

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARCUS D. COLE

APPELLANT

**FILED**

MAY 27 2008

VS.

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SUPREME COURT  
COURT OF APPEALS

NO. 2007-KA-1930

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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**IN THE COURT OF APPEALS OF MISSISSIPPI**

**MARCUS D. COLE, A/K/A  
MARCUS D. HARMON**

**APPELLANT**

**VERSUS**

**NO. 2007-KA-1930-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR APPELLEE**

**STATEMENT OF THE CASE**

**Procedural History**

Marcus D. Cole, a/k/a Marcus D. Harmon, was convicted in the Circuit Court of Attala County on a charge of felony fleeing law enforcement in a motor vehicle and was sentenced to a term of five years in the custody of the Mississippi Department of Corrections with four years suspended on post-release supervision. (C.P.68-70) Aggrieved by the judgment rendered against him, Cole has perfected an appeal to this Court.

**Substantive Facts**

The night of June 18, 2007, Officer Mark Gilmore of the Kosciusko Police Department was "[o]ut on patrol" when he observed the defendant's vehicle "coming out of Yorkshire Apartments on Martin Luther King Drive" and heading toward a red light at a high rate of speed. Officer Gilmore "got in behind" the vehicle and made preparations to

"run the tag" and "try to slow it down some anyway." Shortly thereafter, he was notified that "the tag was expired." Officer Gilmore then activated his "blue lights and siren to attempt to pull it over," but the vehicle "wasn't stopping." Instead, it "started down Highway 12 West towards McAdams and Durant." Officer Gilmore then "called into the other officers" that he "had one vehicle appeared to be not stopping for red lights, yielding to red lights, no, blue lights and siren." (T.51-52)

Officer Gilmore recounted the ensuing events as follows:

And I got on down to McAdams, down in that area. Before we got out of town, I noticed we was running at a high rate of speed, around 90, 95 miles an hour, in that area. And the vehicle never did stop.

I got down into McAdams. The vehicle was in front of me, still riding along, still at a safe distance behind it. The vehicle was jamming on the brakes as if he was trying to get me to ram into the back of him. When I was at a safe distance, I didn't. And I still slowed down still at the safe distance. And I noticed, I said, well, we are coming up on McAdams school, and I noticed a blue car was coming out of McAdams school fixing to get onto Highway 12. And just as we got to the intersection right there, I noticed that the white vehicle slammed into the driver's side of the vehicle that was already at the stop sign, coming up to the stop sign.

(T.52-53)

The defendant's vehicle "kept on going." Officer Gilmore pursued it "down back behind the school," onto a dead-end dirt road. (T.54) Officer Gilmore went on to testify,

And, I am following his trail, the dust trail down through there. And got down there, down at a dead end; there is a big old, big old open area, a field area down through there. And coming down, I had my lights and all still going. And my lights caught the reflectors or the vehicle as to down in the field. And I proceeded down towards it, and as I got down there, I popped my, my spotlights. I had all those lights going all the time.

And when I got down to it, as I got closer to it, the vehicle popped his headlights on. When I got down to it and was headed toward him, he drove right up beside it. And I looked into the vehicle, and I looked in and I saw, I said, I called in; I said, "I believe the subject is Marcus Cole. Marcus Cole. That's the way I said it."

(T.54)<sup>1</sup>

Subsequently, Cole "left out of the field" and "started back up the same road ... back behind the school." Officer Gilmore continued to pursue him. "[M]aybe a mile or so up the road," Cole "turned around" and came "back by" Officer Gilmore, who verified that the driver was Marcus Cole. (T.57) Officer Gilmore recounted the culmination of this pursuit as follows:

And when he pulled out, and I went up and turned around, got back behind him again; come back down the same road; made a left at the dead end down there; got back out on Highway 12; ran it all the way down to Horn's Grocery. We ran, made a right turn at Horn's Grocery and about a mile down that road, made a, I made a left turn at, I believe it's New Bethel Church. I followed the road, followed the tracks through the dust trail until they just, you know, just didn't know, died down, and then I called off the chase right there.

(T.57-58)

When asked why he had "decided to call off the chase," Officer Gilmore answered, "Basically, I had ran out of dirt trail and wasn't anybody else on the road. I didn't see anybody else, didn't see any signs of him again. I had lost him." Officer Gilmore reiterated that he was "[v]ery certain" that Marcus Cole had been driving this car, which was registered to Cole's father, Robert Harmon. (T.58-59)

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<sup>1</sup>Officer Gilmore was acquainted with Cole; they had attended "school together down at McAdams." (T.54) At trial, he positively identified Cole as the driver of the vehicle that he pursued on the night in question. (T.57)

1 day after chase

Deputy Tim Nail of the Attala County Sheriff's Department testified that he was working at the county jail the night of June 19, 2007, when Marcus Cole telephoned to report that his vehicle had been stolen. According to Deputy Nail, "Mr. Cole stated that the vehicle he had was stolen; that he had seen it last on June 15<sup>th</sup>, that he had removed the malfunctioning ignition; and that "somebody had to have put the ignition back in to steal the car." Deputy Nail testified further that the vehicle was recovered on Highway 51 in Holmes County. It "appeared to have been wrecked," but the ignition was intact. There was no evidence that the vehicle had been stolen. (T.63-65)

Deputy Frank Smith of the Attala County Sheriff's Department testified that he was dispatched to the scene of the collision "near the high school" that night. Deputy Smith found "only one vehicle" at the scene. This car "showed visible damage as though it had been hit by another vehicle." (T.70-71)

The driver of this car, William Wingo, testified that as he was approaching Highway 12 on the night in question, he "saw some blue lights" and "stopped shy of the stop sign right then." He ascertained that a police vehicle "was chasing a car" and anticipated that the car would "just keep going on down Highway 12." However, the pursued vehicle "made a right turn" and hit the side of Mr. Wingo's car, causing some \$2500 worth of damage to the driver's side. Asked to describe the car that collided with his, Mr. Wingo testified, "It was a big blue Lincoln with a white top." Previously acquainted with Marcus Cole, Mr. Wingo went on to testify, "I have seen him driving that vehicle." (T.75-78)

The defendant put on an alibi defense. (T.83-123)

## SUMMARY OF THE ARGUMENT

The verdict is based on legally sufficient proof and is not contrary to the overwhelming weight of the evidence. The state presented substantial credible proof that Cole was guilty of felony fleeing of law enforcement; the evidence to the contrary simply created a straight issue was fact which was properly resolved by the jury.

