IN THE COURT OF APPEALS 2/11/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00281 COA

ADOLPH BRYANT, JR. A/K/A SONNY MAN A/K/A SONNY A/K/A ACE

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. MICHAEL RAY EUBANKS

COURT FROM WHICH APPEALED: LAWRENCE COUNTY CIRCUIT COURT

FOR APPELLANT:

ROBERT E. EVANS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: RICHARD DOUGLASS

NATURE OF THE CASE: CRIMINAL: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

TRIAL COURT DISPOSITION: CT I POSSESSION OF A CONTROLLED SUBSTANCE, WITH INTENT TO SELL OR DISTRIBUTE, TO-WIT MARIJUANA: CT II POSSESSION OF A CONTROLLED SUBSTANCE, WITH INTENT TO SELL OR DISTRIBUTE, TO-WIT

COCAINE: CT I SENTENCED TO 10 YRS & CT II 20 YRS

MANDATE ISSUED: 6/18/97

BEFORE BRIDGES, C.J., KING, AND PAYNE, JJ.

BRIDGES, C.J., FOR THE COURT:

Adolph Bryant, Jr. was convicted in the Lawrence County Circuit Court of two counts of possession of a controlled substance with intent to distribute. He was sentenced to serve ten years on count one and twenty years on count two. Aggrieved by this conviction, he appeals asserting five issues.

> I. Whether the trial court erred when it found sufficient probable cause for the officers to stop Bryant's car.
>
> II. Whether the trial court erred when it denied Bryant's motion to suppress evidence seized while searching Bryant's car.
>
> III. Whether the court erred when it overruled Bryant's motion to exclude the cocaine found ten days after the arrest.
>
> IV. Whether the court erred in overruling the special demurrer to the multi-count indictment.
>
> V. Whether the court erred in denying Bryant's motion for a directed verdict.

FACTS

Officer White of the Monticello Police Department received information from a confidential informant that Adolph Bryant, Jr., would be driving into Monticello, Mississippi, on a particular day in a red escort. According to the informant, Bryant would be carrying cocaine which he purchased in Houston, Texas.

On February 16, 1993, Officers Smith and Stanley stopped Bryant's red Escort at Newman's Washateria in Monticello. At this time, Bryant gave consent to have his car searched. Officer White arrived on the scene and requested permission to take the car to the police station, to which Bryant again gave his permission.

At the police station, the officers were met by Mr. Murray and his drug dog. The dog went immediately to the steering wheel and began chewing on it. Mr. Murray explained that if Bryant had been handling drugs the dog would smell the drugs on the steering wheel. Because of this, the officers dismissed the idea that drugs could be in the steering wheel and placed the dog in the trunk of the car. In the trunk, the dog made a "hit." The officers began removing items from trunk, including the spare tire. While moving items in the trunk, they noticed the dog began chewing on the spare tire. The officers "broke down" the tire and inside found marijuana. Bryant, at this time, was

arrested.

On February 17, 1993, Officer White requested another dog for the purpose of a second search. The dog handler was booked up for several days, followed by another several days of rain (the handlers do not like to take the dogs out in the rain), postponing the search. On February 27, 1993, when the dog was available, and the officers went to the storage area where Bryant's car was kept and performed a second search. The testimony during trial explained that the car had not been tampered with, was still locked, and the tape outside the storage area had not been broken.

During the search, the dog reacted to the steering wheel. The officers removed the cover where the horn was located and found three and a half ounces of a substance which tested positive for cocaine. Also, four glass tubes, a small set of scales, and many plastic bags were found in the steering wheel. All of the items were wrapped in a Houston, Texas, newspaper located inside a Crown Royal bag. The inner bag had ammonia poured over it, and it was inside a ziploc bag.

> I. WHETHER THE TRIAL COURT ERRED WHEN IT FOUND SUFFICIENT PROBABLE CAUSE EXISTED TO STOP BRYANT'S CAR.

The evidence indicates that Officer White received information from a confidential informant which: (1) identified the vehicle, (2) described the occupant of the vehicle, (3) indicated the occupant was selling cocaine, and (4) indicated that the car would be returning to Bryant's house trailer, only 400 feet from the location where the car was stopped. Combined with this information, Officer White testified, "I'd received numerous tips in the past that Bryant was selling drugs at his house trailer." Together all these facts form the requisite probable cause for the stop and detainment of Bryant.

