

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00389 COA

JON M. DEVINE A/K/A JOE M. DEVINE

AND LINDA J. DEVINE

APPELLANTS

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. R.I. PRICHARD III

COURT FROM WHICH APPEALED: LAWRENCE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

ALFRED LEE FELDER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

**NATURE OF THE CASE: CRIMINAL - ILLEGAL POSSESSION OF FISH ILLEGALLY
TAKEN**

**TRIAL COURT DISPOSITION: APPELLANTS FOUND GUILTY AND SENTENCED TO
FIFTEEN DAYS, PAY A \$1,000 FINE, A STATE ASSESSMENT AND COSTS OF \$182.00,
AND ALL COURT COSTS, WITH SUSPENSION OF THE FIFTEEN DAYS UPON PAYMENT**

OF THE ASSESSMENTS.

MANDATE ISSUED: 9/5/97

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Jon M. Devine and Linda J. Devine were found guilty of two offenses: taking fish from a lake with the aid of electrical devices, and unlawful possession of fish illegally taken. On appeal the Devines assign five errors. The State filed a motion to strike two of the assignments, which we have granted under separate order. The other alleged errors are that certain testimony and physical evidence from the two arresting Wildlife and Fisheries officers should have been suppressed. We find these arguments without merit and affirm.

FACTS

Jon and Linda Devine were fishing in the Pearl River in Lawrence County. A law enforcement supervisor of the Department of Wildlife and Fisheries observed the boat and noticed two wires coming over the side and extending into the water. He also observed fish coming to the top of the water and the Devines dipping the fish from the water. The officer then positioned himself further down the river to get a better view of the activity. He testified that he got as close as thirty-feet to the boat and was able to write down the registration number of the boat. The officer observed the Devines for about fifteen minutes. They were not using poles or rods and reels. The officer went to get assistance from another officer. When the officers returned to the river, they did not reveal themselves for fear that the Devines would throw the fish back into the river. After the Devines returned to shore, loaded their boat onto its trailer and started to pull away from the ramp, the officers stopped them. Mr. Devine gave the officers consent to search the vehicle. The officers opened the ice chest on the boat and saw several motley catfish. The officers examined the mouths of the fish and did not see any signs that fish hooks had been used. The officers then got consent to search Mrs. Devines' purse and found what appeared to be a device used to shock fish. The Devines were read their rights and arrested.

DISCUSSION

The Devines argue that the trial court erred in overruling their motion to suppress the evidence. They contend that the evidence should have been suppressed because the arresting officers did not attempt to arrest them at the time the first officer observed the violations taking place. Instead, the officers waited some 3 ½ hours later to make the arrest without securing an arrest warrant in the interim. The alleged justifications for delay are these: the boat was in the river when the violation was first observed and that it would have been impossible for the officer to arrest the Devines under those conditions; the arresting officer was afraid that the evidence would be destroyed if the Devines were still in the water when the officers revealed themselves.

There is no requirement shown us by the Devines, nor that we can divine by logic, that officers must arrest at the earliest possible moment, when to do so would jeopardize the law enforcement motive in making the arrest. We will examine the relevant case law.

1. Was the delay between the probable cause and arrest justified?

In determining whether the delay between the commission of the offense and the actual arrest was justified, the Mississippi supreme court has said this:

The arrest for misdemeanors committed or attempted in the presence of officers must be made as quickly after the commission of the offense as the circumstances will permit. After an officer has witnessed a misdemeanor, it is his duty to then and there arrest the offender.

Florence v. State, 397 So. 2d at 1106.

This requires the officers to do no more than what occurred here -- to arrest "as quickly . . . as the circumstances will permit." The court explained that this delay may be necessary where the time is spent by the officer in summoning assistance where such may reasonably appear to be necessary. *Id.* The officer in this case testified that he went to get the assistance of another officer to assist him in this arrest. The concern was also reasonable about having insufficient control over the actions that the Devines might take if the officers revealed themselves while the suspects were still on the water. The delay was reasonable.

2. Is the right to search and arrest under Miss. Code Ann. § 49-1-43 constitutional?

The Devines argue that Miss. Code Ann. § 49-1-43 is unconstitutional in that it authorizes "general searches" and "indirect search warrants" in violation of Section 23 of the Mississippi Constitution and the Fourth Amendment to the Constitution of the United States. The Devines contend that § 49-1-43 permits the conservation officer, based on a belief that wild game is possessed in violation of law to conduct a general search of all of the personal property and possessions of the accused. The pertinent parts of Section 49-1-43 reads:

49-1-43. Powers and duties of director of Department of Wildlife, Fisheries and Parks.

