

IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00043 COA

FRED EVANS

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 BUSH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: DUNN LAMPTON

NATURE OF THE CASE: CRIMINAL-POSSESSION OF COCAINE WITH THE INTENT TO
DISTRIBUTE

TRIAL COURT DISPOSITION: DEFENDANT CONVICTED, AND SENTENCED TO FIFTEEN
YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH
THREE YEARS SUSPENDED, FIVE YEARS PROBATION, AND FINED \$2,000.00

BEFORE THOMAS, P.J., BARBER, McMILLIN, AND PAYNE, JJ.

McMILLIN, J., FOR THE COURT:

Fred Evans was tried and convicted in the Covich County Circuit Court of possession of crack cocaine with the intent to distribute. Evans now appeals this judgment on the ground that the trial court erred in allowing the crack cocaine rocks to be admitted into evidence. Evans argues, as his sole issue on appeal, that the cocaine was discovered as the result of an illegal search and, therefore, was inadmissible as evidence against him at trial.

I.

Facts

The Hazelhurst Police Department received a tip from a confidential informant that Fred Evans was in possession of cocaine and could be found in Room 1 at the Hilltop Motel. As a result of this tip a police sting operation was organized. The informant was outfitted with a "wire" for recording purposes and given \$200.00 in cash to make the buy from Evans.

Officer Jason Tourne followed the informant to the Hilltop Motel, watched him enter Room 1, and saw the informant and Evans leave the motel in separate vehicles. Tourne followed the two men to a local car wash, where the transaction took place. Upon leaving the car wash the informant immediately drove to a designated location where he met with Officer Tourne and confirmed that he had bought \$200.00 worth of crack cocaine.

Immediately after the sting operation was completed, Hazelhurst police officers obtained an arrest warrant for Evans and a search warrant for Room 1 at the Hilltop Motel. Officers Ellis Stuart and Milton Twiner went to the Hilltop Motel to serve the warrants, while Tourne and other officers waited close by as backup. As Stuart and Twiner approached the motel room, the door was open, and they could see Evans inside the room. Stuart then radioed for Tourne and the other officers to assist.

Officers Stuart and Twiner entered the room and told Evans that they were there to arrest him. Both officers testified that when they came in the room, Evans was sitting on the bed and not wearing a shirt, but that his shirt was beside him on the bed. As he was being arrested, Evans asked if he could put on his shirt. Officer Stuart told Evans that he could not have the shirt until it was checked for "guns or weapons or anything." Stuart searched the shirt and found a pill bottle containing what was later confirmed to be crack cocaine. It is this search and the seizure of this cocaine that Evans now complains was illegal, and, thus, the introduction of the cocaine as evidence at trial was reversible error.

II.

Law

Although it appears that the officers had procured a valid search warrant for motel room, that warrant was not introduced at trial, for reasons not germane to our consideration. Therefore, we must determine whether or not a warrantless search of Evans's shirt was proper in this case. The

State argues that the search of the shirt was proper as being incident to the lawful arrest of Evans. The Mississippi Supreme Court stated, "A search incident to a valid arrest is not limited to a *Terry* type search. *United States v. Robinson*, 414 U.S. 218, 229 (1973). The area within the arrestee's immediate control, from which he might obtain a weapon *or where he may conceal evidence*, may also be searched, consistent with the Fourth Amendment." *Rankin v. State*, 636 So. 2d 652, 657 (Miss. 1994) (emphasis supplied) (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)).

This issue presents us with a mixed question of law and fact. The question of fact deals with the proximity of Evans to the shirt at the time of arrest. The testimony of Stuart and Twiner, the first officers in the room, was that Evans was inside the room sitting on the bed, and that his shirt was lying on the bed immediately beside him. Although Evans's testimony differed, matters of conflicting testimony are to be resolved by the fact-finder, and the fact-finder must decide what degree of weight and credibility to give the evidence. *Gayten v. State*, 595 So. 2d 409, 411 (Miss. 1992). In this instance, the trial court was acting as the trier of fact. The trial court, after hearing the testimony, found, as a matter of fact, that Evans was "sitting on or very close to the bed," and "the shirt was on the bed." These findings do not amount to manifest error on the part of the trial court.

Given these findings, the issue of law becomes whether trial court erred in holding that the search of Evans's shirt was proper. More precisely, was the shirt in Evans's "area of immediate control" within the meaning of *Rankin v. State*? In *Rankin*, it had been reported that the Johnny Rankin was carrying a concealed weapon. *Rankin*, 636 So. 2d at 654. When the deputy arrived to investigate the matter, Rankin was sitting on his jacket on a guard rail. *Id.* The deputy noticed a handgun in the small of Rankin's back and immediately placed him under arrest. *Id.* Upon searching the Rankin's jacket, \$654.00 of cash and 112 rocks of cocaine were discovered. *Id.* at 654-55. The court held that the it was within the bounds of the Fourth Amendment for the officer to have searched Rankin's jacket, even though he was not wearing it at the time, because it was within the area of his immediate control. *Rankin*, 636 So. 2d at 657 (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)). We hold that Evans's shirt was in the area of his immediate control; especially since the proof shows he requested permission to put on the shirt. Therefore, the trial court did not err in denying the defense's motion to suppress the drugs found incident to searching the shirt.

THE JUDGMENT OF THE CIRCUIT COURT OF COPIAH COUNTY OF UNLAWFUL POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE AND SENTENCE OF FIFTEEN (15) YEARS, THE LAST THREE (3) YEARS SUSPENDED, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND ORDER TO PAY A FINE OF TWO THOUSAND DOLLARS (\$2,000.00) IS AFFIRMED. COSTS ARE ASSESSED TO COPIAH COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.