

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00044 COA

ROBERT GLEN VIRGIL

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. KEITH STARRETT

COURT FROM WHICH APPEALED: COPIAH COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

PATSY ANN BUSH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: DUNN LAMPTON

NATURE OF THE CASE: POSSESSION OF CRACK COCAINE AND MARIJUANA

TRIAL COURT DISPOSITION: UNLAWFUL POSSESSION OF CRACK COCAINE AND
UNLAWFUL POSSESSION OF MARIJUANA SENTENCED TO 6 YRS IN THE MDOC ON CT
1, PAY A FINE OF \$60,000.00, CT II PAY \$500.00

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

PAYNE, J., FOR THE COURT:

Robert Glen Virgil was convicted of one count of unlawful possession of crack cocaine and one count of unlawful possession of marijuana. The trial court sentenced him as a habitual offender pursuant to section 99-19-81 of the Mississippi Code to serve six (6) years in the custody of the Mississippi Department of Corrections, and to pay a fine of sixty thousand dollars (\$60,000.00) for unlawful possession of crack cocaine. The trial court also sentenced the Appellant to pay a fine of five hundred dollars (\$500.00) for unlawful possession of marijuana. The court denied Virgil's motion for JNOV or, in the alternative, a new trial. We find that none of Virgil's issues on appeal has merit and therefore affirm.

FACTS

In the early morning hours of August 14, 1993, Hazlehurst police chief, Ellis Stuart, was on patrol in the area of Shannon's Club, a local bar. Chief Stuart testified that he observed Robert Glen Virgil walking toward Shannon's Club carrying a can of beer in one hand, partially covered by a green towel, and carrying a blue plastic cup in the other hand. Chief Stuart testified that he suspected that Virgil might be in violation of the "open container" ordinance and therefore called Virgil to come over to him. Virgil complied with the chief's request at which time Chief Stuart ascertained that the blue cup Virgil was holding contained beer. Chief Stuart then placed Virgil under arrest for violation of the "open container" ordinance. As Chief Stuart attempted to search Virgil, a struggle ensued. Chief Stuart testified that during the struggle, he saw Virgil reach into his pocket and pull out what appeared to be plastic bags. Chief Stuart testified that Virgil threw the plastic bags to the ground. Chief Stuart then asked an individual who had approached the scene to get Officer Cramer from the nightclub. Officer Cramer arrived shortly thereafter and assisted Chief Stuart in getting Virgil under control.

After Virgil was subdued, Chief Stuart completed his search of Virgil's person and confiscated approximately five hundred and forty dollars (\$540.00) in cash. Chief Stuart and Officer Cramer then searched the immediate area and discovered two plastic bags under a nearby car. The bags were later submitted to the Mississippi Crime Lab and were determined to contain marijuana and cocaine.

Virgil was charged and indicted for possession of a controlled substance with intent to distribute. The jury convicted Virgil of unlawful possession of crack cocaine and marijuana and the trial court sentenced him as a habitual offender. Virgil contends on appeal that he was the victim of an unlawful search and seizure and requests a new trial.

ANALYSIS

I. DID THE TRIAL COURT ERR IN DENYING VIRGIL'S MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE, SPECIFICALLY, THE CONTRABAND FOUND UNDER CAR 1 AND THE MONEY TAKEN FROM VIRGIL'S POCKET?

Virgil contends that City of Hazlehurst Police Chief, Ellis Stuart, did not have probable cause to search him, and all evidence obtained pursuant to the illegal search is inadmissible. Virgil argues that the United States Supreme Court and the Mississippi Supreme Court have held that objective facts must be present to create a reasonable suspicion that an individual is involved in criminal activity before a stop is justified. Virgil argues that there was nothing in his behavior on the night in question to indicate that he was engaged in, or about to be engaged in, any criminal activity, or that he was carrying contraband, or that he had been drinking beer. Virgil contends that Chief Stuart had no reason to believe that he was violating the "open container" ordinance, as Chief Stuart could not have possibly determined from the distance at which he was positioned what Virgil had in the cup he was carrying, or what Virgil had concealed under the green towel he was carrying. Virgil argues that his arrest was the result of Chief Stuart's determination that he was in violation of the "open container" ordinance after Chief Stuart took the cup from Virgil and concluded that it contained beer. Virgil argues that the taking of the cup exceeded the bounds of a *Terry* frisk, and that the resulting arrest was pursuant to an illegal search. Virgil argues specifically that the money taken from his person and the contraband he allegedly removed from his pocket and tossed to the ground at the site of the arrest is inadmissible in that this evidence stemmed from an illegal search and arrest. Virgil contends that if the contraband did, in fact, come from his person then it should be excluded from evidence because he had a Fourth Amendment right to privacy from an illegal arrest.

