

SUPREME COURT OF MISSISSIPPI

James Evans, Jr. v. City of Aberdeen, Mississippi

926 So. 2d 181 (Miss. 2006) · No. No. 2003-CT-01638-SCT · Decided March 30, 2006

SUMMARY

The Supreme Court of Mississippi considered whether \$7,600 seized from James Evans's home was subject to civil forfeiture under Mississippi Code section 41-29-179(2). The court held that dog alerts to currency may have probative value but found the sniff test unreliable because of possible contamination. It affirmed the Court of Appeals' determination that the City failed to prove by a preponderance of the evidence that the money was connected to illegal narcotics trafficking, reversed the circuit court, and rendered judgment for Evans.

CASE DETAILS

COURT	Supreme Court of Mississippi
WRITING FOR THE COURT	Smith, Chief Justice; Waller, P.J.; Cobb, P.J.; Easley, J.; Carlson, J.; Dickinson, J.; Graves, J.; Diaz, J.; Randolph, J.
JURISDICTION	Mississippi
DECIDED	March 30, 2006
DOCKET	No. 2003-CT-01638-SCT
DISPOSITION	reversed
PROCEDURAL POSTURE	The City brought a civil forfeiture action in the Monroe County Circuit Court seeking forfeiture of \$7,600 in cash. The circuit court ordered the money forfeited. The Mississippi Court of Appeals reversed and rendered judgment against the City, and the Mississippi Supreme Court granted the City's petition for writ of certiorari.
STANDARD OF REVIEW	Forfeiture statutes are penal in nature and must be strictly construed. The issue is whether, considering all the evidence together, a rational trier of fact could find by a preponderance of the evidence that the funds were the product of, or instrumentalities of, violations of Mississippi's Uniform Controlled Substances Law. The trier of fact may rely on circumstantial evidence and reasonable inferences as well as direct evidence.
PRECEDENTIAL VALUE	Published Mississippi Supreme Court en banc opinion; precedential
PARTIES	James Evans, Jr. v. City of Aberdeen, Mississippi

TOPICS

evidence burden of proof appellate procedure preservation of error standard of review

PRACTICE AREAS

civil forfeiture evidence municipal law appellate procedure controlled substances

QUESTIONS PRESENTED

1. Whether, under Mississippi Code section 41-29-179(2), the City proved by a preponderance of the evidence that the \$7,600 found in Evans's home was subject to forfeiture.
2. Whether a dog alert to currency is entitled to probative weight despite the currency-contamination theory.
3. Whether Evans preserved any challenge to the City's failure to qualify Officer Perkins as an expert witness.

HOLDINGS

1. A properly conducted and properly trained narcotics-dog alert to currency is entitled to probative weight; the currency-contamination theory does not categorically preclude such evidence unless accompanied by other persuasive evidence.
2. The dog-sniff evidence in this case was improperly obtained or contaminated because the testing conditions did not establish that the dog alerted to the currency itself.
3. The City failed to prove by a preponderance of the evidence that the \$7,600 was subject to forfeiture.
4. Evans waived any error arising from the City's failure to qualify Officer Perkins as an expert because he made no contemporaneous objection at trial.

KEY QUOTATIONS

"Therefore, based on the Seventh Circuit's in depth analysis of the reliability of dog alerts to currency, we adopt the Seventh Circuit's sound reasoning and finding that dog alerts to currency are entitled to probative weight." (185)

"Considering the circumstances as a whole, this Court finds the City did not meet its burden proving by a preponderance of the evidence that the \$7,600 is subject to forfeiture." (187)

FACTUAL BACKGROUND

Police found \$7,600 wrapped in hair bands beneath a console television in Evans's bedroom. They also found a brass container containing a brillo pad, ashes, and residue; perforated tin foil; a cigarette pack with residue; and plastic bags. No drugs were found in the home, and the residue and other items were not submitted for laboratory testing. The City's dog-sniff test was conducted using a possibly contaminated paper bag and in a possibly contaminated area, leaving uncertainty whether the dog alerted to the money, the bag, or the surrounding area.

PROCEDURAL HISTORY

The Monroe County Circuit Court held that the City proved by a preponderance of the evidence that the \$7,600 was furnished in exchange for, or used or intended to be used in violation of, the Uniform Controlled Substances Law. The Court of Appeals reversed and rendered judgment against the City, concluding that the evidentiary presumption did not apply and that the City had not established a sufficient connection between the money and drug trafficking. The Supreme Court affirmed the Court of Appeals' judgment while rejecting its currency-contamination rationale and reversing and rendering the circuit court's judgment.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The judgment of the Mississippi Court of Appeals was affirmed, and the judgment of the Monroe County Circuit Court was reversed and rendered. The opinion does not direct further proceedings on remand.

