ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT SMOOTS	APPELLANT
V.	NO.2018-KA-01611-COA
STATE OF MISSISSIPPI	APPELLEE

PRO SE REPLY BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Madison County where Robert Smoots was convicted of possession of 2.2 grams of cocaine with intent to distribute in Count I of the indictment and of tampering with evidence in Count III. (C.P. 96-99). Smoots' two-day jury trial was conducted April 30 - May 1, 2018 with the Honorable William E. Chapman, III, Circuit Judge, presiding. The Appellant ultimately was sentenced to forty years on the cocaine conviction with ten years suspended on five years of supervised release. For the tampering conviction, Smoots was sentenced to a concurrent two years of incarceration and he is presently incarcerated with the Mississippi Department of Corrections.

Smoots was represented at trial by the Attorney Darla Palmer.

On or about Madison County Narcotic agents conducted a search of the premises of a business location. Upon searching the inside of the premises, after finding no illegal conduct or substances the agents proceeded to a outside drain pipe linked to two different businesses. (T.R.177,181)

The state conceded that an alleged sale that had procured at the location a day prior to the search warrant was the subject of the search warrant. The record identifies that the Appellant moved on several occasions to suppress the search warrant including at trial but fails to provide a sufficient record for appellate review.(C.P. 12,18-24)(T.r.70-72,91,101) The Search warrant had failed to name the Appellant as a perpetrator of any crime and in fact had failed to list any drain pipe as the property of the Appellant.(C.P.20)

At trial, but just prior to trial a perspective jurors expressed its opinion of the courts presumed findings of the Appellants guilt. This was done in the presence of the entire panel of jurors and severely prejudiced the Appellant. (C.P. 45,69) Impermissible evidence was introduced at trial. (search warrant, C.I. testimonial evidence, ect.)

Jasmine Cross, a manager at the location for 4 and one- half years, testified that the pool hall had been rented out for the last four and a half years. She stated that she had been in charge of the money. She further testified, that, the funds from the previous day (funds from day C.I. was alleged to have purchased drugs with marked money at location) had been given to the Appellant by herself. The witness expressed personally knowledge regarding the back door at the location. She identified that the toilet had been broken about a year and a half, every since it had been moved from the kitchen area.T.r.204-212,224-225.) other witnesses cohabitated this testimony.(231,235,236).

Ultimately, the Appellant was convicted for cocaine that he had no personally knowledge about. He now brings this appeal to this Honorable court.

SUMMARY OF THE ARGUMENTS

The Appellant first argued how the prosecution has failed to prove the elements of the crimes that he presently stands convicted of. The Appellant ask the court to review this claim under the federal standard *Jackson V. Virginia,,* specifically relying upon the facts and *circumstances* of this record in making its decision

Next the Appellant argues that the trial court erred when it failed to suppress the search warrant. The search warrant had issued because of a alleged sale that had been reported by a C.I. The Appellant had not been named as a perpetrator of crime in the search warrant. The outside drainage of the two different businesses had not been control by the Appellant. Although the trial court postponed trial to allow the testimony of the C.I to be examined for the purposes of determining whether the information that had been produced was reliable the record fails to identify what transpired at this hearing. This has hampered the Appellants argument on appeal.

Third the Appellant argues how he has been denied any fair trial. At trial, during voir dire, a perspective juror expressed his opinion regarding the Appellants presumed guilt. This feeling had derived from the tone that the atmosphere had created through the facial expressions of the judge and ect. The trial court failed to ensure that all the jurors had not been prejudiced before allowing the panel to proceed or the effect that the remarks that the prospective juror had made had affected the rest of the prospective jurors.

Next, the Appellant argues that the trial court erred when it denied his motions for directed verdict and motion for J.N.O.V. The record of this case will show that the prosecution has failed to meet his burden of proof.

Last the Appellant argues that the trial court erred when it denied his circumstantial instruction. The record supported this instruction.

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ARGUMENTS

VI. THAT THE STATE FAILED TO PROVE THE ELEMENTS OF THE CRIMES THAT THE APPELLANT STANDS CONVICTED OF.

In this case the state was burdened with proving that the Appellant had possessed 2.2 grams of cocaine with intent to distribute and that he had tampered with evidence. (C.P.6-8) The evidence presented at trial would show that the Appellant had been siting at a table in the establishment along with two other patrons discussing business related to the Appellants trucking company when the police had entered.(T.r.224-124,149,168,225) The establishment had been a business location of the Appellant where he sold food, beverages, ran pool tables, Changed money to allow patrons to play pool and arcade games that were in the establishment and had also sold snacks.(T.r.192) Jasmine Cross, a manager

at the location at the time of the incident testified that she was in charge of the money, and that she had personally delivered the money to the Appellant from the previous days accountings (T.r.204-207,211-212).