Virgil argues, alternatively, that if the trial court did not believe the contraband to have been on Virgil's person, then the theory of allowing the contraband into evidence must have been based on the "plain view" doctrine. Virgil contends, if this is the case, that the contraband is still inadmissible because the "plain view" doctrine states that evidence must have been discovered pursuant to a lawful arrest.

The State contends that Chief Stuart did have probable cause to stop Virgil on suspicion that Virgil was violating the "open container" ordinance. The State argues that Chief Stuart had reason to investigate when he saw Virgil outside of a bar on a municipal sidewalk with a can of beer in one hand and a cup in the other hand. The State argues further that when Chief Stuart saw that Virgil was in violation of the city ordinance, he had reason to arrest him.

The State also contends that the contraband was not illegally seized. The State argues that if Virgil threw the packets of marijuana and cocaine onto a public street, then he knowingly exposed the items to the public which removes the items from the protection of the Fourth Amendment. Alternatively, the State argues that if Virgil did not throw down the contraband as he claims, then he has no expectation of privacy in the items and no standing to have them excluded. The State contends that there was no "search" because the packets of cocaine and marijuana were lying on a public street where Chief Stuart had every right to look and take possession of what appeared to be contraband.

Finally, the State, responding to Virgil's "plain view" argument, contends that the "plain view" doctrine has no application in the present case. The State argues that the "plain view" doctrine is seen as an exception to the general rule that warrantless searches are presumptively unreasonable, and this exception merely allows a law enforcement officer to seize an item that is not specified on a search warrant. The State argues that Virgil's case does not implicate the "plain view" doctrine in any way.

The Mississippi Supreme Court has held that there are three types of actions that a police officer may

employ in conjunction with his duties of "preventing crime, detecting violations, making identifications, and in apprehending criminals:"

(1) Voluntary conversation: An officer may approach a person for the purpose of engaging in a voluntary conversation no matter what facts are known to the officer since it involves no force and no detention of the person interviewed;

(2) Investigative stop and temporary detention: To stop and temporarily detain is not an arrest, and the cases hold that given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest; (3) Arrest: An arrest may be made only when the officer has probable cause.

Nathan v. State, 552 So. 2d 99, 102 (Miss. 1989) (citing *Singletary v. State*, 318 So. 2d 873, 876 (Miss. 1975)). In other words, in order for a stop to be justified, the law enforcement officer merely needs a reasonable suspicion that something is amiss, whereas, probable cause is required before an arrest can be made. *Id.* at 102-03 (citations omitted). Reasonableness must be viewed in light of the Fourth Amendment which requires that "in every situation the officer must make the intrusion into the person's privacy as limited as reasonably possible." *Singletary v. State*, 318 So. 2d 873, 876 (Miss. 1975).

In the present case, Chief Stuart testified that he was patrolling the area near a local nightclub in which there had been some problems in the past with patrons of the bar violating the "open container" ordinance. Chief Stuart testified that on the night in question, he saw Virgil walking toward the nightclub with a beer can in one hand and a blue cup in the other hand. Chief Stuart stated that he suspected that Virgil might be in violation of the city ordinance, at which point Chief Stuart called Virgil to come over to him. Once Chief Stuart confronted Virgil, he was able to determine that the cup contained beer which is a violation of the city ordinance. At this point, Chief Stuart placed Virgil under arrest. Virgil contends that Chief Stuart exceeded the bounds of a *Terry* search when he took the cup of beer from him, therefore making the subsequent arrest unlawful, and thus, constituting a violation of his Fourth Amendment rights. It seems clear, however, that Chief Stuart's actions did not rise to the level of a *Terry* search as defined by the United States Supreme Court. *Terry v. Ohio*, 392 U.S. 1, 29 (1968) (holding that "[t]he sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer"). Furthermore, the taking of the cup does not fall into the category of a search protected under the Fourth Amendment because the cup and the contents thereof were knowingly exposed to the public. *Katz v. United States*, 389 U.S. 347, 351 (1967). We find that Chief Stuart's suspicions were reasonable under the circumstances, and that stopping Virgil did not violate his Fourth Amendment rights, nor did Chief Stuart exceed the bounds of a *Terry* search because Chief Stuart had not begun a search at this point.

