

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00940 COA**

MILTON GREEN

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

DATE OF JUDGMENT:	09/07/95
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	COPIAH COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KATE EIDT
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
DISTRICT ATTORNEY:	ALEXANDER C. MARTIN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	POSSESSION OF A WEAPON BY A CONVICTED FELON: SENTENCED TO SERVE 3 YRS WITH THE MDOC
DISPOSITION:	REVERSED AND RENDERED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

BEFORE THOMAS, P.J., DIAZ, HERRING, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

Milton Green was convicted in the Circuit Court of Copiah County for possession of a firearm by a convicted felon. Green was sentenced to serve three years in the custody of the Mississippi Department of Corrections. Aggrieved, Green appeals the conviction on three issues. Green claims that (1) the trial court erred when it denied his motion for dismissal of the indictment based upon lack of probable cause to stop the defendant in his vehicle and the search of the vehicle, (2) the trial court erred when it allowed the indictment to proceed to trial as the evidence of the charge was a result of an illegal search and seizure, and (3) the jury verdict was contrary to the overwhelming weight of the

evidence.

FACTS

On December 31, 1994, Milton Green was driving his fiance's Ford Taurus a short distance north of Highway 27 and Highway 51 in Covich County when he was pulled over by two unmarked vehicles. The unmarked vehicles were the patrol cars of Officers Crew, Stuart, and Young. The basis of the stop was that the officers believed Green had committed the crime of conspiracy by agreeing to purchase drugs from a confidential informant, and that he was traveling to a meeting place where Green was to purchase the narcotics. This meeting never took place. It is not clear where Green was going when he was stopped, but he was headed in the direction of his fiance's home. The State argues that the officers had probable cause to stop Green because they believed he was acting in furtherance of the conspiracy at that time. The officers stopped Green, removed him from the vehicle, and patted him down for weapons. Simultaneously, another officer conducted a search of the vehicle and discovered a .9 millimeter firearm. Green was ultimately charged with and indicted for possession of a weapon by a convicted felon.

ISSUES

A. Did the trial court err in failing to grant Green's motion to dismiss the indictment for lack of probable cause to stop the appellant?

Green moved to dismiss the indictment pre-trial stating that there was no probable cause to initially stop or detain Green. Green argues that Officers Crew, Stuart, and Young specifically set out to engage Green in a conspiracy and initiated this with a call to Green by a confidential informant who was working for the government. The confidential informant and Green had several telephone conversations which were taped and one final telephone conversation which was not taped or heard by any third party. At some point in these conversations a meeting place was set for the sale of cocaine from the confidential informant to Green. There is some confusion as to exactly where the meeting place was to be, but Green was headed north when he was stopped.

The State argues that they had probable cause to stop Green because they had reason to believe that he had committed the crime of conspiracy, and he was acting in furtherance of the conspiracy. We hold that the State is mistaken in its belief. Mississippi law is clear on this issue. When two or more people conspire to commit a crime then there exists a conspiracy. Miss. Code Ann. § 97-1-1 (Rev. 1994). For a conspiracy to lie the conspirators must be persons who act of their own free will in agreeing to commit an offense. *James v. State*, 481 So. 2d 805, 808 (Miss. 1985). "One who 'conspires' with himself or with another who by law is precluded from co-conspirator status is not guilty of the crime of conspiracy in this state." *Id.*

In *James*, the Court discussed, in a footnote, the fact that some states have carved out exceptions to the rule that a person conspiring with a confidential informant cannot legally be guilty of conspiracy. These states follow a unilateral approach which focuses the culpability on the individual charged and disregards the co-conspirator. Their logic is that if the accused had the requisite intent to engage in

illegal conduct, then he is guilty. Although the Supreme Court of Mississippi acknowledged the existence of the unilateral approach, the court did not see fit to adopt this new train of thought. *Id.*

In this case, the only two people who supposedly agreed to commit a crime were the confidential informant and Green. Because the confidential informant was precluded from co-conspirator status, Green was not capable, by law, of committing the above mentioned conspiracy. It follows then that the officers in this case, who we assume are aware of the law in Mississippi, must have known that there was no actual crime which had occurred and therefore, they had no probable cause to stop Green.

We find that the trial court committed reversible error when it failed to dismiss the indictment on this basis. We reverse and render. Therefore, we will not address the remaining issues.

THE JUDGMENT OF THE CIRCUIT COURT OF COPIAH COUNTY IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO COPIAH COUNTY.

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

McMILLIN, P.J., NOT PARTICIPATING.