IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01137 COA

MARK CURTIS RICHARDSON **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:	10/11/95
TRIAL JUDGE:	HON. ROBERT H. WALKER
COURT FROM WHICH APPEALED:	STONE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GEORGE S. SHADDOCK
	CALVIN DANIEL TAYLOR
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: CHARLES W. MARIS JR.
DISTRICT ATTORNEY:	CONO CARANNA
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO TRANSFER OR DISTRIBUTE: SENTENCED TO 10 YRS IN THE CUSTODY OF THE MDOC, 7 YRS SUSPENDED WITH 3 YRS TO SERVE; UPON HIS RELEASE HE IS TO BE PLACED ON 2 YRS REPORTING PROBATION
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

DIAZ, J., FOR THE COURT:

Mark Richardson was arrested and convicted of possession with the intent to transfer or distribute.

He was sentenced to ten years in the Mississippi Department of Corrections with seven years suspended and two years probation.

At the conclusion of the State's case, Richardson made a motion for a directed verdict which was denied. The motion was later renewed, and a peremptory instruction was made, both of which were denied. After the jury returned its verdict, Richardson made a motion for a new trial or in the alternative a JNOV, which was also denied. He now appeals claiming that:

I. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A DIRECTED VERDICT, AND DENYING JURY INSTRUCTION D-1, WHICH WAS A PEREMPTORY INSTRUCTION ON THE CHARGE OF POSSESSION WITH INTENT TO DELIVER ; AND

II. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A DIRECTED VERDICT, OR THE MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT.

FACTS

Stone County Sheriff's deputy, Darrell Thornton, Jr., observed a 1978 Buick with no tail lights swerving. He followed the car and pulled it over. Because there was a passenger in the car, Thornton radioed for assistance. He then approached the driver's side of the car and asked what Richardson's name was and to see his license. Richardson told Thornton his name was John Phillips and that he did not know where his license was. Thornton then asked Richardson to step out of the car and proceeded to search him. It was discovered that Richardson had a cassette tape case with money inside.

Thornton then proceeded to the passenger side of the vehicle and searched the passenger also. Suddenly, Richardson turned and ran. Thornton testified that Richardson acted like he was throwing something, but Thornton did not actually see anything leave Richardson's hand. After securing the passenger, Thornton followed Richardson. Thornton did not catch Richardson, but found his jacket close to the woods into which he ran. The other officers who arrived on the scene took the passenger into custody and secured the area. The officers then searched the jacket and found that it contained the tape case with $600 in it.

Lieutenant Michael Grisset of the Wiggins Police Department arrived on the scene just as Richardson began running off. A few minutes later, David Nellums, a game and fish conservation officer, arrived, and as Grisset was informing him of the incident, Nellums looked down and found a clear plastic bag. The bag was found about twenty feet behind and fifteen feet to the side of the vehicle. The crime lab report identified the contents of the bag as rock cocaine. The weight was 26.9 grams.

Because the issues are essentially the same, we will address both issues together.

DID THE TRIAL JUDGE ERR WHEN HE DENIED RICHARDSON'S MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE A JNOV?

Richardson, in his brief to this Court, argues sufficiency of the evidence, which springs from the trial court's denial of Richardson's motions for a directed verdict, peremptory instruction, and JNOV. ***McClain v. State,* 625 So. 2d 774, 778 (Miss. 1993)**. However, post-trial Richardson made a motion for a new trial, which goes to the weight of the evidence, along with his motion for a JNOV. Although Richardson made motions throughout the trial concerning sufficiency of the evidence, this Court must rule on the last challenge made, which is the motion for a JNOV. Even though Richardson argues only sufficiency of the evidence in his brief, this Court will, for the sake of clarity, address not only the sufficiency of the evidence, but the weight of the evidence as well.