In order for the Prosecution to sufficiently prevail in proving its elements of the crime, possession of cocaine, they were obligated to put forth evidence that reasonably showd that, the Appellant, had; unlawfully, willfully, knowingly, feloniously and intentionally possessed with intent to sell, distribute or transfer a quantity of two (2) grams but less than ten (10) grams of Cocaine, a Schedule II controlled substance, to a person, in violation of Miss.Code Ann. §41-29-139,

Here in this case the evidence produce showed that some cocaine was discovered on the outside of the establishment in a drain pipe that was connected to two different buildings, one being the Appellants establishment(T.r.181) One of the agents, more specifically, Agent Loveall testified that he did not know how long the cocaine that he had removed from the drain pipe had been in the location where he had located it at.(T.r.152) No evidence was introduced at trial that identified the Appellant had personally had or maintained personal dominion or control over the cocaine that was discovered in the drain pipe. In fact, the evidence at trial only had indicated that the Appellant had been siting down talking when the agents entered. (T.r.124,149,168) Because the prosecution has failed to put forth any evidence that reasonably connects the Appellant to the cocaine that was discovered in a drain pipe, outside, or that he had at a minimum had some knowledge of the cocaine being in the drain pipe or maintained some dominion or control over the drugs found in the pipe, the previous findings fall short of the standards required by Our United States Constitution.5th, 6th 14th Amendments U.S. Constitution. Jackson V. Virginia, 99 S. Ct. 2781.

In order for the Prosecution to sufficiently prevail in proving its elements of the crime, tampering with evidence, they were obligated to put forth evidence that reasonably showed that the Appellant had, willfully, unlawfully, intentionally and feloniously removed and dispose of certain physical evidence relating to said

proceeding, to-wit: they flushed cocaine down the toilet, with intent to impair its availability in the aforesaid prosecution, in violation of Miss Code Ann. 97-9-125(1)(a).

The evidence introduced at trial only showed that the Appellant had been siting down having a conversation when the agents entered the establishment and that no one in the establishment had flushed the toilet. (T.r.124,149,168,210-211,224-225231,236) The prosecution was specifically burdened with proving that the Appellant had flushed cocaine down the toilet in the establishment, with intent to impair its availability in the aforesaid prosecution. The record fails to put forth any reasonable evidence that the Appellant had ever flushed a toilet. In fact the evidence specifically reflects that the Appellant had been siting at the table and had never moved.(T.r.236, Although the agents may have found cocaine in the drain pipe outside(T.r.152), it those not follow that the Appellant had maintained dominion or control over the cocaine that had been flushed at some point in time by one of the two establishments that were linked to the drain pipe.(T.r.181) The record evidence in this case fails to meet our fundamental standards.5th,6th,14th Amendments of U.S. Constitution .

Our United States Supreme Court has made it clear, that;

"A person can not incur the loss of liberty for an offense without notice and meaningful opportunity to defend; a meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused. The court went on to express that Due Process requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof, defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. The court went on to hold that the critical inquiry on review of the sufficiency oy the evidence to support a criminal conviction must be not simply to determine whether jury was properly instructed, but to determine whether record evidence could reasonably support a finding of guilt beyond a reasonable doubt; the relevant question is whether, after viewing the evidence in light most favorable to prosecution, any rational trier of fact could have found the

essential elements of the crimes beyond a reasonable doubt"14th Amendment U.S. Constitution. Jackson V. Virginia, 99 S. Ct. 2781. (emphasis added)

The record evidence fails to reflect any evidence that which reasonable shows that the prosecution has met its burden of proof. The proper remedy is to reverse an render the Appellants convictions and sentences.

THAT THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANTS MOTION TO SUPPRESSS THE SEARCH WARRANT.

Prior to the trial the Appellants counsel had made a motion to suppress the search warrant that had been issued against the Appellants business.(C.P. 18-24) The prosecution had alleged that a confidential informant had allegedly purchased cocaine from the Appellants establishment.(C.P. 12)(T.r.70-72,91,101) Although the confidential informant was said to have been wired the prosecution failed to produce any recording of the alleged sale that had taken place. The agents alleged that the recording had failed. (C.P. 12) The facts and underlying circumstances had failed to say that drugs had been purchased from the Appellant and only noted that drugs had been purchased from someone at the location. At trial, the court had found that trial should be postponed momentarily so that the state could produce the C.I. witness' testimony so as to determine whether the search warrant was reliable. The record has omitted what transpired at this hearing although it is apparent that trial was postponed for these reasons. (T.r.60-85)Although trial counsel failed to argue these particular basis at trial the Appellant respectfully asserts that this issue involves fundamental rights of severe importance and should be reviewed under our plain error doctrine. Federal R. Crim. Proc. 52(b). In the event that this court were to find that this issue should not be reviewable under our plain error doctrine, the Appellant respectfully reserves his right to present this issues upon a ineffective assistance of counsel basis in his motion for post-conviction relief, for the record is not sufficient to allow this court to determine this issue on direct appeal.

