

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARCUS D. COLE

APPELLANT

V.

NO. 2007-KA-1930-COA

STATE OF MISSISSIPPI

APPELLEE

FILED

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COURT OF APPEALS**

BRIEF OF THE APPELLANT

NO ORAL ARGUMENT REQUESTED

On Appeal from the Circuit Court of Attala County, Mississippi

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARCUS D. COLE

APPELLANT

V.

NO. 2007-KA-1930-COA

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

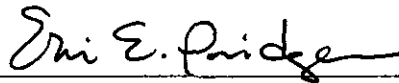
1. State of Mississippi
2. Marcus D. Cole, Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable Clarence E. Morgan, III, Circuit Court Judge

This the 22nd day of February, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Marcus D. Cole, Appellant

BY:



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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT ERRED IN FAILING TO GRANT COLE'S MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**
- II. THE TRIAL COURT ERRED IN FAILING TO GRANT COLE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION OF FELONIOUS FLEEING.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Attala County, Mississippi, where Marcus D. Cole a/k/a Marcus D. Harmon (hereinafter referred to as "Cole") was convicted of felonious fleeing of a law enforcement officer in a motor vehicle, in violation of Mississippi Code Annotated Section 97-9-72 (Rev. 2006). The Honorable C.E. "Cem" Morgan, Circuit Judge, presided over the one day jury trial on September 27, 2007.

Following the trial, Cole was sentenced to serve five years in the custody of the Mississippi Department of Corrections (MDOC) with four of those years to be served under post-release supervision. MDOC was authorized to place Cole in the Intensive Supervision Program for a period of one year, conditioned on Cole's compliance with the program's requirements. If the program is not successfully completed, the Court authorized MDOC to place Cole in a MDOC facility in order to complete the one year sentence. Cole was also ordered to pay a fine of \$1,000.00, and all court costs, fees, and assessments.

Cole filed his motion for judgment notwithstanding the verdict or, alternatively, motion for a new trial on October 3, 2007. The trial court denied such motion and Cole timely noticed this appeal on October 25, 2007.

FACTS

On Friday, June 15, 2007, Marcus Cole prepared to leave his home in Kosciusko,

Mississippi, to spend the Father's Day weekend in Jackson, Mississippi with friends. [T. 83-84, 110-111] Cole, overcoming the recent loss of his father, wanted to get away from the city for the weekend. [T. 110] Experiencing difficulties with his vehicle, he called his friend, Cornelius Manuel, to pick him up and take him to Jackson. [T. 84-85, 111] According to Manuel, the drive from Kosciusko, Mississippi to Jackson, Mississippi is approximately

Cole's inoperable vehicle was a white Lincoln that was registered to his father, Robert Harmon. [T. 58-59] Cole's brother, a mechanic, had previously worked on Cole's car but when Cole was ready to leave for Jackson, the car was still inoperable. [T. 111] At his brother's instructions, Cole left the vehicle sitting in his front yard, with the keys in the ignition and the doors unlocked, so that his brother could work on the car at a later time. [T. *Id.*]

In Jackson, Cole's weekend was full of activities that included visiting and catching up with old friends. [T. 111-114] On June 15th, when Manuel and Cole first arrived to Jackson, the two went to a barbeque dinner held at Sonya Flowers' house. [T. 85, 112-112] On that Saturday, Cole visited with Rochella and Billy Joe Caldwell at the hospital. [T. 100, 103, 112] On Sunday, June 17th, Cole again visited with the Caldwells in the hospital. [T. *Id.*] After visiting with the couple, Cole once again ate at Sonya Flowers' house, this time sharing a Father's Day meal with Manuel. [T. 88-89, 112]

On Monday, June 18th, Cole called Manuel Monday evening to shoot pool at the Dairy Bar, a local pool hall in Jackson. [T. 85, 113] Cole and his friends, Billy Caldwell, Marcus Harrington, Cornelius Manuel, and Sonya Flowers shot pool at the pool hall until just before midnight. [T. 103]

The next day, Cole asked Manuel to take him back home. [T. 86, 114]

When the two arrived at Cole's house, Manuel was the first to notice that Cole's white Lincoln was no longer parked in front of his home. [T. 97] Cole then called the Kosciusko Police