1. Sufficiency of the evidence.

A challenge to the sufficiency of the evidence requires an analysis of the evidence by the trial judge to determine whether a hypothetical juror could find beyond a reasonable doubt, that the defendant is guilty. ***May v. State,* 460 So. 2d 778, 781 (Miss. 1984).** If the judge determines that no reasonable juror could find the defendant guilty, then he must grant the motion for a directed verdict or JNOV. ***Id.*** If he finds that a reasonable juror could find the defendant guilty beyond a reasonable doubt, then he must deny the motion. ***Id.*** Here Richardson made a motion for a directed verdict at the end of the State's case and a motion for a JNOV after the jury returned its verdict, and the judge sentenced Richardson. As stated earlier, we must review the evidence at the last time the motion was made--the JNOV. This Court's scope is limited to the same examination as that of the trial court in reviewing the motion for a JNOV. That is, if the facts point in favor of the defendant to the extent that reasonable jurors could not have found the defendant guilty beyond a reasonable doubt, viewing all facts in the light most favorable to the State, then it must sustain the assignment of error. ***Blanks v. State,* 542 So. 2d 222, 225-26 (Miss. 1989).** Of course, the opposite is also true. We may reverse the trial court's ruling only where one or more of the elements of the offense charged is lacking to such a degree that reasonable jurors could only have found the defendant not guilty. ***McClain* 625 So. 2d at 778.**

In the case *sub judice*, there was legally sufficient evidence to find Richardson guilty beyond a reasonable doubt. The law in Mississippi allows for the presumption of constructive possession when surrounding circumstances are so incriminating as to justify such a finding without actual physical possession of the controlled substance. ***Ferrell v. State,* 649 So. 2d 831, 834 (Miss. 1995)**. The State made out its prima facia case of possession with intent to deliver on the part of Richardson by showing that the surrounding circumstances, taken together, leave no reasonable hypothesis explaining the cocaine which is consistent with innocence. Richardson was traveling on a highway at 4:00 a.m. in a car that was swerving and had no taillights. Richardson lied about his identification to Officer Thornton and ran from the police making a throwing motion with his hand. Richardson was carrying about $600 in cash and the drugs found were in the amount of 135 average size doses. This amount is more than a reasonable juror could presume to be consistent with individual use. That taken together with the money that Richardson possessed and the fact that he was unemployed point to his intent to distribute the drugs. Because the State put forth sufficient, credible evidence, the trial judge was required to leave the final decision of guilt or innocence to the jury. We affirm the judge's ruling as to the motion for a JNOV.

2. Weight of the evidence.

The second motion the defense made, although it is not argued in the brief, was for a new trial which goes to the weight of the evidence. Because Richardson did not brief this issue, we are not required to address it; however, we feel compelled to do so for the sake of clarity. In reviewing this motion, the Court should examine the trial judge's overruling of Richardson's motion for a new trial and his implicit argument that the verdict was against the overwhelming weight of the evidence. ***Jones v. State,* 635 So. 2d 884, 887 (Miss. 1994).** The decision of whether or not to grant a motion for a new trial rests in the sound discretion of the trial judge and should only be granted when the trial judge is certain that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant the motion would result in an unconscionable injustice. ***May,* 460 So. 2d at 781**. In making the determination of whether a verdict is against the overwhelming weight of the evidence, this Court must view all evidence in the light most consistent with the jury verdict, and we should not overturn the verdict unless we find that the lower court abused its discretion when it denied the motion. ***Blanks,* 542 So. 2d at 228**. The proper function of the jury is to decide the outcome in this type of case, and the court should not substitute its own view of the evidence for that of the jury's. ***Id.* at 226.** Likewise, the reviewing court may not reverse unless it finds there was an abuse of discretion by the lower court in denying the defendant's motion for a new trial. ***Veal v. State,* 585 So. 2d 693, 695 (Miss. 1991).** Upon reviewing all of the evidence presented in the light most consistent with the verdict, we find that the trial judge did not abuse his discretion in denying Richardson's motion for a new trial.

The judge, correctly finding that the State had made out a prima facia case of possession with intent to transfer or deliver, allowed the case to go to the jury. The jury properly performed its function by drawing reasonable inferences from the evidence presented and rendering a verdict which was supported by the evidence. Therefore, we affirm the lower court's denial of Richardson's JNOV and motion for a new trial.

THE JUDGMENT OF THE CIRCUIT COURT OF STONE COUNTY OF CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO TRANSFER OR DISTRIBUTE AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SEVEN YEARS SUSPENDED, THREE TO SERVE AND TWO YEARS PROBATION IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.

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