# IN THE COURT OF APPEALS 4/11/95

# OF THE

# STATE OF MISSISSIPPI

## NO. 92-KA-00112 COA

**CANDY LYNN JONES 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. JERRY OWEN TERRY, SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

FIRST JUDICIAL DISTRICT

ATTORNEY(S) FOR APPELLANT(S): ARTHUR D. CARLISLE

ATTORNEY(S) FOR APPELLEE(S): OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE McCRORY

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL - FELONY - POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE MORE THAN A KILOGRAM OF MARIJUANA

TRIAL COURT DISPOSITION: CONVICTION AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE BRIDGES, P.J., McMILLIN AND SOUTHWICK, JJ.

McMILLIN, J., FOR THE COURT:

Candy Lynn Jones was convicted in the Circuit Court of Harrison County for the crime of possession of a controlled substance with intent to distribute. In this appeal she asserts two errors: (1) She alleges the trial court erred in denying her mistrial motion upon the State's introduction of evidence that she was carrying a concealed weapon at the time of her arrest; and, (2) she alleges error in the denial of her motion for a directed verdict made at the conclusion of the evidence, claiming that the evidence was legally insufficient to sustain her conviction.

Upon a review of the record and the applicable law, we find these alleged errors to be without merit and affirm the conviction.

I.

FACTS

On the evening of March 26, 1990, Officer Darryl Deschamp of the Mississippi Highway Patrol was patrolling Interstate Highway 10 in Harrison County when he stopped a brown Lincoln automobile to issue a speeding ticket to the driver. The vehicle was driven by Robert Powell and contained two passengers, Charles Coffin and the defendant, who was in the back seat. The vehicle bore Texas license plates, and Officer Deschamp elected to request identification from all three occupants. Powell was standing outside the vehicle, but the two passengers remained inside. Officer Deschamp went to the passenger side windows to make his inquiry. Officer Deschamp testified that, upon bending over to the open passenger's window, he detected a "strong, very strong, distinctive odor of marijuana" emanating from the vehicle.

At that point, he decided to temporarily detain the vehicle and requested backup assistance. Officer Victor Smith, a Harrison County Deputy Sheriff, was dispatched to the scene along with a dog trained in drug detection. According to Deputy Smith, the dog was put through a routine known as "an outer perimeter search" around the vehicle and the dog displayed the signs the deputy called "a positive alert," indicating the presence of illicit drugs. Based upon the dog's behavior, Officer Deschamp retrieved the keys from the vehicle ignition and opened the trunk. He discovered six trash compactor bags bound with gray tape that contained a leafy substance that appeared to Officer Deschamp to be marijuana. (His assumption was later confirmed by tests at the Mississippi Crime Lab.) There was also in the trunk what was described as "a Christmas tree scent" commonly used in vehicles to freshen the air.

The remaining areas of the vehicle were searched and all occupants of the vehicle were arrested and searched. A make-up bag belonging to the defendant was found to contain a loaded 32-caliber pistol. No luggage was found in the trunk. Officer Deschamp testified that, according to his recollection, each occupant had a change of clothes in the passenger compartment. Deputy Smith recalled the possibility of a couple of small tote bags or utility bags in the passenger compartment containing a small amount of extra clothing. The defendant denied in her testimony having any extra clothing on the trip other than what she wore. The computer check on the vehicle indicated that it was registered to Brady Motors in Brady, Texas. No evidence was presented at trial as to exactly how the trio came to have possession of the automobile.

The defendant testified and related the circumstances that led to her being in Harrison County, which we here summarize: Charles Coffin, the other passenger, was her fiance. They were both residents of Van Ormy, Texas, a community near San Antonio. Jones and Coffin were living together at the time with apparent plans to be married at some time in the future. From time to time, Coffin would travel to other locations seeking contract work on construction jobs as the painting contractor. The defendant worked for Coffin's sister in a capacity similar to that of "nanny," helping to take care of her future sister-in-law's four children. In the early afternoon of March 26, 1992, Coffin had come by his sister's house in the company of Powell and indicated to the defendant that he was preparing to leave for Fort Lauderdale, Florida, to look for painting work for a condominium project then underway. Powell's role in this enterprise was never made completely clear to her, but she assumed that he would be assisting in the work. The defendant was invited to go along, and, since the children's mother was home at the time, the defendant agreed, looking on the trip as a break from her child-care duties. Because her home was about thirty miles in the wrong direction, and since they were only going to be gone a couple of days, the defendant decided to leave without packing any clothes or accessories. She explained that, if the men were successful in getting the work, they would have to return promptly to Texas to permit Coffin to retrieve his painting equipment.