We also find that Chief Stuart had probable cause to arrest Virgil after discovering that Virgil's cup contained beer in violation of the city ordinance. The Mississippi Supreme Court has held that "[t]he existence of 'probable cause' or 'reasonable grounds' justifying an arrest without a warrant is

determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Abram v. State*, 606 So. 2d 1015, 1026 (Miss. 1992); *see also Gandy v. State*, 438 So. 2d 279, 283 (Miss. 1983) (to justify warrantless arrest, officers must only entertain a reasonable belief, which rises above mere unfounded suspicion, that a suspect is involved in an offense). Probable cause or reasonable grounds that justify an arrest without a warrant exists where the facts and circumstances within an arresting officer's knowledge and of which the officer had reasonable trustworthy information are justification enough to warrant a person of reasonable caution to believe that an offense has been committed. *Florence v. State*, 397 So. 2d 1105, 1107 (Miss. 1981) (citation omitted). A combination of information and personal knowledge may raise the inference beyond suspicion to reasonable grounds. *Id.*

The Mississippi Supreme Court has also held that, in a case of a search incident to arrest, "the exception to the warrant requirement is founded upon the reasonable concern that the arrestee might have a weapon on his person or within reach, and that he may attempt to destroy evidence which is within his grasp." *Ferrell v. State*, 649 So. 2d 831, 833 (Miss. 1995) (citation omitted). Police officers may search an arrestee and any area in his or her immediate control, following a lawful arrest, without a search warrant to protect themselves and others from danger and to prevent the destruction of evidence. *Chimel v. California*, 395 U.S. 752, 768 (1969). The search must be contemporaneous with the arrest, conducted to prevent the use of a weapon or the destruction of evidence, and limited to the area immediately within the arrestee's control. *Id.* Moreover, officers cannot be expected to have perfect judgment regarding what is within and what is beyond an arrestee's grasp while making a dangerous arrest. *United States v. Bennett*, 908 F.2d 189, 192-94 (7th Cir. 1990).

In the present case, after discovering Virgil to be in possession of an open container of beer, probable cause existed to arrest him for violation of the "open container" ordinance. Once the arrest had been made, Chief Stuart was authorized to conduct a search of Virgil and his immediate area. *Rankin v. State*, 636 So. 2d 652, 657 (Miss. 1994) (holding that the Fourth Amendment is not violated when one under lawful arrest is subjected to a full search of his person, that the search is not limited to a *Terry* type search, and that the area within the arrestee's immediate control may be searched). However, before Chief Stuart could begin the search, Virgil resisted and during the struggle Chief Stuart indicated that Virgil removed a plastic bag from his pocket and tossed it under a nearby car. Once Virgil was subdued, Chief Stuart and another officer retrieved two plastic bags containing what appeared to be cocaine and marijuana. Virgil claims that the contraband found under the nearby car was never on his person and that the trial court erred in allowing the contraband to be admitted into evidence. We disagree.

Regarding admissibility of evidence issues within a criminal case, the Mississippi Supreme Court has stated that admissibility rests within the sound discretion of the trial court, and reversal of a conviction is appropriate only when the trial court abused that discretion. *Peterson v. State*, 671 So. 2d 647, 655 (Miss. 1996) (citations omitted). However, an appellate court must determine if the trial court utilized the proper legal standards in its fact findings regarding the admissibility of evidence. *Id.* at 656 (citation omitted). Finally, any trial court error regarding this issue must have affected a substantial right of the defendant to warrant reversal on this point. *Id.*; *see also Johnson v. State*, 655 So. 2d 37, 42 (Miss. 1995) (relevancy and admissibility of evidence issues are within the discretion of the trial court, and reversal may only be based on abuse of that discretion). The court has also stated that an appellate court must determine from the entire record, i.e., the suppression hearing as well as