"The 4th Amendment of Our United States Constitution prohibits the unlawful search and seizure of any citizen. This includes the right to have a search warrant with reliable information issued to lawfully pursuant his arrest. This is likewise a requirement of Due process of Law"4th,14th Amendments U.S. Constitution.

"Totality of the circumstances approach is the prevailing test for determining whether an informant's tip suffices to establish probably cause for issuance of a search warrant. Even if search warrant application is supported by bare bones affidavit, a reviewing court may properly conclude that, notwithstanding the deference a magistrate deserves, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances of because the form of the warrant was improper in some respect". Citing U.S. V. Leon, 104 S.Ct. 3405.4th, 14th Amendment U.S. Constitution.

The court should order the trial court to supplement the record with the documents of the hearing that the record reflects postponed the trial, and/or direct the trial court to submit whether this hearing did or did not transpire in alternate remand this cause to the trial court so as to allow the trial court to determine this issue so that this court may sufficiently evaluate the issues and determine whether such decision is proper. The trial Court Erred and failing to suppress the search warrant.

THAT THE APPELLANT HAS BEEN DENIED ANY FAIR TRIAL PURSUANT TO THE 6TH AND 14TH AMENDMENTS OF OUR UNITED STATES CONSTITUTION.

At the trial, during the voir dire a juror was of the opinion that the Appellant had already been adjudicated guilty of the offenses that he was being tried for.(T.r.45) This comment was made during voir dire but prior to any evidence being presented by the prosecution. The atmosphere had created the scenario. Although the trial court instructed the jury regarding the comments it failed to consider the impact that the statement had already had on the entire

panel.. The following deposition took place at the trial between a perspective juror and the parties in the presence of the panels of jurors;

Q. So does that make you feel like you don't want to be involved? Do you think because you don't know that right now that you couldn't be fair?

A. How can we give y'all an answer when we don't--we're just coming into it and we don't know what--y'all just giving us the simple little things of a problem, so y'all already then found him guilty. Y'all have found him guilty already, so why we're here?

Following the remarks made to counsel by the juror the court ask the parties whether they desired the court to explain it to the juror for the benefit of her personal voir dire. Even aft addressing the juror, still the court was unsure if the instruction had cured the matters. Furthermore, the court failed to consider any prejudice that had inflicted the other jurors during the conflict. The following took place during the trial;

THE COURT: Okay. Ms. Thurman, let me jump in here just a second to make sure youy and everybody understand. I want to address your comments about yall aren't giving a person a chance. Like Ms. Palmer said, this is the very beginning of the trial.

JUROR NO. 4: I understand.

THE COURT: And right now this gentleman, if y'all were to be put on a jury and have to vote, you'd have to vote that he is not guilty, because the state

represented by Mr. McAlpin and Mr. Bramlett haven't put on any evidence here at this witness stand.

The way this proceeds is after these lawyers ask y'all questions to determine who they want to pick to be on the jury, then the state's lawyers will call all of their witnesses to try to prove that Mr. Smoots did what he's charged with doing.

Now, after that Ms. Palmer has the ability to call witnesses that put on defenses that she thinks the defendant—Ms. Palmer, can you move, so I can keep my eyesight?

MS. PALMER: Yes, sir.

THE COURT: That the Defendant Mr. Smoots didn't do what the state has accused him with. So this is in any trial, not just this one, but in all trials, the way the process is that the state will go call all of their witnesses to try to prove their case, and then the Defendant gets the opportunity to call witnesses to try to prove his case. So this case is not just getting here at this point. It's taken processes to get to this point, and it's now at the point where the case will go to trial, where like I said, the jury will hear from the witnesses.

I don't know if that helps you with your understanding of anything, but I'll be more than willing to answer any question about anything?

JUROR NO. 4: No. I'm just sitting here listening to y'all.

The Courts comment that the Defendant would then try to prove his case implied that the burden of proof rested with the Defendant.5th,6th,14th Amendments U.S. Constitution. Furthermore, the instruction still failed to specifically ensure that every juror had not been affected by the comments. This falls short of the standards of our Constitution in providing the insurance of the accused receives a fair trial and should be afforded consideration under our plain error doctrine. Federal R.Crim. Proc. 52(b).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his deference. 6th, 14th Amendments U.S. Constitution.

The Appellant has been denied any fair trial by any impartial jury, the atmosphere had created a dispositive and non-fundamental environment before the trial had even started irreparably prejudicing the jury to believe not only that the case had already been decided but also that the Appellant was presumed guilty unless he could prove his innocence. The court should reverse this case for a new trial.

That THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANTS MOTION FOR A DIRECTED VERDICT AND J.N.O.V.