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Department and reported his vehicle stolen. [T. 97, 114] Deputy Tim Nail of the Attala County Sheriff's Department received the call regarding Cole's stolen car. [T. 64, 115] At trial, Nail testified that vehicle was eventually recovered by the Holmes County Sheriff's Department. [T. 65] Deputy Frank Smith of the Holmes County Sheriff's Department contacted Deputy Nail and informed him that the car was found on Highway 51 in Holmes County. [T. 73]

After the car was recovered, Deputy Nail went to the car's location, took pictures and examined the vehicle. [T. 65] He testified that the vehicle appeared wrecked and there was a "good bit" of damage to the car. [T. *Id.*] Deputy Smith testified that, due to the old age of the car, it was hard to determine if the car had been stolen. [T. 73]

Cole later discovered that on June 18, 2007, while in Jackson, Mississippi, with friends, his white Lincoln was involved in a chase with Officer Mark Gilmore of the Kosciusko Police Department and he was identified as the driver in the pursuit. The details of the pursuit are as follows.

On June 18, 2007, between 9-10p.m., Officer Gilmore was on patrol near the Yorkshire Apartments in Kosciusko, MS. [T. 51-52] Heading out of the complex, he noticed a white car driving toward the stop light at an elevated rate of speed. [T. 52] He followed the car onto Highway 12 to run the vehicle's tag and to "try to slow it down some" [T. *Id.*] Officer Gilmore did not clock the driver's speed or determine how fast the vehicle was driving before he started pursuing the car. [T. 56] He testified that, based on his training, he knew the car was driving over the posted 25 mph speed limit for that street. [T. *Id.*]

Officer Gilmore stated that the vehicle's tag was expired and he then called the police dispatch to run the tag number as well. [T. 52] Officer Gilmore testified that he activated the squad car's blue lights and sirens to initiate a stop regarding the expired tag. [*Id.*] However, at trial, the

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State properly admitted photos taken of Cole's vehicle that showed the tag displayed an expiration date of November 2007. [T. 65; RE 4-5]

According to Officer Gilmore, the Lincoln continued driving away from town, toward the McAdams community. [T. 52] The officer testified that during the chase, the two cars increased to speeds between 90 to 95 mph. [T. *Id.*]

William Wingo was approaching Highway 12, near McAdams school, when the police chase neared him. [T. 53, 75] As Wingo prepared to enter the highway, he noticed blue lights and stopped shortly before reaching the stop sign. [T. 75] The Lincoln, instead of continuing on Highway 12, made a sharp right turn at the stop sign and hit the side of Wingo's work vehicle. [T. 53, 75] Wingo testified that he did not sustain any injuries by the collision but his car was heavily damaged. [T. 76] He further stated that, while he was familiar with the car that collided with him, he could not identify the face of the driver of the car. [T. 77-78] Neither Officer Gilmore nor the Lincoln stopped after the car collision with Wingo. [T. 54] Instead, the officer called for back up and continued to pursue the Lincoln until the road reached a dead end and the Lincoln entered an open field. [T. 54, 70]

At some point in time, the driver of the Lincoln turned off the vehicle's lights. [T. 54] According to Officer Gilmore, he then put on his squad car's spotlights and spotted the Lincoln in the field with no lights on. [T. *Id.*] The driver of the white car turned on the his headlights, drove toward the officer, and passed the officer. [T. *Id.*] The officer testified that he swerved to avoid being hit by the Lincoln. [T. 61] At this point, the officer stated that he believed the subject was Marcus Cole, one of his former high school classmate. [T. 57-58] The officer also stated that this chase occurred on a very narrow and dusty dirt road. [T. 57]

According to Officer Gilmore, the chase continued for a couple of more miles. [T. 57] During the chase, the driver of Lincoln again turned the car and proceeded in the officer's direction.

[T. *Id.*] Officer Gilmore testified that this time, he positively identified the driver as Marcus Cole.

[T. *Id.*] Officer Gilmore did not arrest the driver of the vehicle that evening because the dusk trail he was following eventually “tapered” off and he lost sight of the vehicle. [T. 58]

(1) **SUMMARY OF THE CASE**

The trial court committed reversible error in denying Cole’s motion for judgment notwithstanding the verdict. At trial, Cole provided testimonies of three consistent witnesses that corroborated his testimony that he was in Jackson, Mississippi during the time of the police pursuit. Cole does not deny that he car was involved in the police pursuit, however, the only positive identification that Cole was driving the vehicle came from Officer Mark Gilmore. Given the dark and dusty conditions of the police chase, coupled with the unexplained discrepancies regarding the expiration date of the Lincoln’s car tag, the jury gave undeserved weight to Officer Gilmore’s identification of Cole as the driver of the fleeing car. The trial court should have found that Cole’s guilty verdict was against the overwhelming weight of the evidence.

