IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00426 COA

JOHNNY SEALES A/K/A LAND CARTER **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:	03/18/96
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	NESHOBA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	EDMUND J. PHILLIPS, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	KEN TURNER
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	POSSESSION OF COCAINE: SENTENCED TO SERVE A TERM OF 3 YRS IN THE MDOC & PAY A FINE OF $5,000.00
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

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

BRIDGES, C.J., FOR THE COURT:

Johnny Seales a/k/a Land Carter was convicted in the Neshoba County Circuit Court of possession of cocaine on March 18, 1996. He was sentenced to serve three years in the Mississippi Department of Corrections and fined $5,000. Aggrieved, he appeals arguing that 1) the circuit court erred in refusing defendant's instruction D-12, and 2) the warrantless strip search was unreasonable, and the evidence discovered was inadmissible. We find no error and accordingly, we affirm.

FACTS

On December 20, 1995, Officer Julian Greer of the Philadelphia Police Department conducted a routine traffic stop of the vehicle driven by Seales. Officer Greer smelled the presence of alcohol, and Seales was taken to the police station to perform an intoxilyzer test. At the station, Seales asked to go to the rest room and was escorted by two policemen. A strip search was performed, and Officer Waddell testified that he and Officer Payne "noticed two rock like substances in his crotch, scrotum area." Officer Waddell testified that he asked Seales "to place them on the table that was beside him, and he took one of them and mashed it up. . . . " Officer Waddell stated that he then told Seales to let the other one hit the floor, but Seales "attempted to try to stomp it . . . . " Officer Payne and Officer Waddell testified that they grabbed Seales to get him away from the rock-like substance. The toxologist testified that the substance was crack cocaine.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE TRIAL COURT ERRED IN REFUSING DEFENDANT'S INSTRUCTION D-12.

Seales argues that the trial court erred in refusing his proposed instruction D-12. In support of his contention, Seales argues that by refusing the instruction the jury was not informed that the prosecution was required to prove beyond a reasonable doubt that Seales consciously exercised control over the cocaine to justify a conviction. Instruction D-12 reads as follows:

> The Defendant, Johnny Seales, is charged by indictment with the crime of possession of a controlled substance, namely cocaine.
>
> To constitute the crime of possession, there must be sufficient evidence, in addition to physical proximity, to prove beyond a reasonable doubt that the defendant consciously exercised control over the cocaine, and absent this evidence, it is your duty to find Johnny Seales, not guilty.

We find Seales's argument to be procedurally barred.

The law is well settled in this state that the failure to object to jury instructions at trial precludes the consideration of the issue on appeal. ***See Lester v. State,*** **692 So. 2d 755, 799 (Miss. 1997);** ***Jackson v. State,*** **684 So. 2d 1213, 1229 (Miss. 1996);** ***Walker v. State,*** **671 So. 2d 581, 618 (Miss. 1995);** ***Carr v. State,*** **655 So. 2d 824, 856 (Miss. 1995);** ***Chase v. State,*** **645 So. 2d 829, 852 (Miss. 1994).** Our review of the record does not reveal an objection at trial to instruction D-12. According to record, Seales never objected to Instruction D-12 being refused. "The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal." ***Ballenger v. State,*** **667 So. 2d 1242, 1264 (Miss. 1995).** "No assignment of error based on the granting of an instruction will be considered on appeal by this Court unless specific objection was made to the instruction in the trial court stating the particular ground or grounds for such objection." ***Davis v. Singing River Elec. Power Ass'n,*** **501 So. 2d 1128, 1131 (Miss. 1987).**

Even if Seales's argument were not barred, we find it to be without merit. Defendant's Instructions D-9 and D-10 read as follows:

Defendant Instruction D-9:

> The Defendant, Johnny Seales, is charged by indictment with the crime of possession of a controlled substance, namely cocaine.
>
> To constitute a possession, there must be sufficient facts to warrant a finding beyond a reasonable doubt that the Defendant was aware of the presence and character of the particular substance, in this case, cocaine, and was intentionally and consciously in possession of it.
>
> Where the particular substance is not in the actual physical possession of the Defendant, there must be sufficient facts to establish beyond a reasonable doubt that the substance involved was subject to Johnny Seales['] dominion or control.
>
> The burden of proof in this case is on the State of Mississippi, and unless the State has presented evidence sufficient to prove beyond a reasonable doubt that the substance involved was subject to Johnny Seale's [sic] dominion or control and that the Defendant was intentionally and consciously in possession of it, then it is your sworn duty to return a verdict of not guilty.

Defendant Instruction D-10:

> The Court instructs the Jury that the burden of proof is upon the State and the State must prove its case beyond a reasonable doubt by proper and legal evidence, and that so long [a]s there is a reasonable doubt as to the Defendant Johnny Seale's [sic] guilt, the State not sufficiently and satisfactorily made out its case, and unless the jury believes beyond a reasonable doubt from the evidence in this case that at the time charged Johnny Seale[s] knew that it was cocaine, it is your sworn duty to find Johnny Seale[s] not guilty.

