containing the marijuana to the sheriff's department where it was tagged. Morgan then requested Green to transport the sixty and one-half pounds of marijuana to the state's crime laboratory. It was received by the lab from Green, and there it was marked and tested. The sixty and one-half pounds of marijuana was then returned to the Warren County Sheriff's Department where some of it was destroyed for safety purposes.

This state's supreme court has held that the test for continuous possession or chain of custody is "whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." *Grady v. State*, 274 So. 2d 141, 143 (Miss. 1973). There is a presumption of regularity which supports the official acts of public officers, and the burden to prove there was irregularity or a broken chain of custody lies with the defendant. *Nix v. State*, 276

So. 2d 652, 653 (Miss. 1973). Likewise, the trial judge has the sound discretion to determine matters relating to the chain of custody of evidence, and his decision will not be overturned by this Court absent an abuse of discretion. *Id.* In the case at hand, there was continuous custody by public officials in their official capacity from the time of the original stop and discovery of the marijuana until the trial. There was no irregularity in the manner in which the evidence was handled, nor has the appellant proved any such irregularity or inference of probable tampering. We therefore, affirm the lower court's ruling as to the admittance of the marijuana into evidence.

B. Did the trial court unfairly prejudice the jury against the appellant when it allowed the co-defendant to enter a plea of guilty after voir dire and then allowed co-defendant to be called as a rebuttal witness?

After the jury was empaneled, Reddick pled guilty and then later testified against Keller. A continuance was requested by Keller's attorney but was later withdrawn when Keller stated he did not desire a continuance. Keller also made no objection to Reddick's testimony. Keller has forever waived his right to appeal on this issue because of his knowing and voluntary waiver of the continuance and the lack of objection to Reddick's testimony. In *Haddox v. State*, 636 So. 2d 1229, 1240 (Miss. 1994), Mississippi's supreme court stated:

Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection that was not the assertion at trial is not an issue properly preserved on appeal. (Citations omitted).

There is no evidence in the record of any objection by Keller to Reddick's testimony. Further, Keller made a knowing and voluntary waiver of his request. He made it clear on the record that he no longer wanted a continuance. Due to the above circumstances, this Court is not obligated to review the issue.

We hold that the trial judge was not in error when he allowed the marijuana to be admitted into evidence, and we affirm the lower court's decision.

THE JUDGMENT OF THE WARREN COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF OVER A KILOGRAM OF MARIJUANA AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND A FINE OF $1000, PAYMENT OF WHICH IS SUSPENDED, IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO WARREN COUNTY.

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