CASES CITED

- Evans v. City of Aberdeen, 925 So. 2d 850, 851-55 (Miss. Ct. App. 2005)
- Parcel Real Property Located at 335 West Ash Street, Jackson, Miss. v. City of Jackson, 664 So. 2d 194, 199 (Miss. 1995)
- Jackson v. State ex rel. Miss. Bureau of Narcotics, 591 So. 2d 820, 822-23 (Miss. 1991)
- Hickman v. State ex rel. Miss. Dep't of Public Safety, 592 So. 2d 44, 45-48 (Miss. 1991)
- United States v. Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars (\$30,670), 403 F.3d 448, 455-60 (7th Cir. 2005)
- United States v. \$5,000.00 in U.S. Currency, 40 F.3d 846, 849 (6th Cir. 1994)
- United States v. \$84,615 in U.S. Currency, 379 F.3d 496, 502 (8th Cir. 2004)
- United States v. \$141,770.00 in U.S. Currency, 157 F.3d 600, 604 (8th Cir. 1998)
- United States v. \$242,484.00, 389 F.3d 1149, 1165-66 (11th Cir. 2004)
- United States v. Saccoccia, 58 F.3d 754, 777 (1st Cir. 1995)
- United States v. Golb, 69 F.3d 1417, 1428 (9th Cir. 1995)
- United States v. Carr, 25 F.3d 1194, 1203 (3d Cir. 1994)
- United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars in U.S. Currency, 661 F.2d 319, 324 (5th Cir. Unit B 1981)
- United States v. \$38,600.00 in U.S. Currency, 784 F.2d 694, 696-98 (5th Cir. 1986)
- Mallard v. State, 798 So. 2d 539 (Miss. 2001)
- Smith v. State, 530 So. 2d 155, 161-62 (Miss. 1988)

OPINION

PER CURIAM.

926 So. 2d 181 (2006) James EVANS, Jr. v. CITY OF ABERDEEN, Mississippi. No. 2003-CT-01638-SCT. Supreme Court of Mississippi. March 30, 2006. *182 J. Dudley Williams, Aberdeen, attorney for appellant. Robert H. Faulks, attorney for appellee. EN BANC. *183 ON WRIT OF CERTIORARI SMITH, Chief Justice, for the Court. ¶ 1. This case involves a civil forfeiture action by Appellee, the City of Aberdeen ("City"), in the Monroe County Circuit Court.

The judgment ordered that \$7,600 in cash be forfeited, holding the City met its burden of proof that the cash was furnished in exchange for a controlled substance and/or used or intended to be used in violation of the Uniform Controlled Substances Law. ¶ 2. James Evans, Jr. ("Evans") filed a Notice of Appeal to this Court.

On April 26, 2005, the Mississippi Court of Appeals reversed and rendered decision against the City. Evans v. City of Aberdeen, 925 So. 2d 850, 855 (Miss.App.2005). As a result, the City filed a motion for rehearing.

The Court of Appeals denied the motion. ¶ 3. The City submits this Petition for Writ of Certiorari contending that the Court of Appeals rendered a decision in conflict with the prior decisions of this Court and the Court of Appeals.

We reject the "currency contamination theory" as adopted by the Court of Appeals. Instead, we adopt the 7th Circuit Court decision in United States of America v. Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars (\$30,670), 403 F.3d 448 (7th Cir.2005).

However, we find the "dog sniff test" conducted here was contaminated, thus improper. We agree with the Court of Appeals' holding that the City failed to meet its burden of proof that the \$7,600 was subject to forfeiture. FACTUAL BACKGROUND ¶ 4.

The Mississippi Court of Appeals stated the facts of this case in detail. Finding no need to restate them, we direct the reader to Evans, 925 So.2d at 851-53. On appeal, the Court of Appeals reversed the trial court's judgment holding that the trial court improperly identified the objects seized from Evans' room as drug distributing and/or manufacturing paraphernalia.

Id. at 853. As such, the Court of Appeals found the evidentiary presumption that cash seized in close proximity to drug distributing and/or manufacturing paraphernalia can be subject to forfeiture did not apply. Id. ISSUE I. WHETHER UNDER MISS. CODE ANN. SECTION 41-29-179(2), THE CITY PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE \$7,600 FOUND IN THE EVANS' HOME IS SUBJECT TO FORFEITURE STANDARD OF REVIEW ¶ 5.