"This Court's standard in reviewing jury instructions is to read all instructions together and if the jury is fully and fairly charged by other instructions, the refusal of any similar instructions does not constitute reversible error." ***Hull v. State,*** **687 So. 2d 708, 722 (Miss. 1996).** Failure to give a jury instruction is reversible only if the instruction was substantially correct, was not substantially covered by other instructions actually delivered, and concerned an important point at trial so that failure to give it seriously impaired defendant's ability to present a given defense. ***U.S. v. Andrews,*** **22 F.3d 1328, 1345 (5th Cir. 1994).**

With regard to Instruction D-12, Seales argued that it should have been granted. We disagree because the same law was covered by Instructions D-9 and D-10, which was given to the jury. The trial court need not instruct the jury on otherwise valid instructions if the subject matter contained in the proposed instruction is adequately covered by an instruction already granted. ***Griffin v. State,*** **610 So. 2d 354, 356 (Miss. 1992).** We feel that D-12 was adequately covered by D-9 and D-10 and therefore, not necessary. We find no merit to this issue.

II. WHETHER THE WARRANTLESS SEARCH OF THE DEFENDANT WAS UNREASONABLE AND THE EVIDENCE OF COCAINE INADMISSIBLE.

Seales argues that the warrantless strip search was unreasonable because it was not incident to arrest, did not occur under exigent or emergency circumstances, and went beyond what constituted a frisk. We find this issue also to be procedurally barred. As stated previously, "[t]he assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal." ***Ballenger v. State*, 667 So. 2d 1242, 1264 (Miss. 1995).** Seales raises objections on appeal that can be found nowhere in the record; therefore, his objections were not properly preserved on appeal. When the State rested its case, the record does indicate that Seales made a motion to exclude the evidence presented by the State, but the evidence had already been introduced into evidence without objection. Seales did not file any type of motion to suppress the evidence before trial nor did he object when the evidence was introduced by the State. Seals left no tools for the trial and this Court to consider the merits of his objections. This issue is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF NESHOBA COUNTY OF CONVICTION OF POSSESSION OF COCAINE AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF $5,000 IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO NESHOBA COUNTY.

COLEMAN, DIAZ, HERRING, HINKEBEIN AND PAYNE, JJ., CONCUR. McMILLIN, P.J., CONCURS IN PART. KING, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY MCMILLIN AND THOMAS, P.JJ., AND SOUTHWICK, J.

KING, J., CONCURRING IN PART, DISSENTING IN PART:

I concur with the result reached in this case. However, I write separately to express my disagreement with a portion of the rationale, given by the majority in reaching that result.

In discussing the refusal of the trial court to grant the Defendant's requested instruction D-12, the majority finds that issue to be procedurally barred for failure to object. As the foundation for this holding, the majority cites the following cases: ***Lester v. State*, 692 So. 2d 755, (Miss 1997); *Jackson v. State*, 684 So. 2d.1213 (Miss.1996); *Walker v. State*, 671 So. 2d 581(Miss. 1995); *Carr v. State*, 655 So. 2d. 824 (Miss. 1995); *Chase v. State*, 645 So. 2d. 829 (Miss. 1994).**

The cases cited by the majority on this point are inapplicable, and therefore not controlling.

In the cases relied upon by the majority, the Defendants assigned as error the granting of various instructions requested by the State. The supreme court held these appeals to be procedurally barred because the Defendant(1) failed to object at trial or (2) objected on different grounds upon appeal.

The concept of a procedural bar has as its core the belief that a matter not brought to the attention of the trial judge should not be chargeable to him as error. This statement is repeated by this Court

on a daily basis. Indeed, it has become such a truism, that case citation could be dispensed with. In order to avoid a procedural bar, the Defendant was required to call the matter to the court's attention and give the court the opportunity to address it.

In the present Case the Defendant (1) requested instruction D-12 and (2) did not withdraw his request for instruction D-12.The trial court considered instruction D-12, and made the decision that he would refuse it. Given this sequence of events, what purpose would be served by requiring the Defendant to state those magic words, "I object to your decision to deny instruction D-12"? The answer to that question is clearly none.

I would suggest that the Defendant has satisfied his obligation, where he (1) requests an instruction, which properly states the law, (2) does not voluntarily withdraw the requested instruction and (3) designates the denied instruction as a part of the record for purposes of appeal. This belief would appear to be consistent with the holding of our supreme court in ***Conner v. State,*** **632 So. 2d. 1239, 1254 (Miss. 1993)**, and ***Jackson v. State,*** **672 So.2d. 468, 493 (Miss 1996).**

For the foregoing reasons, I concur in part and dissent in part.

MCMILLIN AND THOMAS, P.JJ., AND SOUTHWICK, J., JOIN THIS SEPARATE OPINION.