

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MILTON DOWNING

APPELLANT

FILED

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**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

VS.

NO. 2007-KA-0263

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

PROPOSITION ONE: The chain of custody for State's Exhibit 1 was supported by sufficient proof and the trial court correctly denied Downing's Motion for Judgment Notwithstanding the Verdict or for a New Trial.

PROPOSITION TWO: The verdict is supported by the overwhelming weight of the evidence and the trial court correctly denied Downing's Motion for a Judgment Notwithstanding the Verdict or for a New Trial.

STATEMENT OF THE CASE

On November 29, 2006, the Coahoma County Grand Jury indicted Milton Leon Downing for the unlawful sale of cocaine, a Schedule II controlled substance, pursuant to 41-29-139(a)(1) of the Mississippi Code Annotated of 1972, as amended. Downing was tried in the Coahoma County Circuit Court on February 1, 2007. The jury returned a verdict of guilty for the unlawful sale of cocaine. On February 8, 2007, Downing filed his Motion for Judgement Notwithstanding the Verdict, or in the Alternative, a New Trial. The trial court denied that motion on February 9, 2007. The instant appeal ensued.

STATEMENT OF THE FACTS

Agent Bobby Walker was an undercover narcotics agent for the North Central Narcotics Task Force. On August 30th, Walker was in Clarksdale. He had with him a monitor which was a Coca-Cola can with a camera in it. He was riding around in Clarksdale and came across a black male. He asked the man where he could find some "hard." The man got into the car with Walker and took Walker to 219 State Street. Walker gave the man \$40, two \$20 bills. The man went inside the house and brought out what appeared to be crack cocaine got back in the car. Walker dropped the man off in an unknown location. Walker sealed the crack cocaine in an evidence bag, marked it with his initials and dated it August thirtieth.

At trial, Walker identified the package containing the crack cocaine as the same package he received from Downing on August 30th.

SUMMARY OF THE ARGUMENT

The chain of custody for State's Exhibit 1 was supported by sufficient proof and the trial court correctly denied Downing's Motion for Judgment Notwithstanding the Verdict or for a New Trial. The verdict is supported by the overwhelming weight of the evidence and the trial court correctly denied Downing's Motion for a Judgment Notwithstanding the Verdict or for a New Trial.

ARGUMENT

PROPOSITION ONE: The chain of custody for State's Exhibit 1 was supported by sufficient proof and the trial court correctly denied Downing's Motion for Judgment Notwithstanding the Verdict or for a New Trial

Testimony at trial revealed that the bag of crack cocaine Downing sold to undercover narcotics agent Bobby Walker was first marked by Walker. Walker stored the bag in a secret compartment in his vehicle. After he dropped Walker off at an unknown location, he sealed the package in an evidence bag and put his initials on the evidence bag. Walker then took the bag back

to narcotics headquarters, sealed with red evidence tape and initialed and dated it again. The bag was stored in the narcotics room, a locked room accessible only by Mary Nolden. To release evidence to go the Mississippi Crime Lab, Nolden must open the narcotics room and authorize the item to be sent to the Mississippi Crime Lab. Pursuant to that authorization, an agent then took the sealed evidence bag to the Mississippi Crime Lab. Downing was unsure whether Agent Anthony Jones or Agent Meesha Lessie took the sealed evidence bag to the Mississippi Crime Lab. However, the evidence tape was marked by Agent Meesha Lessie, indicating that she was the agent who took the bag to the crime lab. After the evidence bag was received by the Mississippi Crime Lab.

Gary Fernandez, drug analyst for the Mississippi Crime Lab than testified as an expert witness that:

First a substance has to be submitted to our laboratory, this is taken in by one of our technical assistance personnel. That person will take the evidence from the submitting agency's officer. They will make sure it's in a properly sealed condition. They will enter that into our computer system, assign it a laboratory number, and then print out a bar code with that laboratory number on it. They attach this bar code to that evidence, and it is tracked through the system by that bar code and lab number (T. 29)

It first goes into the vault until the analyst that the case has been assigned to is ready to work it. I have my own bar code an analyst. . . . [The analyst goes to] get it out of the vault, and by computer and laser scanner, they scan that case to me. I then take it back to my work area to work the case, write up my results, and then turn the case back into the evidence technician. They scan it back into the vault, and it stays in the vault until it is picked up by the submitting agency. (T. 29)

Each analysis that goes outside the laboratory is subjected to technical and administrative peer review, whereby a second analyst goes through the paperwork, worksheets and notes line by line

and word for word checking it against all the applicable standards and reference books. Once the reviewing analyst has verified that the conclusions in the report are correct, that person initials and dates the report as the technical reviewer.

Fernandez identified the evidence at trial and Bobby Walker and Agent Lessie brought the evidence package containing crack cocaine to court on the day of trial.

