

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI**

NO. 97-KA-00994-COA

CONSOLIDATED WITH

NO. 97-KA-01032-COA

PATRICK SPURLOCK, A/K/A PATRICK DEMOND SPURLOCK

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 05/16/1997

TRIAL JUDGE: HON. MIKE SMITH

COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: B. CALVIN COSNAHAN II

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT T. ALLRED III,

WAYNE SNUGGS

DISTRICT ATTORNEY: DUNNICA O. LAMPTON

NATURE OF THE CASE: CRIMINAL - FELONY

TRIAL COURT DISPOSITION: 05/16/1997: CT I UNLAWFUL POSSESSION OF MORE THAN ONE OUNCE BUT LESS THAN ONE KILOGRAM OF MARIJUANA: CT II UNLAWFUL POSSESSION OF COCAINE: SENTENCED INTO THE CUSTODY OF THE MDOC FOR AND DURING THE SPACE OF (6) YEARS ON EACH COUNT TO RUN CONSECUTIVELY; ORDERED TO PAY A FINE IN THE AMOUNT OF \$2,500 ON EACH COUNT FOR A TOTAL OF \$5,000, COURT APPOINTED ATTORNEY FEES IN THE AMOUNT OF \$250.00, AND COURT COSTS;

DISPOSITION: REVERSED AND RENDERED -5/30/00

MOTION FOR REHEARING FILED: 6/28/00 -DENIED- 11/21/00; REVERSED AND RENDERED
CERTIORARI FILED:

MANDATE ISSUED: 12/12/2000

ON MOTION FOR REHEARING

EN BANC.

KING, P.J., FOR THE COURT:

¶1. This case has returned to this court upon the State's rehearing motion. That motion is denied. However, the prior opinion of this Court is withdrawn, and this opinion is substituted in its stead.

¶2. Patrick Spurlock was convicted of possession of marijuana and possession of cocaine in the Pike County Circuit Court. He was sentenced to serve terms of six years on each count in the custody of the Mississippi Department of Corrections said terms to be served consecutively. Aggrieved by his convictions and sentences, Spurlock has appealed and assigned two points of error: 1) whether the trial court erred in denying the appellant's request for a circumstantial evidence instruction to the jury, and 2) whether there was legally sufficient evidence to support the defendant's motion for directed verdict, and did the trial court err in failing to grant a motion for judgment notwithstanding the verdict, or alternatively a new trial. We find the evidence of guilt to be legally insufficient and therefore reverse and render Spurlock's conviction.

FACTS

¶3. At approximately 8:50 p.m. on April 6, 1996, Officers Erik Allen and David Elson drove to a location known as the Playhouse Lounge. While driving through the parking lot, they observed a car parked in front of the building. The officers parked the patrol car adjacent to this car. As the officers approached the parked car, Patrick Spurlock, a front-seat passenger, leaned out of the car. The officers were unable to observe what Spurlock did because the car door and a concrete porch obstructed their view. However, they believed that Spurlock possibly leaned out to place an open beer on the ground.

¶4. The officers directed all passengers to get out of the car. They then searched the driver and arrested him after finding marijuana in his pocket. Officer Carter searched Spurlock and found no contraband. Spurlock was then allowed to leave the scene. Officer Elson subsequently found drugs underneath the passenger side of the vehicle where Spurlock had been seated and called him back to the scene where he was arrested.

¶5. Spurlock was charged with possession of marijuana and cocaine. During the trial, Spurlock requested a circumstantial evidence instruction saying there was no direct evidence that he possessed the drugs or placed the drugs underneath the car. The prosecution, objected and the trial court excluded the circumstantial evidence instruction. The jury convicted Spurlock of all charges. Spurlock was sentenced to serve consecutive terms of six years on each count, in the custody of the Mississippi Department of Corrections. His motion for a directed verdict, judgment notwithstanding the verdict, or alternatively a new trial having been denied, Spurlock now appeals his convictions and sentences.

ANALYSIS OF THE ISSUES AND DISCUSSION OF THE LAW

I.

Whether there was legally sufficient evidence to support the defendant's motion for directed verdict, and did the trial court err in failing to grant a motion for judgment notwithstanding the verdict, or alternatively a new trial.

¶6. Because the standards of review for the denial of a directed verdict and a judgment notwithstanding the verdict are the same, we will group these two arguments for discussion purposes. *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987). *See also Steele v. Inn of Vicksburg, Inc.*, 697 So. 2d 373, 376 (Miss. 1997); *American Fire Protection, Inc. v. Lewis*, 653 So. 2d 1387, 1390 (Miss. 1995); *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 252 (Miss. 1993). Under this standard, "the prosecution must be given the

benefit of all favorable inferences that may be reasonably drawn from the evidence." *Id.* (citations omitted). "We may 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." *Harveston v. State*, 493 So. 2d 365, 370 (Miss.1986). This assignment of error challenging the sufficiency of the evidence should be sustained "[i]f the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty." *Burge v. State*, 472 So. 2d 392, 396 (Miss. 1985).

¶7. Possession requires the exercise of dominion and control. *Berry v. State*, 652 So. 2d 745, 751 (Miss. 1995) In applying the standard to the case at bar, we find substantial evidence in the record to support Spurlock's argument that the State's evidence was insufficient to establish his "dominion and control over the contraband." *Curry v. State*, 249 So. 2d 414, 416 (Miss. 1971); *Miller v. State*, 634 So. 2d 127, 130 (Miss. 1994). The officers saw Spurlock open the car door and lean over. However, the officers did not actually see Spurlock with contraband or anything else, nor did they see him place contraband, or anything else, underneath the car. At best, the officers testimony established that they believed that Spurlock possessed contraband. However, that testimony failed to establish a nexus between Spurlock and any contraband, or that he exercised dominion or control over any contraband. Additionally, Spurlock's fingerprints were absent from the bag containing the contraband. Considering the evidence, reasonable men could not have found Spurlock guilty beyond a reasonable doubt. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). The evidence was legally insufficient to support the denial of Spurlock's motion for directed verdict, as well as his motion for judgment notwithstanding the verdict.