The validity of the officers' stop is not judged by whether he had grounds for an arrest, but rather whether he had grounds for a stop. The right of a police officer to briefly stop a person for questioning who is engaging in suspicious conduct, has been recognized by the United States Supreme Court in *Terry v. Ohio,* 392 U.S. 1, 24 (1968) and the Mississippi Supreme Court in *Penick v. State,* 440 So. 2d 547, 552 (Miss. 1989). This right extends to the investigation of confidential reports of suspicious activity. Based upon a confidential informant's tip, officers have a reasonable and articulable basis for stopping a car for non-invasive and non-intrusive investigatory activities. *Neely v. State,* 628 So. 2d 1376, 1379 (Miss. 1993).

This case is similar to *Alexander v. State,* 503 So. 2d 235 (Miss. 1987). In *Alexander,* an officer had information from a confidential informant that an individual was selling drugs. This was corroborated by observations made by the officer consistent with the information given by the informant. The court accepted the State's argument that there was probable cause to arrest the individual and to conduct a search incident to that arrest. *Alexander,* 503 So. 2d at 238-39. Quoting from *Gandy v. State,* 438 So. 2d 279, 283 (Miss.1983), the *Alexander* court instructed:

> Before a warrantless yet lawful arrest could be made, it was not necessary that . . . [the police] have reasonably believed beyond a reasonable doubt that . . . [the defendant] was involved in a cocaine deal . . . . [The police] need only have entertained a reasonable belief that . . . [the defendant] was involved -- a belief rising above mere unfounded suspicion.

Alexander, 503 So. 2d at 235 (citations omitted). The court held that if, from a totality of the

circumstances, the officer makes a practical, common sense decision that there is a fair probability that the person proposed to be arrested or searched is involved in substantial criminal activity, then a search incident to arrest is proper and the evidence procured from that search is not subject to suppression on Fourth Amendment grounds. *Id.* at 238-39; *see Alabama v. White*, 496 U.S. 325 (1990) (stop justified where stop was based upon independent corroboration of confidential informant's tip).

We believe that the officers involved with the original search had sufficient probable cause to believe that they would find an illegal substance in Bryant's vehicle. Accordingly, this proposition is without merit.

> II. WHETHER THE TRIAL COURT ERRED BY DENYING BRYANT'S MOTION TO SUPPRESS EVIDENCE SEIZED IN AN ALLEGEDLY ILLEGAL AND WARRANTLESS SEARCH OF BRYANT'S CAR.

Having stopped the vehicle, the officers allegedly requested and received the permission of Bryant to conduct a search. Officers Smith, White, and Stanley all testified as to Bryant's consent to the search of his car. Officer White went on to testify that Bryant told them to search anywhere they wanted, and that Bryant actually helped with the search of his car by opening the trunk and the doors. His only request was that they not tear his car up. Bryant denies having given the officers permission to search his car. When considering contrary statements, it has been resolved by the Mississippi Supreme Court that conflicts in the evidence on the issue of consent are for the trial judge to resolve. *Smith v. State*, 465 So. 2d 999, 1002 (Miss. 1985). In this case, the trial court denied Bryant's motion to suppress, and affirmed in the findings of fact that Bryant gave the officers permission to search his car.

Once the officers received the driver's permission to search the car, no formal search warrant was required. *Jones v. State*, 607 So. 2d 23, 26 (Miss. 1991). The Mississippi Supreme Court has stated that "[a] voluntary consent to a search eliminates an officer's need to obtain a search warrant." *Jones v. State ex rel. Mississippi Dept. of Public Safety*, 607 So. 2d 23, 26 (Miss. 1991).

If we were to put the issue of consent aside, a vehicular search is permissible without the addition of a search warrant. The Mississippi Supreme Court has found that warrantless searches of private property are *per se* unreasonable, but an exception to this general rule is the "automobile exception." If the officer has probable cause to believe the car may contain something that offends the law, the officer can search the car without a warrant. *Sanders v. State*, 678 So. 2d 663, 667 (Miss. 1996). In deciding whether or not there was probable cause to search the vehicle, the trial judge should look at the totality of the circumstances surrounding the search, and once done, it is at the court's discretion whether probable cause was found. Here, the court found such probable cause for the initial stop, thus making the search reasonable, and resulting in admittance of the evidence found during the search.