She testified that it was her usual practice to keep herself armed because she had been raped at the age of thirteen and carried the pistol for protection from such dangers. She had assumed that the vehicle belonged to Powell, since she was only briefly acquainted with him and had never seen him in a vehicle before, but she knew it did not belong to her or Coffin. The matter of the vehicle had not been discussed during the ride from Texas to Harrison County. She denied having noticed the odor testified to by Officer Deschamp, explaining that she smoked cigarettes, as did at least one other occupant, and the cigarette smoke interfered with her sense of smell.

II.

INTRODUCTION OF DEFENDANT'S PISTOL INTO EVIDENCE

During opening argument, the prosecutor mentioned the pistol found in the defendant's bag, prompting defense counsel to make the following statement: "Your honor, comes now the defense and moves for a mistrial in this case. [The prosecutor] has just referred to a pistol. Having a pistol in the purse would be a concealed weapon. That is evidence of another crime and, your Honor, I think it would highly prejudice the defense in this case, and I move for a mistrial." The trial court denied the motion. Defense counsel renewed his mistrial motion at the time the weapon was offered as an exhibit through Officer Deschamp's testimony and "renewed" his objection to its introduction. Over defense counsel's protest, the weapon was admitted.

This issue is without merit. To begin with, we cannot assume with certainty that the possession of the gun itself was criminal. Section 97-37-9(b) of the Mississippi Code of 1972 provides an absolute defense to the charge upon a showing "that [s]he was traveling and was not a tramp, or was setting out on a journey and was not a tramp. . . ." Miss. Code Ann. § 97-37-9(b) (1972). If that is the case, the only objection to introduction would have been one based upon relevance. While defendant argues that there is no connection between the possession of a firearm and drug trafficking, she cites no authority on the point. The relevant authority points the other way.

Even assuming the criminality of possessing the pistol, the issue of the admissibility of such evidence

has been long resolved against the defendant. In *Martin v. State*, a drug possession case, the defendant argued that testimony concerning his possession of a .25-caliber automatic pistol "was irrelevant and highly prejudicial as evidence of another and separate crime." *Martin v. State*, 413 So. 2d 730, 733 (Miss. 1982). The Supreme Court dismissed the assertion and quoted with approval from a Third Circuit Court of Appeals case as follows:

> It often happens that illegal enterprises, such as narcotic conspiracies, are ongoing ventures, requiring the use of guns for protection of the contraband and in such a case, a weapon may be as much a tool of the crime as the van used to transport the narcotics.

*Martin*, 413 So. 2d at 733 (quoting *United States v. Picklesimer*, 585 F.2d 1199, 1204 (3rd Cir. 1978)).

There was no error in admitting the gun into evidence.

III.

THE SUFFICIENCY OF THE EVIDENCE

The defendant alleges that the evidence in this case was legally insufficient to support a jury finding that she was in possession of the contraband drugs discovered in the trunk of the automobile. In considering this issue, the Court must look to the state of the law on constructive possession since no drugs were discovered on the person of the defendant or within the passenger compartment of the vehicle. Defendant argues that, since she did not own the vehicle, no presumption of her dominion and control over the contents can arise, and that her close proximity to the contraband is insufficient to sustain her conviction, relying upon such cases as *Fultz v. State*, 573 So. 2d 689 (Miss. 1990).

In a constructive possession case, the Supreme Court has noted that the degree of proof necessary is not:

> [s]usceptible of a specific rule. However, there must be sufficient facts to warrant a finding that defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the drug involved was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.