(4) The director and each conservation officer shall have power, and it shall be the duty of the director and of each conservation officers:

- (a) To execute all warrants and search warrants for a violation of the laws and regulations relating to wild animals, birds and fish and to serve subpoenas issued for the examination and investigation or trial of offenses against any of the laws or regulations;
- (b) To search where the conservation officer has cause to believe and does

believe that animals, birds or fish, or any parts thereof, or the nest or eggs of birds, or spawn or eggs of fish are possessed in violation of law or regulation and in such case to examine, without warrant, the contents of any boat, car, automobile or other vehicle, box, locker, basket, creel, crate, game bag or other package, to ascertain whether any law or regulation for the protection of animals, birds or fish have been or are being violated, and to use such force as may be necessary for the purpose of such examination and inspection;

(d) To arrest, without warrant, any person committing or attempting to commit a misdemeanor, felony or a breach of the peace within his presence or view and to pursue and so arrest any person committing an offense in any place in the state where the person may go or be; to aid and assist any peace officer of this state or any other state if requested, in manhunts or natural disasters within the state; . . .

The Devines contend that allowing a conservation officer to conduct a general search of the personal property and possessions of the accused without a warrant is in violation of the Constitution. However, as we discussed above, an officer may arrest and conduct a search upon a finding of probable cause. The plain language of Section 49-1-43, as well as the supreme court's interpretation of the statute, require "probable cause as a pre-requisite to a warrantless search of a vehicle." *Drane v. State*, 493 So. 2d 294, 297 (Miss. 1986). The Mississippi supreme court has said that "a statute is presumed constitutional", and "[c]ourts have a solemn duty to avoid passing upon the constitutionality of any law ... unless compelled to do so by an issue squarely presented to and confronting a court in a particular case." *State v. Watkins*, 676 So. 2d 247, 249 (citing *Jones v. Harris*, 460 So.2d 120, 122 (Miss.1984) (quoting *Western Line Consol. Sch. Dist. v. Greenville Mun. Separate Sch. Dist.*, 433 So.2d 954, 958 (Miss.1983))).

There was probable cause to search in this case. Any broader powers that might be given under this statute are not properly before us for review. The search was constitutional.

Both officers testified at the suppression hearing that the Devines gave their consent to search. If valid consent was given, no further authority to search is needed. The Devines aver that no consent was given, but they did not testify at the suppression hearing. However, the trial judge made no finding regarding the factual issue of consent. We will not either.

3. Overwhelming Weight of the Evidence

The Devines argue that the verdict was against the overwhelming weight of the evidence. They contend that the officer's identification of them was insufficient, that the electrical device was not sufficiently tested, and that the fish, which the officer claimed to have been frozen in order that they could be used at trial, were not put into evidence.

The state responds by arguing that the evidence presented at trial supported each element of the crime. We reviewed the evidence in an earlier section. In summary, the officer had a good view of the Devines. The Devines were gathering fish without normal fishing equipment, but instead a wire

hanging over the side of the boat extending into the water. The electrical device was admitted into evidence. There was no testimony disputing the fact that the device was a shocking device. Furthermore, both officers testified that they examined the fish and did not see any hook marks on the mouths of the fish. There was no testimony presented by the defense.

After reviewing the evidence presented at trial, there was sufficient evidence to support the verdict of the jury. Therefore, this issue is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF LAWRENCE COUNTY OF CONVICTION OF JON M. DEVINE AND LINDA DEVINE OF COUNT I, TAKING FISH WITH THE AID OF AN ELECTRICAL DEVICE AND COUNT II, UNLAWFUL POSSESSION OF FISH ILLEGALLY TAKEN AND SENTENCE OF EACH APPELLANT FOR COUNT I TO FIFTEEN DAYS IN THE LAWRENCE COUNTY JAIL AND FINE OF ONE THOUSAND DOLLARS, A STATE ASSESSMENT AND COSTS OF ONE HUNDRED AND EIGHTY-TWO DOLLARS, WITH SUSPENSION OF THE FIFTEEN DAYS UPON PAYMENT OF THE FINES, COSTS AND ASSESSMENTS, AND FINE OF \$100 FOR EACH APPELLANT IN COUNT II IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO APPELLANTS.

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