The Court of Appeals cited the following standard of review: Forfeiture statutes are penal in nature and must be strictly construed. Parcel Real Property Located at 335 West Ash Street, Jackson,

Miss. v. City of Jackson, 664 So. 2d 194, 199 (Miss. 1995); Jackson v. State ex rel. Miss. Bureau of Narcotics, 591 So. 2d 820, 822 (Miss.1991).

In a civil forfeiture case, the question is whether, given all of the evidence taken together, a rational trier of fact could have found that the funds were the product of or the instrumentalities of violations of the State's Uniform Controlled Substances Laws. Hickman v. State ex. rel. Miss. Dep't of Public Safety, 592 So. 2d 44, 48 (Miss.1991).

The trier of fact may act on circumstantial evidence and inferences as well as direct evidence. Id. at 46. Evans, 925 So.2d at 853. ANALYSIS ¶ 6. The Court of Appeals found the presumption that currency found in close *184 proximity to manufacturing or distributing paraphernalia under Miss.Code Ann. section 41-29-153(a)(7) does not apply.

The City does not contest this finding on appeal; as such, this Court will not address that issue. However, the City argues the Court of Appeals improperly utilized a divide-and-conquer approach to specific items of probative evidence; specifically, that the Court of Appeals incorrectly adopted a "currency contamination theory," improperly dismissed expert testimony because the City failed to qualify the expert, improperly dismissed evidence that the \$7,600 was a large amount of money for Evans to have legally accumulated, and improperly applied a Fifth Circuit case to support its decision.

Under the controlling statute, section 41-29-179(2), the petitioner must prove by a preponderance of the evidence that the property is subject to forfeiture. A. Currency Contamination Theory ¶ 7. The trial court found evidence that a drug dog alert to a presence of drugs on the \$7,600 was probative in its finding that the cash was subject to forfeiture.

However, the Court of Appeals applied a currency contamination theory to discredit this evidence. This theory holds: "there is some indication that residue from narcotics contaminates as much as 96% of the currency currently in circulation." Evans, 925 So.2d at 855 (quoting United States. v. \$5,000.00 in U.S. Currency, 40 F.3d 846, 849 (6th Cir.1994)). ¶ 8.

The City argues the Court of Appeals' finding is improper and cites to the First, Third, Seventh, Eighth, Ninth, and Eleventh federal circuits which reject such a currency contamination theory. See Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars (\$30,670), 403 F.3d at 460 ("We therefore conclude that the empirical information provided in this case indicates that dog alerts to currency should be entitled to probative weight."); United States. v. \$84,615 in U.S. Currency, 379 F.3d 496, 502 (8th Cir.

2004)(dog's alert to currency provides some-albeit slight-indication that the money was connected to drug trafficking)(citing United States v. \$141,770.00 in U.S. Currency, 157 F.3d 600, 604 (8th Cir.1998)(concluding that the dog's alert to the seized money supported the government's contention that the currency was substantially connected to illegal drugs)); United States v.

\$242,484.00, 389 F.3d 1149, 1165-66 (11th Cir.2004)(declining to accept the currency contamination theory and disagreeing with the district court's conclusion that the probative value of a dog alert to currency was weak, because "no one with any expertise testified in support of [the claimant's] ever-lasting scent, global contamination theory."); *United States v. Saccoccia*, 58 F.3d 754, 777 (1st Cir.1995)("Even though widespread contamination of currency plainly lessens the impact of dog-sniff evidence, a trained dog's alert still retains some probative value."); *United States v. Golb*, 69 F.3d 1417, 1428 (9th Cir.1995)(holding that the trial court did not abuse its discretion in admitting evidence of currency dog sniffs); *United States v. Carr*, 25 F.3d 1194, 1203 (3d Cir.1994)("[W]e consider the dog alert evidence as only another piece of evidence tending to show that [the defendants] knew that the money involved in the conspiracy was derived from illegal drug trafficking."). ¶ 9.

Neither this Court nor the Fifth Circuit Court of Appeals has addressed this issue. It is therefore first impression for this Court. In *Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars (\$30,670)*, 403 F.3d at 455-60, the Seventh Circuit discussed in detail whether dog alerts to currency are entitled to any probative weight. *185 ¶ 10. There, the defendant argued that dog alerts were not entitled to any probative weight, alleging that most U.S. currency in circulation is tainted with cocaine.