*Curry v. State*, 249 So. 2d 414, 416 (Miss. 1971).

Evidence of the defendant's awareness of the presence and character of the marijuana was presented through the testimony of both arresting officers as to the distinct odor emanating from the vehicle.

While the defendant denied being able to smell anything unusual due to the cigarette smoke in the vehicle, the jury was entitled to disregard or discount such testimony as self-serving. Certainly, the sense of smell is sufficiently capable of apprising a person of the presence and character of a substance as are such other senses as sight, touch, and taste. In *Hart v. State*, the Supreme Court considered the arresting officer's testimony of the strong odor of marijuana emanating from the trunk of a vehicle as an element in analyzing the sufficiency of the evidence to convict the driver of constructive possession, adding that Hart's denial of the odor "tested his credibility." *Hart v. State*, 639 So. 2d 1313, 1319 (Miss. 1994).

While the contents of the trunk were not within the exclusive possession and control of the defendant due to the fact that there were two other occupants in the vehicle, there is nothing in the record that would point toward exclusive possession of the contraband in either of the other two occupants. The defendant admitted that Coffin and Powell had exchanged driving duties, and the fact that Powell was driving at the time of the stop appears to be merely a fortuitous circumstance that does nothing to suggest a greater degree of dominion on his part. Legal registration of the vehicle was shown to be in Brady Motors, apparently a business in Brady, Texas, and no further explanation was offered as to how the trio came to be in possession of the automobile. Under those circumstances, we think it entirely proper for the jury to infer that the vehicle was acquired by these three individuals for the purpose of a common enterprise, and, therefore, the parties were in joint possession and control of the vehicle at the time of their arrest.

Contraband items may certainly be jointly possessed. *See Martin v. State*, 413 So. 2d 730 (Miss. 1982) (vehicle owner and passenger apparently on an extended trip from Virginia with large quantity of marijuana). "Possession may be joint or individual, and two or more may be in possession of burglar tools where they have the joint power of control and inferable intent to control jointly." *Johnson v. State*, 246 Miss. 182, 145 So. 2d 156, 158 (1962).

We note that the Supreme Court in *Boches v. State* commented that contraband in the trunk of a vehicle is not "hidden" in the ordinary sense of the word. The Court implied that Boches' professed ignorance as to the presence of contraband in the trunk of a car not belonging to him which he had driven from Miami to Alcorn County was not controlling on the issue of constructive possession. *Boches v. State*, 506 So. 2d 254, 259 (Miss. 1987).

The facts in this case bear a close resemblance to those in *Hart.* In that case, Hart was stopped for speeding in Harrison County on his way from Texas, ostensibly to meet a girlfriend in Atlanta, Georgia. He was driving a vehicle he claimed to have borrowed from a friend. The arresting officer detected the odor of marijuana coming from the vehicle, and the ensuing investigation revealed two duffle bags in the trunk containing 35 pounds of marijuana. The *Hart* Court considered the length of the trip, both in distance and time, as supporting a finding of Hart's possession and control of the vehicle. Additionally, the Court considered the dubious nature of Hart's explanation of the circumstances of his trip and the apparent strong odor of the contraband to support an extension of the inference of dominion and control to the drugs in the trunk. *Id.* at 1319.

In this case, a number of the additionally incriminating factors of *Boches* and *Hart* are present: the unexplained circumstances of possession of the vehicle, the length of the trip, the implausible nature of the defendant's story, the strong odor of drugs, and the ready accessibility of the contraband. Also,

the defendant was found to be in possession of a "tool of the trade" of drug traffickers. On these facts, we believe the jury was entitled to reasonably infer that these three parties had embarked upon a joint venture to transport the marijuana, and that all three were in constructive possession of the contraband discovered in the vehicle's trunk. The defendant did not contest the sufficiency of the evidence on the element of "intent to distribute"; therefore, on the limited scope of review available to this Court, as set out in *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993), we are compelled to affirm this conviction.

**THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HARRISON COUNTY OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE MORE THAN A KILOGRAM OF MARIJUANA AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. HARRISON COUNTY IS TAXED WITH ALL COSTS.**

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