The trial court considered the chain of evidence in the case sub judge and found that it was sufficient. There was no indication, and indeed, no allegation, that tampering had occurred or that the evidence package containing the crack cocaine was ever handled by any unauthorized person or in any unauthorized manner. This Court has held that

[t]he burden is on the defendant to show whether there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence. *Hemphill v. State*, 566 So.2d 207, 208 (Miss. 1990). In determining this issue, the decision is left to the discretion of the trial court. "[U]nless the judicial discretion has been so abused as to be prejudicial to the Defendant, this Court will not reverse the ruling of the trial court." *Wright v. State*, 236 So.2d 408, 409 (Miss. 1970).

Terry v. State, 944 So.2d 911 (Miss. App. 2006).

Further,

"Our well-established standard of review for reviewing the trial court's admissibility of evidence, including expert testimony, is abuse of discretion." *Jones v. State*, 918 So.2d 1223 (Miss. 2005) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003); *McGowen v. State*, 859 So.2d 320, 328 (Miss. 2003); *Haggerty v. Foster*, 838 So.2d 948, 958 (Miss. 2002)). "Our well-settled standard of review for the admission or suppression of evidence is abuse of discretion." *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003). "Unless we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, or the accused in a criminal case, we will affirm the trial court's ruling." *Jones*, 918 So.2d at 1223 (citing *McGowen*, 859 So.2d at 328).

[T]he test for the continuous possession [i.e., "chain of custody"] of

The courts of this state have further held

State, 592 So.2d 983, 985 (Miss.1991)).

Ellis v. State, 934 So.2d 1000 (Miss. 2006) (citing, Ormond, 599 So.2d at 959 (relying on *Butler v.*

Mississippi law has never required a proponent of evidence to produce every handler of the evidence.

no reasonable inference of material tampering with, or substitution of, the evidence; however,

Further, in order for the evidence to be admissible, the proponent of the evidence must show

771 So.2d at 894.)

Ellis v. State, 934 So.2d 1000 (Miss. 2006) (citing, *Spann v. State*,

Nix v. State, 276 So.2d 652, 653 (Miss.1973)).

(Miss.1995) (citing *Gibson v. State*, 503 So.2d 230, 234 (Miss.1987); substitution of the evidence. *Nalls v. State*, 651 So.2d 1074, 1077 or reasonable inference of probable tampering with the evidence or in the chain of custody of evidence is whether there is an indication Ormond, 599 So.2d at 959. The test of whether there has been a break

admitting the [evidence].

This case presents no evidence of alteration or substitution or tampering with the [evidence] at any time. Under the abuse-of-discretion standard, although the chain may not have been thoroughly demonstrated, in the absence of any contention of alteration or tampering, the trial court did not abuse its discretion in

Evid. 901(a). In Ormond, this Court explained:

that the matter in question is what its proponent claims." Miss. R. admissibility is satisfied by evidence sufficient to support a finding authentication or identification that the "condition precedent to State had satisfied the rule of evidence governing the requirement of Spann's contention of tampering or alteration of the projectile, the Ormond v. State, 599 So.2d 951 (Miss.1992), in ruling that absent [the trial judge appropriately relied upon this Court's decision in

evidence. *Id.* at 893-94. In *Ellis v. State*, the Mississippi Supreme Court held that

Finally, the State is not required to offer testimony from every person who handled the

Ellis v. State 934 So.2d 1000 (Miss. 2006)

evidence is whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence.

See *Barnette v. State*, 478 So.2d 800, 804 (Miss.1985); *Morris v. State*, 436 So.2d 1381, 1388 (Miss.1983); see also *Lambert v. State*, 462 So.2d 308, 312 (Miss.1984); *Grady v. State*, 274 So.2d 141, 143 (Miss.1978 [1973]). "In such matters, the presumption of regularity supports the official acts of public officers," and the burden to produce evidence of a broken chain of custody (i.e., tampering) is on the defendant. *Nix v. State*, 276 So.2d 652, 653 (Miss.1973), quoted in *Barnette*, 478 So.2d at 804.

Ellis v. State, (citing, *Hemphill v. State*, 566 So.2d 207, 208 (Miss.1990).)

Downing argues that the presumption of regularity did not arise due to the testimony of Agent Walker that the evidence was taken to the crime lab by Agent Anthony Jones. The evidence tape that sealed the bag was signed by Agent Lessie. Agent Walker then changed his testimony to reflect that Agent Lessie had picked up the evidence to transport it to the crime lab. While Jones may have been unsure which agent picked up the evidence to transport it, the testimony of the required procedure was sufficient to support the presumption of regularity. Whether Agent Lessie or Agent Jones picked up the bag is not of concern. That it was picked up by an authorized agent who followed procedure, signed the evidence as required, delivered it to the crime lab as required is all that is necessary to create the presumption of regularity.