Id. at 455. Instead of focusing on whether most U.S. currency is tainted with cocaine, the court turned its attention to whether the dog alerts are triggered by cocaine, or from a cocaine by-product, known as methyl benzoate. *Id.* The court found that based on experts' extensive research on the scientific aspects of dog sniffs, the studies established to a reasonable scientific certainty that methyl benzoate, as opposed to the cocaine itself, triggers dog alerts to currency.

Id. at 457-58. Moreover, the court found "methyl benzoate is highly volatile and evaporates at an exponential rate from tainted currency, so currency recently exposed to cocaine and returned to general circulation will quickly lose any detectable odor of methyl benzoate, even if the particles of cocaine remain." *Id.* at 458.

As such, the court found that narcotic dogs will alert to currency "only if it has been exposed to large amounts of illicit cocaine within the very recent past," thus making properly trained narcotic dog alerts to currency entitled to probative weight. *Id.* at 459. ¶ 11.

We find the Seventh Circuit's discussion informative, logical, and persuasive. Therefore, based on the Seventh Circuit's in depth analysis of the reliability of dog alerts to currency,[1] we adopt the Seventh Circuit's sound reasoning and finding that dog alerts to currency are entitled to probative weight. Likewise, we also reverse the Court of Appeal's finding that the currency contamination theory precludes evidence of a dog alert unless coupled with other persuasive evidence. ¶ 12.

However, although we find dog sniffs are entitled to probative weight, the circumstances surrounding the dog sniff in the case at bar presents the issue of whether the City conducted a proper dog-sniff test on the currency. Officer Perkins testified that prior to the test, he placed the money in a brown paper bag which he found lying in the police stations' basement.

He also admitted the bag may have been contaminated, and he was not sure whether the dog hit on the paper bag or on the money. Likewise, Officer Perkins admitted the testing area may have been contaminated, and that the dog could have alerted to the area where he placed the bag instead of to the money itself. It is essential that a proper test be administered.

We can not so find in the case at bar. B. Expert Testimony ¶ 13. The City argues the Court of Appeals improperly dismissed Officer Perkins' testimony when making its decision, finding that the City failed to qualify him as an expert witness during trial. This Court repeatedly has held that in order to preserve error for appellate review, a contemporaneous objection must be made, and if no objection is made, the appellant waives the error.

Mallard v. State, 798 So. 2d 539 (Miss.2001); Smith v. State, 530 So. 2d 155, 161-62 (Miss.1988). Because Evans made no objection at the trial court level to the City's failure to qualify their witness, Evans waived the issue.

The Court of Appeals, therefore, improperly excluded Officer Perkin's testimony from its decision concerning the circumstances surrounding the items found in Evans' room. *186 C. \$7,600 ¶ 14. The City argues the Court of Appeals improperly held the \$7,600 was not subject to forfeiture because direct evidence of drug activity did not exist. Evans, 925 So.2d at 855.

The City argues that direct evidence is not required; instead, the trier of fact may take into consideration circumstantial evidence as well as direct evidence. See Hickman v. State, 592 So. 2d 44, 45 (Miss.1991). Specifically, the City argues under Jackson a large amount of cash, without any credible explanation, should be considered probative as evidence of drug trafficking. ¶ 15.

In Jackson v. State, 591 So. 2d 820, 822-23 (Miss.1991), this Court upheld a forfeiture of \$1,087 where authorities caught the defendant in a sting operation with fake cocaine and the \$1,087 on his person. In reaching our decision, this Court cited to United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars in U.S. Currency, 661 F.2d 319 (5th Cir.

Unit B 1981) (hereinafter "\$364,960"). There, authorities found \$364,960 in cash along with cocaine, hashish, guns, a scale, and five glassine bags containing cocaine residue. Id. at 324. The Fifth Circuit held "[f]rom the sheer quantity of currency seized under these circumstances, a court may permissibly infer a connection with illegal narcotics trafficking."

Id. (emphasis added). ¶ 16. In the case at bar, police officers found \$7,600 of currency wrapped in hair bands underneath a console television in Evans' bedroom. Furthermore, the police found a

brass container containing a brillo pad, ashes, and residue; a piece of tin foil with holes in it; a cigarette pack with residue; and some plastic bags. Officer Perkins testified that the brass container was "used to make [a] crack pipe or [was] being used to make a crack pipe."; that the tin foil with holes in it "would indicate somebody ha[d] been using that to smoke crack cocaine with."; and that the plastic bags "indicate[d] the transport or storage of drugs."

