

IN THE COURT OF APPEALS 01/30/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01074 COA

CARL DAVIS

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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: SCOTT COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS D. LEE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: MARK DUNCAN

NATURE OF THE CASE: CRIMINAL: POSSESSION OF COCAINE

TRIAL COURT DISPOSITION: GUILTY VERDICT: SENTENCED TO THREE (3) YEARS IN
THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND ORDERED
TO PAY \$5,000.00 FINE.

BEFORE FRAISER, C.J., KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Carl Davis was convicted of possessing cocaine. He appeals the jury verdict raising issues regarding the validity of the search and seizure and the purportedly improper admission of other crimes evidence. We find the claims to be without merit and affirm.

FACTS

On March 3, 1994, two police officers followed a car after they received a tip that the driver had been driving recklessly and that the occupants appeared to have been drinking alcohol. The officers stopped the car after they noticed that it did not have a tag. Three men were in the car; Davis was the driver. After the arresting officer noticed a six pack of beer on the floorboard, the officers searched the car for more alcohol and found a marijuana cigarette and cold, opened bottles of beer. The officers then frisked the men and asked Davis to empty his pockets. Upon emptying his pockets, Davis removed a prescription pill bottle containing a substance which the officers believed to be, and which was later identified as, crack cocaine. Davis was then arrested and charged with possession of cocaine. The jury found Davis guilty, and he was sentenced to three years in prison and ordered to pay a \$5,000.00 fine.

DISCUSSION

1. The Validity of the Search and Seizure

Davis claims that the trial court erred in admitting the evidence concerning the prescription bottle containing the crack cocaine. He contends that it was seized in an unlawful search of the contents of his pockets. Under the facts as testified to by the officers, we find that the challenged search of the contents of Davis' pockets was valid as a search incident to an arrest because, at the time of the arrest, the officers had probable cause to arrest Davis for both possession of beer and possession of marijuana.

The determination of probable cause must be done on a case by case basis, in light of the facts available to the officer, as to whether those facts would cause "a man of reasonable intelligence and caution to believe an offense had been committed, and that the offense was committed by the person arrested." *Riddles v. State*, 471 So. 2d 1234, 1236 (Miss. 1985). As the officers approached the car, they noticed a pack of beer on the floorboard. Because it is illegal to possess beer in the rural areas of Scott County, the officers had probable cause to search the car for more beer. *See* Miss. Code Ann. §§ 67-1-1 *et seq.* (1972); *see Riddles*, 471 So. 2d at 1236. Upon searching the car, the officers found a marijuana cigarette and more cold bottles of beer. At this point, the officers had probable cause to arrest Davis for both possession of beer and possession of marijuana. *Id.* at 1236. However, before they arrested Davis, the officers asked him to empty his pockets. In response to this request, Davis removed from his pocket a prescription pill bottle containing crack cocaine. After discovering the contents of the bottle, the officer arrested Davis.

Davis contends that because the officers testified that they were looking for weapons when they frisked him and searched the contents of his pockets, their search should be likened to one incident to a *Terry* stop and not to an arrest. However, the officers' subjective intent does not matter. Because probable cause to arrest existed from an objective viewpoint, we conclude that the search is properly viewed as one incident to a valid arrest even though the officer did not justify the search on those

grounds. *Ellis v. State*, 573 So. 2d 724, 726 (Miss. 1990); see *White v. United States*, 448 F.2d 250, 254 (8th Cir. 1971). We therefore find this claim to be without merit.

2. The Admission of Other Crimes Evidence

In response to a question asked by defense counsel on cross-examination, the arresting officer made a statement regarding the marijuana cigarette that he found in the car. Defense counsel argued that the statement was evidence of another crime and moved for a mistrial immediately after the exchange. Davis contends that the court should have granted his motion for mistrial and *sua sponte* admonished the jury to disregard the statement. We find no error for two reasons.

First, the arresting officer already testified to the existence of the marijuana cigarette before the jury earlier in the trial. Since the defense made no objection to the earlier testimony, the matter was waived. Second, the defense never requested that the court instruct the jury to disregard the statement. Even when an objection is sustained, if counsel makes no request to disregard the objectionable matter, there is no error. *Marks v. State*, 532 So. 2d 976, 981 (Miss. 1988). Accordingly, we find no error and affirm.

THE JUDGMENT OF THE SCOTT COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF COCAINE, SENTENCE OF THREE (3) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY A FINE OF \$5,000.00 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO SCOTT COUNTY.

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