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In the alternative, even if the jury found that Cole was the driver involved in the police pursuit on June 18th, the evidence was not sufficient to find Cole’s conduct constituted a felony. The State did not present sufficient evidence that the pursuit displayed the “reckless or willful disregard” or “extreme indifference to the value of human life” as required by the statute. At best, Cole should have been charged with the misdemeanor crime of fleeing the police. The trial court committed reversible error in finding the evidence was sufficient to sustain a guilty verdict of felonious fleeing a law enforcement officer.

ARGUMENT

- I. **THE TRIAL COURT ERRED IN FAILING TO GRANT COLE’S MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

The Mississippi Supreme Court has compared the standard of review of motions for new trials as being similar in nature to the Court sitting as a thirteenth juror. *Ross v. State*, 954 So. 2d 968, 1016 (¶127) (Miss. 2007). "A finding that the verdict was against the overwhelming weight of the evidence indicates that the Court disagrees with the jury's resolution of conflicting evidence and requires a new trial." *Id.*

The Court will order a new trial and allow the evidence to be placed before a second jury if the first jury's guilty verdict was based on "extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict." *Id.* (citing *Lambert v. State*, 462 So. 2d 308, 322 (Miss. 1984) (Lee, J., dissenting)). The Court will only disturb the jury's verdict when the verdict is so contrary to the overwhelming weight of the evidence that it would cause an unconscionable injustice if the verdict were allowed to stand. *Bush v. State*, 895 So. 2d 836, 844 (¶18) (Miss. 2005).

Cole's guilty verdict was contrary to the overwhelming weight of the evidence and the Court erred in failing to grant Cole's motion for a new trial. Cole provided a solid alibi to account for his whereabouts from June 15 - 19, 2007 and presented three alibi witnesses that also corroborated his testimony. Cole never denied that his car was involved in the police pursuit with Officer Gilmore, however, he simply asserts that he could not have possibly been the driver of that car. The only evidence that Cole actually drove the car the night of June 18th, comes from the testimony of Officer Mark Gilmore.

According to Officer Gilmore, he was not familiar with the white Lincoln before the night of the police pursuit. [T. 58] When he drove behind the Lincoln, onto Highway 12, he testified that the car displayed an expired tag. [T. 52] He further testified that he confirmed that the tag was

~~Suppressed~~ excluded on Mtn by defense

expired after he called the police dispatcher. [T. Id.] At trial, there was no evidence admitted regarding Officer Gilmore's dispatch to the police to confirm the vehicle's expired tag. The State, however, properly admitted into evidence State Exhibits S-2 and S-5, which are photos that Officer Nail took of the Lincoln after it was recovered by the Attala County Sheriff's Department. [RE 4-5] According to the photos, the car tag was valid until November 2007, which would not have been expired on June 18, 2007, as Officer Gilmore alleged. [T. Id.]

During jury deliberations, the jury sent two questions to the judge - the first regarding the photo of the unexpired tag on the White Lincoln. [RE 6] [T. 140-144] The jury asked, "Was the tag on the car expired? In the pictures it is valid until November '07." [T. Id.] The judge simply responded to the jury that it must base its decision on previously admitted evidence or the Court's previous instructions. [T. Id.]

Shil 6c Not only does this bring to question Officer Gilmore's motives for initially pursuing the white Lincoln, it also shines doubt on the credibility of Officer Gilmore's visual identifications. Officer Gilmore testified that, twice during the pursuit, he identified Marcus Cole as the driver of the car. [T. 57] In the first instance, the driver of the Lincoln was headed toward the direction of the officer and he swerved to avoid being hit by the car. [T. Id.] It was after the vehicle had passed the officer on this dark, narrow dirt road that the officer identified Cole as the driver. [T. Id.] However, Officer Gilmore could not testify to any other distinguishing features about the driver, such as the color shirt the driver was wearing at the time. [T. 61-62]