Finding no assignment of error which warrants reversal, we affirm the lower court on its denial of Bryant's motion to suppress.

> III. WHETHER THE COURT ERRED WHEN IT OVERRULED BRYANT'S MOTION TO EXCLUDE THE COCAINE FOUND TEN DAYS AFTER THE

ARREST.

On February 17, 1996, the same day as the first search, Officer White requested another drug dog to do a more thorough search of Bryant's vehicle. The dog was unavailable until February 27, 1996, at which time a second search was performed on the car in the police holding area. Up until the time of the second search, the car remained locked and untampered with.

The Mississippi Supreme Court has cited *Chambers v. Maroney*, explaining that "police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant." *Jackson v. State*, 440 So. 2d 307, 309 (Miss. 1983) (citing *Chambers v. Maroney*, 399 U.S. 42, 52 (1975)); *Henderson v. State*, 402 So. 2d 325, 327 (Miss. 1981) (citing *Chambers v. Maroney*, 399 U.S. 42, 52 (1975)).

Here, officers believed there was still more contraband in the vehicle. The confidential informant had told police that Bryant would be carrying cocaine and, as of the first search, no cocaine was found. Because of this, the officers believed a second search was necessary. The availability of the drug dog, and the second search, was not until ten days after the initial search; yet, this second search is not unlawful. The Mississippi Supreme Court has relied on and reiterated the authority of the *Chambers* holding saying that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. *Jackson v. State*, 440 So. 2d 307, 309 (Miss. 1983). For this reason, we find this issue to be without merit and affirm the lower court.

IV. WHETHER THE COURT ERRED IN OVERRULING THE SPECIAL DEMURRER TO THE MULTI-COUNT INDICTMENT.

Bryant argues that trying him under a two count indictment was reversible error. The State argues that trying the two charges together was appropriate because Bryant possessed both the marijuana and the cocaine at the same time, in the same place. The two substances were part of the same transaction and were part of the same scheme, as demonstrated by the consistent packaging and the way in which both the marijuana and the cocaine were covered in ammonia to camoflauge the smell.

Historically, "[the Mississippi Supreme Court] prohibited multi-count indictments until 1986 when the Legislature adopted a multi-count indictment statute which [the] Court later adopted." *Corley v. State*, 584 So. 2d 769, 772 (Miss. 1991). *See also* Miss. Code Ann. § 99-7-2 (Supp. 1990). "In allowing a multi-count indictment, [the Court] agreed with the Legislature that the offenses must be based on the same act or transaction, or be based on two or more acts or transactions, connected together or constituting parts of a common scheme or plan." *Corley*, 584 So. 2d at 772.

The pertinent part of the Mississippi Code to our consideration provides that:

> Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: . . . the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

Miss. Code Ann. § 99-7-2(1) (1972).

In the case at hand, Bryant was charged with two counts of possession of a controlled substance, both with intent to distribute. The two substances were part of the same transaction and common scheme. Clearly, Bryant was in possession of both at the time of his arrest. After a review of Bryant's complaint, we find this issue to be without merit.

> V. WHETHER THE COURT ERRED IN DENYING BRYANT'S MOTION FOR A DIRECTED VERDICT.

Bryant appeals his convictions for possession with intent to sell or deliver arguing there was insufficient evidence to establish intent to distribute. The Mississippi Supreme Court has on many occasions cited the standard of review for this situation. The standard of review for a challenge to the sufficiency of the evidence is stated in *McClain v. State*:

> In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence . . . consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993); *Williams v. State*, 595 So. 2d 1299, 1302 (Miss. 1992); *Heidel v. State*, 587 So. 2d 835, 838 (Miss. 1991). After a thorough review of the record and briefs, we find this issue, along with the previous, to be without merit. We affirm the lower court on all counts.

THE JUDGMENT OF THE LAWRENCE COUNTY CIRCUIT COURT OF CONVICTION ON COUNT I OF POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE AND SENTENCE OF TEN YEARS; COUNT II OF POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE AND SENTENCE OF TWENTY YEARS, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCE IN COUNT II IS TO RUN CONSECUTIVELY TO SENTENCE IMPOSED IN COUNT I. LAWRENCE COUNTY IS TAXED WITH ALL COSTS OF THIS APPEAL.

McMILLIN AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HERRING, J., NOT PARTICIPATING.