After the State rested its case, Downing moved for a Directed Verdict of Acquittal and argued that the State had failed to complete the chain of custody. Downing renewed this argument in his Motion for JNOV or, in the Alternative, Motion for new Trial. Downing did not at any time during the trial or in his post-trial motions challenge the application of the presumption of regularity. Thus, this argument is procedurally barred on appeal.

PROPOSITION TWO

The evidence is sufficient to support the verdict and the verdict is supported by the overwhelming weight of the evidence; therefore, the trial court correctly denied Downing's Motion for a Judgment Notwithstanding the Verdict or for a New Trial.

An appellant who challenges the sufficiency of the evidence supporting a jury verdict faces a formidable standard of review. The Mississippi Supreme Court has held that the standard of review for overruling a motion for JNOV based on the sufficiency of the evidence is as follows:

A motion for JNOV challenges the legal sufficiency of the evidence. *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993). A reviewing court must consider as true all credible evidence consistent with the defendant's guilt, and the State must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Id. The trial court will not set aside a verdict unless the verdict would constitute an "unconscionable injustice." *Groseclose v. State*, 440 So.2d 297, 300 (Miss. 1983).

Stone v. State, 867 So.2d 1032 (Miss. App. 2003).

Review of a motion for a directed verdict or judgment notwithstanding the verdict tests the sufficiency of the evidence. *Bush v. State*, 895 So.2d 836, 843 (Miss. 2005). The court must ask whether the evidence, taken in the light most favorable to the verdict, shows "beyond a reasonable doubt that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." Id. at 843 (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss. 1968)). In testing the sufficiency of the evidence, the reviewing court must take the evidence in the light most favorable to the verdict. The question then becomes whether a rational trier of fact, given the evidence regarded in the light most favorable to the verdict, could have found all the elements beyond a reasonable doubt. *Bush*, 895 So.2d at 844 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Looking at the evidence in the instant case in the light most favorable to the State, the

testimony and evidence proved that Agent Walker purchased the crack cocaine from Downing,

marked the bag and placed it in the narcotics room which was accessible on through. The evidence showed that Agent Lessie was appropriately cleared to take the bag out of the vault and to deliver it to the state crime lab. There is no indication of tampering or any indication that the evidence bag of cocaine was handled outside the improperly or in an insecure manner. The bag of crack cocaine was then checked in to the State Crime Lab where all the safe guards were followed to keep the evidence secure while it was being tested. The evidence was then taken back to the Narcotics Room and checked back in. It was left there until Agent Walker and Agent Lessie brought it to court on the day of trial. While Agent Walker may not have know which authorized agent took the bag to the crime lab or specifically which day it was picked up, there is no indication that anyone other than an authorized agent handled it. There is no indication that it had been improperly secured or transported at any time during the process. The evidence is therefore clearly sufficient to support Downing's conviction.

In reviewing a motion for a new trial, the question is whether the jury verdict is against the overwhelming weight of the evidence. *Montana v. State*, 822 So.2d 954, 967-68 (Miss. 2002) (citing

Dudley v. State, 719 So.2d 180, 182 (Miss. 1998)). This court must accept as true any evidence supporting the verdict, and we may only reverse if the trial court abused its discretion in failing to grant a new trial. *Montana*, 822 So.2d at 967-68. However, a verdict that is so contrary to the overwhelming weight of the evidence that it creates an unconscionable injustice warrants reversal.

Id.

The evidence at trial proved each element of the crime of unlawful sale of cocaine. Gary

Fernandez from the State Crime Lab testified as an expert witness that the substance Downing sold

to Walker was a .2 gram rock of crack cocaine. Agent Walker testified that Downing sold the rock of crack cocaine to him for forty dollars. The video showed Downing receiving the money from Agent Walker and it shows the cocaine being delivered to Agent Walker in return. The evidence and testimony showed that Agent Walker received the cocaine from Downing, sealed it, marked it as evidence and that the evidence bag was appropriately marked and secured continuously from the date Downing sold it until the date of trial. Agent Walker identified Downing as the person in the video and the person who sold the cocaine to him. Agent Walker was able to identify Downing in the court room. Corporal Milton Williams identified Downing as the person in the video and specifically identified Downing as having a scar under his left eye, which is visible in the video. Based on the testimony at trial, Downing is guilty beyond a reasonable doubt of sale, transfer, or delivery of cocaine. The jury's verdict was supported by the overwhelming weight and sufficiency of the evidence and this error is without merit. The trial court did not err in denying Pierce's Motion for JNOV or, in the Alternative, for New Trial.

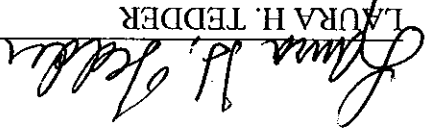
CONCLUSION

The evidence and facts in this case, with all favorable inferences which can be reasonably drawn from that evidence, are sufficient to support Downing's conviction for the unlawful sale of cocaine. The State respectfully submits that arguments Downing's arguments are without merit. Accordingly, the trial court's judgment entered against Downing should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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