¶8. Because we are reversing and rendering Spurlock's conviction due to an insufficiency of the evidence to support the conviction, it is not necessary to address his arguments concerning the weight of the evidence and the trial court's denial of his circumstantial evidence instruction.

¶9. This Court accordingly reverses and renders this case.

¶10. THE JUDGMENT OF THE PIKE COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF MARIJUANA AND SENTENCE OF SIX YEARS AND CONVICTION OF POSSESSION OF COCAINE AND SENTENCE OF SIX YEARS AND FINE IN THE AMOUNT OF \$5,000 ARE REVERSED AND RENDERED. COSTS OF THIS APPEAL ARE ASSESSED TO PIKE COUNTY.

McMILLIN, C.J., IRVING, MOORE, AND THOMAS, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SOUTHWICK, P.J., BRIDGES AND LEE, JJ. MYERS, J., NOT PARTICIPATING.

PAYNE, J., DISSENTING:

¶11. I respectfully dissent. Based on my review of the record before the Court, this is plainly *not* a case where "the evidence is such that reasonable and fair-minded jurors could only find the accused not guilty." *Johnson v. State*, 749 So. 2d 1251 (¶7) (Miss. Ct. App. 1999). It is clear to me that the prosecution presented sufficient evidence to support the conviction under our present law of constructive possession of illegal and controlled substances.

¶12. In *Arnett v. State*, 532 So. 2d 1003, 1011-12 (Miss. 1988), the Mississippi Supreme Court held:

What constitutes a sufficient external relationship between the defendant and the narcotic property to complete the concept of "possession" is a question which is not susceptible of a specific rule. However, there must be sufficient fact to warrant a finding that the defendant was aware of the precedence 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 establishing that the drug involved was subject to his dominion and control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.

(quoting *Curry v. State*, 249 So. 2d 414, 416 (Miss. 1971)). More recently, in *Roberson v. State*, 595 So. 2d 1310, 1319 (Miss. 1992), the Mississippi Supreme Court addressed constructive possession again:

Constructive possession allows the prosecution to establish possession of contraband when evidence of actual possession is absent. Constructive possession is established by evidence showing that the contraband was under the dominion and control of the defendant.

Id. at 1319 (citing *Vickery v. State*, 535 So. 2d 1371, 1379 (Miss. 1988)). The contraband need not be found on the defendant's person. *Curry*, 249 So. 2d at 416. However, "[w]here the defendant is not in control of the premises, that is, the car, the State has the burden of proving competent evidence which would connect the defendant to the cocaine." *Alexander v. State*, 749 So. 2d 1031 (¶10) (Miss. 1999) (citing *Campbell v. State*, 566 So. 2d 475, 476 (Miss. 1990)).

¶13. Since Spurlock was not in exclusive possession of the vehicle in which he was a passenger at the time he constructively possessed the marijuana and cocaine in question, then the burden rested with the prosecution under *Campbell* to connect Spurlock to the cocaine. In my view, the testimony of Agent Erik Allen and Officer David Elson supplies this vital connection.

¶14. Agent Allen testified that he was on a narcotic detail at the Playhouse establishment the night of Spurlock's arrest. As he approached the vehicle in which Spurlock was seated as a front seat passenger, he noticed Spurlock open the passenger's door and lean out in an apparent "effort to place something under it [the car]." Allen further testified that no other passenger leaned out of the car in such a manner, and that the contraband was found in the tire tracks immediately under the car where Spurlock had reached. Officer Elson testified that he, too, saw Spurlock lean out of the car and reach under the vehicle. Elson noted he saw no other passenger in the vehicle reach under the car, and he confirmed that the contraband was found in the tire tracks, which in Elson's opinion were fresh, near where Spurlock was seated. Further testimony indicates that the area where the drugs were discovered was controlled by law enforcement officers. This is significant in that there was no reasonable opportunity for another party to have placed the narcotics in the tire tracks under the car near where Spurlock had been seated as a passenger.

¶15. Spurlock also testified in his own behalf, noting his dismay at his arrest for possession of narcotics when no contraband was found on his person. Quoting from Spurlock's testimony, when Agent Allen informed Spurlock of his arrest, Spurlock quizzed Allen: "I asked him, I said, [y]ou did not, I didn't have any drugs on me, how can you arrest me for possession of crack cocaine? He said, I didn't have to find any drugs on you, I found them underneath the car. And he said, I said, [w]ell, that's not right, I mean, I don't have any drugs on me, that man searched me, I don't have any drugs." Spurlock maintains that he only had house keys in his possession at the time of his arrest. Spurlock also testified on direct examination about his prior conviction for cocaine possession.

¶16. It seems to me this verdict turned on the credibility of the witnesses in this case, and I believe the jury was entitled to believe Allen and Elson over Spurlock. Further, Spurlock's obvious emphasis on the fact that no contraband was found on his person, combined with his convenient failure to explain to the jury the allegation that he leaned out of the car as the officers approached the vehicle and his own testimony about his prior cocaine conviction, was more than a sufficient basis on which the jury could have reasonably found Spurlock guilty of the crimes charged.

¶17. I would affirm.

**SOUTHWICK, P.J., BRIDGES AND LEE, JJ., JOIN THIS SEPARATE WRITTEN
OPINION.**