the trial itself, whether the fact finding is supported by substantial evidence. *Holland v. State*, 587 So. 2d 848, 855 (Miss. 1991) (citations omitted); *see also Nathan v. State*, 552 So. 2d 99, 103 (Miss. 1989) (court will not reverse a finding of fact unless it is clearly erroneous). We find that the trial judge did not abuse his discretion by admitting the packets of cocaine and marijuana found under the nearby car. The Mississippi Supreme Court has set out guidelines to be followed in determining possession: (1) "the State must show that the defendant exercised dominion over the contraband"; and (2) "the State must prove that the defendant was aware of the presence and character of the substance." *Campbell v. State*, 566 So. 2d 475, 477 (Miss. 1990) (citations omitted). Here, Chief Stuart testified that he saw Virgil reach into his pocket and throw the plastic bags under a nearby car. Chief Stuart testified further that a subsequent search of the area under the nearby car resulted in the discovery of two plastic bags containing crack cocaine and marijuana. This testimony was disputed by Virgil's testimony that he did not reach into his pocket and toss the contraband to the ground. At this point, the issue of whether Virgil ever had possession of the contraband became a question of fact for the jury to determine. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) ("The jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed.") (citations omitted). Therefore, we find that the trial court properly admitted the bags of marijuana and cocaine, and we find further that the issue of whether the contraband belonged to Virgil was properly submitted to the jury.

Virgil also contests the admission into evidence of the money taken from his person at the scene of the arrest. We find that the money taken from Virgil's person was obtained pursuant to a search incident to a lawful arrest and was properly admitted into evidence. *Rankin v. State*, 636 So. 2d 652, 657 (Miss. 1994) (citations omitted). We therefore affirm on this issue.

II. DID THE TRIAL COURT ERR IN DENYING VIRGIL'S MOTIONS FOR DIRECTED VERDICT AND JNOV/NEW TRIAL?

A challenge to the sufficiency of the evidence requires consideration of the evidence before the court when made, so that this Court must review the ruling on the last occasion when the challenge was made at the trial level. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). This occurred when the trial court overruled Virgil's motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Virgil's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Id. (citations omitted).

Virgil argues that the evidence did not show that he was in possession of the packets of cocaine and marijuana that were found under a nearby car. We disagreed with this contention in the previous issue and need not revisit it here. The evidence consistent with the guilty verdict must be accepted as true. *Id.* at 778. Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Virgil not guilty of possession of a controlled substance. We find that the trial court properly denied Virgil's motion for a directed verdict.

Virgil also complains that the jury verdict was against the overwhelming weight of the evidence, and he requests a new trial. The Mississippi Supreme Court has held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *Id.* at 781 (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the State. *Id.*

In the present case, the jury heard the witnesses for, and the evidence presented by both the State and the defense. The State presented the testimony of Chief Stuart who stated that Virgil had actual possession of the packets of cocaine and marijuana. The testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Virgil. The trial court did not abuse its discretion by refusing to grant Virgil a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to promote an unconscionable injustice. The trial court properly denied Virgil's motion for a new trial.

This Court notes from its review of the record that the Sentence of the Court filed December 15, 1993, states that the Virgil was convicted as to Count I of "Unlawful Possession Of Crack Cocaine With Intent To Distribute." The Sentence of the Court also sentences Virgil for his convictions of "Unlawful Possession Of Crack Cocaine With Intent To Distribute" and "Lawful Possession Of Marijuana." However, the jury's verdict as to Count I found Virgil guilty of the lesser included offense of "unlawful possession of crack cocaine." Additionally, the jury's verdict as to count II found Virgil guilty of "unlawful possession of marijuana." We note that the handwritten jury verdicts, the Minute Book at page 2674, and the Prisoner Commitment Notice reflect the jury's convictions of Virgil of unlawful possession of crack cocaine and unlawful possession of marijuana. We further note that the jury's verdicts conform to the indictment and jury instructions; and the actual sentences conform to the jury's verdicts. Noting the discrepancy in the record, we find that the Sentence of the Court contained clerical errors. We find these clerical errors to be plain error, sua sponte, and amend

the judgment entered in this cause to reflect the correct convictions as set out above, and affirm the judgment as modified.

THE JUDGMENT, AS MODIFIED, OF THE CIRCUIT COURT OF COPIAH COUNTY OF CONVICTION AS A HABITUAL OFFENDER ON COUNT I OF UNLAWFUL POSSESSION OF CRACK COCAINE AND SENTENCE OF SIX (6) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND SIXTY THOUSAND DOLLAR (\$60,000.00) FINE; COUNT II OF CONVICTION OF UNLAWFUL POSSESSION OF MARIJUANA AND SENTENCE OF A FINE OF FIVE HUNDRED DOLLARS (\$500.00) IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO COPIAH COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., CONCURS IN RESULT ONLY.