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The second time the officer identified Cole as being the driver of the car, the car had once again proceeded in the officer's direction and passed the squad car. [T. 57] At some point, the cars were traveling on a dusty road and the officer eventually lost track of the Lincoln. [T. 62]

The jury's verdict could only be against the overwhelming weight of the evidence once

Cole's alibi and corroborating witnesses' testimonies are weighed against Officer Gilmore's testimony that consisted of unexplained inconsistencies with the expired car tag identification. It would constitute a grave injustice for the verdict to remain as it is because no reasonable juror could have convicted based on the sole testimony of an unreliable witness. *Bush*, 895 So. 2d at 844 (¶18) (Miss. 2005). The trial court erred in not granting a new trial and this Court should reverse and remand the matter for a new trial. Wright

II. THE TRIAL COURT ERRED IN FAILING TO GRANT COLE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT A CONVICTION OF FELONIOUS FLEEING.

The Court reviews challenges to the legal sufficiency of the evidence in the light most consistent with the verdict. *Pate v. State*, 557 So. 2d 1183, 1184 (Miss. 1990). The prosecution is given the benefit of all reasonable inferences from the evidence. *Id.* However, reversal is required when the facts and inferences drawn from the evidence indicate that, as to one of more of the elements of the charged offense, reasonable and fair-minded jurors could only find the accused not guilty. *Coleman v. State*, 926 So. 2d 205, 208 (¶9) (Miss. 2007). SOS

If the Court finds that the jury properly determined Cole to be the driver of the vehicle, Cole alternatively argues that the trial court erred in not granting the motion for judgment notwithstanding the verdict. Cole should have been charged with misdemeanor fleeing a law enforcement officer under Section 97-9-72 (1) of the Mississippi Code Annotated (Rev. 2006), instead of the felonious fleeing of a law enforcement officer under Section 97-9-72 (2).

The crime of fleeing a law enforcement officer is embodied in Section 97-9-72 which states, in pertinent part, the following:

- (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 the law enforcement

Governing Statute

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

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(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

(emphasis added) Miss. Code Ann. §97-9-72 (Rev. 2006).

Applicant

Officer Gilmore indicated that this police pursuit was not conducted in the reckless or willful disregard” or “extreme indifference” in his testimony that this police chase did not occur around a lot of vehicles and it was not endangering the lives of other citizens. [T. 62-63] When asked why he did not end the police pursuit after identifying the driver of the car, Officer Gilmore stated that there were not a lot of cars in the area at this time. [T. 63] One can infer that Officer Gilmore’s decision to continue the pursuit indicated he did not consider the pursuit endangering to the lives of others.

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Likewise, the collision with William Wingo’s vehicle did not constitute a reckless disregard for human life as Wingo testified that he was not injured and the incident did not require the immediate attention of Officer Gilmore. [T. 76] Officer Gilmore testified that he did not even stop to check on the status of Wingo, rather he simply called for back-up to follow up with an incident report. [T. 54, 70] No reasonable jury should have found Cole guilty of the felonious fleeing.

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CONCLUSION

Marcus Cole provided a solid alibi as to his whereabouts on the weekend of June 15-19, 2007. His testimony was corroborated the three witnesses. Officer Gilmore was the only witness that identified Marcus Cole as the driver in the police pursuit on June 18, 2007. The trial court should have found, based on Gilmore’s questionable testimony, that Cole’s guilty verdict was against the

overwhelming weight of the evidence. Cole respectfully requests that this Court reverse and remand this case to the trial court for a new trial.

In the alternative, Cole asserts that the State failed to provide sufficient evidence to sustain Cole's felony charge of fleeing a law enforcement officer. Based on the testimonies of Officer Gilmore and William Wingo, this pursuit did not result in the reckless disregard or extreme indifference for the value of human life, as required by Section 97-9-72(2). The trial court erred in failing to grant Cole's motion for judgment notwithstanding the verdict and Cole respectfully request this Court to reverse and render this case.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Marcus D. Cole, Appellant

BY: Erin E. Pridgen

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CERTIFICATE OF SERVICE

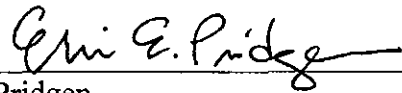
I, Erin E. Pridgen, Counsel for Marcus D. Cole, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge
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Honorable Doug Evans
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This the 22nd day of February, 2008.



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