

**IN THE COURT OF APPEALS 9/17/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 93-KA-01417 COA**

**ROBERT WAYNE JACKSON**

**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. ROBERT LOUIS GOZA, JR.

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

J. EDWARD RAINER

VICKI H. SLATER

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF POSSESSION OF MARIJUANA MORE  
THAN 1 OUNCE BUT LESS THAN A KILOGRAM AND SENTENCED TO THREE YEARS IN  
THE CUSTODY OF THE MDOC.

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

THOMAS, P.J., FOR THE COURT:

Robert Wayne Jackson was convicted of possession of marijuana of more than one ounce but less than one kilogram and sentenced to serve three years in the custody of the Mississippi Department of Corrections. From this conviction Jackson appeals to this Court assigning two alleged errors. Finding no error, we affirm.

## FACTS

Deputy Ronnie Pennington of the Rankin County Sheriff's Office received a phone call from a confidential informant (CI) who had provided accurate and reliable information to Pennington in the past. The CI informed Pennington that a quantity of marijuana could be found in a certain house trailer in Rankin County. The CI told Pennington the location of the trailer and described the trailer and the vehicles which would be parked there.

Based upon the information obtained by the CI, Pennington, along with another officer, drove by the trailer. The location and description of the trailer, as well as the description of the cars parked around the trailer, were consistent with the information obtained from the CI. From this information Pennington obtained a search warrant from Chancellor Roger Clapp who issued the warrant after reading the affidavit and statement of underlying facts and circumstances and after hearing Pennington's sworn testimony.

Deputy Pennington, along with other deputies, executed the warrant upon the premises. As the officers entered the house trailer, Daryl Speaks was in the process of purchasing some marijuana from Michael Kelly, who was renting a room from the owner of the trailer, Robert Wayne Jackson. Kelly told the officers that the marijuana was Jackson's, but he admitted that he was helping to sell it and had been in the process of selling some to Speaks.

Several bags of marijuana were found in the trailer along with paraphernalia for weighing and packaging the marijuana. Some of the marijuana was found in the living room, some in a bedroom and some, along with scales and bags, were found in the kitchen.

When the warrant was executed, Jackson, the owner of the trailer, was not present. However, Jackson did arrive at the scene approximately thirty minutes after the officers arrived, at which time, he was arrested.

## DISCUSSION

I. WHETHER THE EVIDENCE WAS OBTAINED UNDER A CONSTITUTIONALLY DEFECTIVE WARRANT.

In Jackson's first issue, he argues to this Court that the search warrant which was executed upon his home was constitutionally defective because it was based upon a "bare bones" affidavit. He argues that the affidavit in question contained only conclusory allegations that criminal activity was occurring at Jackson's trailer which is not sufficient to justify the issuance of a search warrant.

In reviewing the chancellor's finding that probable cause existed to issue the search warrant, this Court will only look at whether there was a substantial basis for such a decision. *Smith v. State*, 504 So. 2d 1194, 1196 (Miss.1987). "In making our review, we look both to the facts and circumstances set forth in the affidavit for search warrant and as well, the sworn oral testimony presented to the issuing magistrate." *Williams v. State*, 583 So.2d 620, 622 (Miss. 1991).

In the case *sub judice* the affidavit in question stated the following:

On March 17, 1992 at approx. 09:00 hrs. a confidential informant called this officer and stated that a large shipment of marijuana was at 126 Southern Garden Trailer Park. The confidential informant has furnished true and reliable information in the past, that has led to arrests and convictions. The C.I (sic) stated that several people were to go to the below described location and they were to divide the marijuana between them. The C.I (sic) stated that it was approx. three pounds of marijuana.

Based on the reliability of this confidential source in the past, I respectfully request a search warrant be issued for the above described location.

After reading the affidavit and the underlying facts and circumstances, the chancellor placed Pennington under oath and asked him questions concerning the underlying facts and circumstances contained in the affidavit. After questioning Pennington the chancellor issued the search warrant for the house trailer which was described in the affidavit.

As our supreme court has stated: "Written affidavits may be supplemented with sworn oral testimony of officers to establish probable cause." *Lockett v. State*, 517 So. 2d 1317, 1324 (Miss. 1987). Therefore, we must inquire as to whether the affidavit combined with the oral testimony of Pennington constituted a "substantial basis" for the chancellor's finding of probable cause. We find that it does.

Deputy Pennington received a phone call from a CI who stated that there was a quantity of marijuana at a certain house trailer and that the marijuana was being divided for sale. The CI was a person who Pennington knew personally, and who had provided true and reliable information in the past which had led to arrests and convictions. After receiving the information Pennington went to the house trailer to verify some of the details that were given to him by the CI. Only after the details were verified, i.e. the trailer's location, description, and the description of the cars around the trailer, did Pennington then seek to have a search warrant issued.

It is clear that under the facts of this case there was a substantial basis for the chancellor's determination that probable cause existed for the issuance of the search warrant. Therefore, we find this issue to be without merit.

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT AN INSTRUCTION ON A LESSER INCLUDED OFFENSE OF POSSESSION OF LESS THAN ONE OUNCE OF MARIJUANA.

Jackson next argues that the trial court erred in failing to instruct the jury on a lesser included offense. At trial, Jackson requested two instructions on lesser included offenses: one on possession of more than one ounce of marijuana but less than a kilogram, the second on possession of marijuana of less than one ounce. The trial court granted the first but refused to grant the second instruction of less than one ounce. Jackson argues that the failure to grant this instruction amounts to a deprivation of due process of law. However, it is clear that under the facts of this case Jackson was not entitled to this lesser included instruction.

During the search of the trailer the police found a packet of marijuana, which weighed less than one ounce, in a pair of pants in the master bedroom. Jackson argues that the "jury could have reasonably concluded that that packet or some amount less than an ounce of the marijuana seized at the home of Mr. Jackson was in Mr. Jackson's possession and that the remaining marijuana belonged to the person who was "breaking it up" and "selling" it at the time the police arrived on the scene." However, there was no evidence presented at trial which would show that the marijuana found in the pants belonged to Jackson, other than the pants were lying in the master bedroom. The only evidence presented at the trial concerning the ownership of the marijuana came from Kelly who testified that the marijuana found in the pants was his, and it was found in the bedroom that he was using. This was uncontradicted.

As our supreme court has stated, "jury instructions are not given unless there is an evidentiary basis in the record for such instructions." *Colburn v. State*, 431 So. 2d 1111, 1114 (Miss. 1983). There was no evidence that the marijuana found in the pants belonged to Jackson; therefore, we hold that the trial court was correct in refusing the instruction.

**THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF MARIJUANA OF MORE THAN AN OUNCE BUT LESS THAN A KILOGRAM AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE TAXED TO APPELLANT.**

**FRAISER, C.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**

**BRIDGES, P.J., NOT PARTICIPATING.**