However, Evans testified that he used the brass container and tin foil not for illegal drug use, but instead as ashtrays for smoking cigars. As to the plastic bags the officers found in a drawer, Evans testified his room served as a guest and storage room before he occupied it, because along with the plastic bags were screwdrivers, pictures, and records in other drawers.

More importantly, we note the officers did not find drugs in Evans' home, nor did the officers send the brass container, tin foil, and cigarette pack residue to a crime lab for drug testing. Therefore, there is no evidence whatsoever of the presence of illegal drugs in any form including residue. ¶ 17. Based on the facts in the case at bar, applying both Jackson and \$364,960, we find the Court of Appeals was correct in determining that the trial court cannot infer that the \$7,600 seized in connection with a brass container, a brillo pad, burnt tin foil, and a cigarette pack, without more, was connected with illegal narcotics trafficking.

D. United States v. \$38,600.00 in U.S. Currency ¶ 18. The Court of Appeals cited United States v. \$38,600.00 in U.S. Currency, 784 F.2d 694 (5th Cir.1986) (hereinafter "\$38,600.00") in support of its decision to deny forfeiture of the \$7,600.

In \$38,600.00, border patrol agents found a blue bag located on the driver's back seat containing a pipe bearing marijuana residue, cigarette rolling papers, scissors, and a small metal box. Id. at 696. The agents also found \$38,600 in cash concealed underneath the back seat. Id. The agents seized the money after receiving evasive answers from the driver as to his destination *187 and the money's owner.

Id. at 696-97. The Fifth Circuit held the money was not subject to forfeiture. The Fifth Circuit stated: There seems little question that this evidence, when considered collectively, gives rise to a strong suspicion, perhaps even probable cause, of some illegal activity. It is not quite so apparent, however, that these facts give rise to a reasonable belief, supported by more than mere suspicion, that [the driver] furnished, intended to furnish, or had received the money in exchange for drugs.

Id. at 698 (emphasis in original). ¶ 19. Again, this Court has held that in determining whether forfeiture is appropriate, the question becomes whether "given all of the evidence considered together, a rational trier of fact may have found by a preponderance of the evidence that [the] funds were the product of or instrumentalities of violations of this state's controlled substances act."

Hickman, 592 So.2d at 48. See also § 41-29-179(2). ¶ 20. The City argues it presented evidence exceeding the evidence found in \$38,600.00. The City points to several factors, including that its confidential informant, who provided true and valuable information in the past which led to the arrest of drug dealers, reported Evans and his friend Blanchard were storing crack cocaine at the Evans' home; that Evans failed to properly provide conclusive evidence of legal sources of the \$7,600 found under the console television in his bedroom; and the conduct of the Evans' family following the search (installation of a security system in the Evans' home, removal of Evans from the home). ¶ 21.

However, we point out the police department's failure to conduct a proper dog-sniff test, the conflicting evidence as to the use of the brass container and tin foil, the failure to test the residue found in the cigarette pack and the brass container to determine whether such residue was an illegal substance, the conflicting evidence as to the source of the \$7,600 cash, and that the police never found drugs in the Evans' home.

Considering the circumstances as a whole, this Court finds the City did not meet its burden proving by a preponderance of the evidence that the \$7,600 is subject to forfeiture. CONCLUSION ¶ 22. We agree with the Court of Appeals' finding that the City did not meet its burden of proving by a preponderance of the evidence that the \$7,600 found in Evans' home was subject to forfeiture.

However, we reject the Court of Appeals' finding that the currency contamination theory precludes evidence of a dog alert unless coupled with other persuasive evidence. Instead, we adopt the Seventh Circuit's finding that dog alerts to currency are entitled to probative weight.

Therefore, the judgment of the Court of Appeals is affirmed and the judgment of the Monroe County Circuit Court is reversed and rendered. ¶ 23. THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED. THE JUDGMENT OF THE MONROE COUNTY CIRCUIT COURT IS REVERSED AND RENDERED. WALLER AND COBB, P.JJ., EASLEY, CARLSON AND DICKINSON, JJ., CONCUR. GRAVES, J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION.

DIAZ AND RANDOLPH, JJ., NOT PARTICIPATING. NOTES [1] For a detailed discussion of Seventh Circuit's analysis of the reliability of narcotic dog detection alerts to currency, see *Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars (\$30,670)*, 403 F.3d at 455-60.