### PROPOSITION:

#### THE VERDICT IS BASED ON LEGALLY SUFFICIENT PROOF AND IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

*Went word*  
Cole's argument on appeal challenges the sufficiency and weight of the evidence undergirding his conviction. To prevail on the assertion that he is entitled to a judgment of acquittal, he must satisfy the following formidable standard of review.

When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.

*SOR*

*Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).



Furthermore,

The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).

(emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App. 1999).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss.2000).

This rigorous standard applies to the claim that Cole is entitled to a new trial:

The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201

SC

(Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighting the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss. Ct. App. 2001).

*Smith v. State*, 868 So.2d 1048, 1050-51 (Miss. App. 2004),

note  
explain  
Appellate

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court recently reiterated in *Hales v. State*, 933 So.2d 962, 968 (Miss. 2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

We incorporate by reference the proof set out in our Statement of Substantive Facts to support our position that the prosecution presented substantial credible evidence of Cole's guilt of possession felony fleeing of a police officer, defined as follows by MISS.CODE ANN. § 97-9-72 (1972) (as amended):

application statute

(1) The driver of a motor vehicle who is given a visible or audible signal by a law enforcement officer by hand, voice, emergency light or siren directing the driver to bring his motor vehicle to a stop when such signal is given by a law enforcement officer acting in the lawful performance of duty who has a reasonable suspicion to believe that the driver in question has committed a crime, and who willfully fails to obey such direction shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed One Thousand Dollars (\$1, 000.00) or imprisoned in the county jail for a term not to exceed six (6) months, or both.

(2) Any person who is guilty of violating subsection (1) of this section **by operating a motor vehicle in such a manner as to indicate a reckless or willful disregard for the safety of persons or property, or who so operates a motor vehicle in a manner manifesting extreme indifference to the value of human life**, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00), or by commitment to the custody of the Mississippi Department of Corrections for not more than five (5) years, or both.

(emphasis added)

The state presented compelling proof that Cole was in fact driving the vehicle in question, that he failed to obey Officer Gilmore's visible and audible commands to stop, and that he was driving the car "in such a manner as to indicate a reckless or willful disregard for the safety of persons or property," or "in a manner manifesting extreme indifference to the value of human life ... " Regarding the defendant's identity, Officer Gilmore testified unequivocally that he saw the defendant's face and recognized him as Marcus Cole, as former schoolmate. Cole's alibi testimony simply presented an issue of fact for determination by the jury.

As to the recklessness of the defendant's operation of his motor vehicle, Officer Gilmore testified that the driver failed to respond to the blue lights and siren and also that he ran red lights during this pursuit, in the course of which the defendant drove speeds of 90 to 95 miles per hour. Furthermore, his collision with Mr. Wingo's car is evidence of his reckless disregard for the safety of persons or property as well as extreme indifference to the value of human life.<sup>2</sup>

<sup>2</sup>The fact that Mr. Wingo was fortunate enough not to be injured in no way absolves the defendant. Furthermore, Officer Gilmore testified that he abandoned pursuit not because he decided that the defendant's driving was not a menace, but because he simply "lost him."

For these reasons, the state submits no error can be shown in the trial court's submission of this case to the jury and refusal to disturb its verdict.

**CONCLUSION**

The state respectfully submits that the arguments presented by Cole have no merit. Accordingly, the judgment rendered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL  
STATE OF MISSISSIPPI**

A handwritten signature in black ink, appearing to read "Deirdre McCrory", with a checkmark at the end.

BY: DEIRDRE McCRORY  
SPECIAL ASSISTANT ATTORNEY GENERAL

## CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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:

Honorable C. E. Morgan, III  
Circuit Court Judge  
P. O. Box 721  
Kosciusko, MS 39090

Honorable Doug Evans  
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Erin E. Pridgen, Esquire  
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This the 27th day of May, 2008.



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IN THE CIRCUIT COURT OF ATTALA COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS.

CAUSE NO. 07-0108-CR


MARCUS COLE

NOTICE OF APPEAL

By this notice, Marcus Cole appeals to the Supreme Court of Mississippi against the State of Mississippi from the final judgment entered in this case on, September 27, 2007, and the denial of the Motion for Judgment Notwithstanding the Verdict or, in the Alternative for a New Trial, by order entered on October 3, 2007.

Respectfully submitted,

Marcus Cole,  
Appellant (Defendant)

By: 

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OCT 25 2007

  
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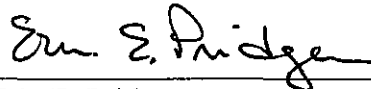
RE 12

## CERTIFICATE OF SERVICE

I, Erin E. Pridgen, Counsel for Marcus D. Cole, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **RECORD EXCERPTS** to the following:

Honorable Jim Hood  
Attorney General  
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Jackson, MS 39205-0220

This the 22<sup>nd</sup> day of February, 2008.



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