Now the Appellant argues that the trial court erred when it denied his motion for a directed verdict and motion for J.N.O.V. (T.r.188-190) No where in the record had the state produced any evidence that the Appellant had tampered with any evidence or that the Appellant had maintained dominion or control over the cocaine that had been found by the officers. In fact, the evidence introduced at trial indicated that the Appellant had been sitting down the entire time that the agents had been around the establishment.(T.r.124,149,152,168,177,181,224-225) In order to establish that the Appellant had maintained control of the Cocaine under the circumstances the state at minimum should have produced evidence that the Appellant had ordered that the cocaine be flushed or that it was at least was personally flushed by the Appellant. No evidence was submitted that could reasonably infer that the Appellant had disposed of the cocaine in fact

the agent admitted that he was unable to say whether the cocaine had come from the Appellants establishment or if it had been flushed in the other establishment that shared the outside drain pipe with the establishment.(T.r.181) It follows that no reasonable minded jury could have concluded from the evidence of the record that the Appellant had possesses the cocaine or tampered with the evidence reasonably considering the circumstances.5th, 6th 14 Amendments U.S. Constitution.

"The standard of review for denial of motion for judgement notwithstanding the verdict and denial of a motion for a directed verdict are identical; the motion for directed verdict challenges the legal sufficiency of the evidence presented by the Plaintiff during his case in chief, asking whether the plaintiff has met the burden of going forward on the evidence. Appellate court will reverse denial of motion for directed verdict where reasonable and fair minded jurors could only have found in favor of the moving party." Wal-mart Stores Inc. V. Littleton, 832 So 2d. 1056.

Here in this case the jury obviously should have met a different conclusion. Although they found that Appellant had possessed cocaine nothing in the record that which is sufficiently admissible supports the allegations that the Appellant possessed cocaine. Likewise, nothing in the record supports the allegations that the Appellant tampered with evidence, the record identifies indisputably that no one sitting at the table moved at any point.(T.r.124,149,152,168,177,181,204-212,224-225,231,235-236,241) No witness produced testimony that which could reasonably infer that the Appellant, Robert Smoots tampered with any evidence.

The Appellant respectfully prays this court reverse and render these convictions.

THAT THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANTS REQUEST FOR A CIRCUMSTANTIAL INSTRUCTION.

Last, the Appellant argues that the trial court erred when it denied his circumstantial instruction. The instruction had a solid foundation in the evidence, was support by the record, and was a correct statement of the law. The record that had been produced at trial had sufficiently produced a circumstantial setting wherein the Appellant should have been entitled to the requested instruction. The trial court erred when it denied the instruction under the circumstances. (T.r.124,149,152,168,177,181,204-212-224-225,231,235-236-241)

"The Supreme Court reviews a grant or denial of a jury instruction under abuse-of-discretion standard. Jury instructions must be read as a whole to determine if they fairly announce the law, and they must be supported by the evidence." Mc*Innis V. State, 61 So.3d 872.*(emphasis added)

In McInnis V State, the court emphasized regarding the definition of *circumstantial evidence.* All and all the court clearly held, that;"[Circumstantial evidence is evidence that which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist.]"

In *Henderson V state,* the court reversed and remanded the case. In Henderson, the evidence produced by the state had been substantially contradicted by a witness testifying for the defendant. The case against Henderson was based upon his constructive possession on cocaine. In Henderson, with the court relying upon Curry V. state, 249 So 2d 414 (miss. 1971), the court discussed what constituted constructive possession. The Court ultimately held, That;

"What constitutes a sufficient external relationship between the defendant and the narcotic property to complete the concept of possession is a question which is

susceptible 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 and control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances." Henderson V. State, 453 So. 2d 708.(emphasis added)

The record before this court fails to put forth sufficient facts to warrant the finding that the Appellant was aware of the presence and character of the cocaine that had been in the drain pipe for who knows how long. The record identifies no evidence that reasonably infers that the Appellant was intentionally and consciously in possession of the cocaine that had been in the drain pipe for who knows how long. The proper remedy is to reverse and render these convictions.5th,14th Amendments Of U.S. Constitution.

CONCLUSION

The Appellant respectfully prays this court reverse and render his convictions, that this cause is remanded for further proceedings, or in alternate that this cause been reversed for a new trial.

Robert L Smoots

ROBERT SMOOTS

CERTIFICATE OF SERVICE

I, Robert Smoots, hereby certify that I have on this date delivered by via U.S postage prepaid mail a true and correct copy of the above and foregoing Pro Se Brief of the Appellant to;

Muriel B. Ellis, Clerk

P.O. Box 249

Jackson, Mississippi 39205

Jason L. Davis, Attorney General

P.O. Box 220

Jackson Mississippi, 39205

THIS, the 4th, day of October, 2019.

Robert L Smoots

ROBERT SMOOTS