IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VINCENT CARNELL HUDSON A/K/A SLIM — APPELLANT

VS. — NO. 2007-KA-02016-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Procedural History

This appeal proceeds from the Circuit Court of Winston County, Honorable C.E. Morgan, III, presiding, wherein Vincent Carmel Hudson a/k/a "Slim" was convicted of possession of a controlled substance in violation of Miss. Code Ann. §41-29-139(c)(1)(A).

Hudson was indicted as a habitual offender and tried on two counts of possession of cocaine, one count possession of methamphetamine and one count of possession of marijuana (CP 3). On November 1, 2007, a jury convicted Hudson for possession of less than one-tenth gram of cocaine and acquitted him of the remaining charges. (CP30, 31). Being a five time prior convicted felon, Victor Hudson was sentenced to life without parole. After a hearing and denial of Hudson's motion for a new trial or in the alternative a JNOV, Hudson appeals.

Facts

On February 6, 2007, Vincent Hudson (hereinafter "Hudson") was a passenger in a car driven by his brother, Hillute Hudson (hereinafter Hillute) when Officer Patrick Estes of the Louisville

Police Department pulled the car over for a traffic violation. (T 32-35). Hillute it turned out had a suspended license and an outstanding warrant for arrest. Officer Estes arrested Hillute on an outstanding warrant and for driving with a suspended license. (T 36). Estes arrested Hudson for possession of an open container of beer. (T 45).

Upon a search of the car, a sack containing crack cocaine, and other illegal narcotics were found on the backseat and marijuana in the ashtray. (T 46). Officer Estes testified that while in the process of stopping the car and calling in the license plate information, he observed Hudson turn around in the passenger's seat and reach to the area of the backseat where the drugs were found. (T 47). Hillute claimed the marijuana found in his pocket and the marijuana found in the car ashtray (T 49).

Narcotics detective Barry McWhirter was called to the scene, took possession of the narcotics and subsequently transported Hudson and Hillute to jail. The seized narcotics and Hudson's clothes were submitted to the Mississippi Crime Lab for testing. (T 51-64). At trial, Officer Estes testified that the clothing submitted to the Crime Lab and subsequently admitted into evidence as State's Exhibit 4, was the clothing Hudson was wearing at the time of his arrest. (T. 38). The Crime Lab forensic analyst testified that the narcotics found in the vehicle were marijuana, cocaine and ecstasy. (T 70). The forensic analyst also testified that trace amounts of cocaine were found in the right front shirt pocket and trace amounts of cocaine and marijuana were found in the right front blue jeans pocket of the clothing identified as being Hudson's. (T 73).

After being convicted of felony possession of less than a tenth of a gram (.10) of cocaine, the trial court conducted a hearing and found Hudson was a habitual offender, having previously been convicted of five (5) separate felonies: felony shoplifting for which he was sentenced to five (5) years; possession of heroin for which he was sentenced to two (2) years; aggravated assault on a law

enforcement officer for which he was sentenced to serve thirty (30) years; armed robbery for which he was sentenced thirty (30) years; and felony DUI for which he was sentenced to serve five (5) years. The court, finding that two of the felonies were crimes of violence, sentenced Hudson to life in the custody of the Mississippi Department of Corrections without the possibility of parole, pursuant to Miss. Code Ann. § 99-19-83. (CP 32; T 110-17).

Hudson filed a motion for a new trial or in the alternative a J.N.O.V, which the trial court denied after hearing argument of counsel.. (CP 35-37; T 122-23).

Hudson appeals raising the following issues:

I. Whether the mandatory sentence of life imprisonment without possibility of parole for possession of a trace amount of cocaine without considering extenuating factors such as the proportionality of the type of conviction compared to the amount of cocaine petitioner was accused of having possession thereof and the fact that the petitioner as never been convicted as a drug trafficker constitutes cruel and unusual punishment prohibited under the eighth amendment.

II. Whether the trial court erred when it failed to grant appellant's motion for a J.N.O.V. or, in the alternative, a new trial, when the state failed to prove by legally sufficient evidence beyond a reasonable doubt all the essential elements of knowing and felonious possession of a trace amount of cocaine on his clothing and the jury returned a verdict of guilty on the meager amount of evidence where the substance in question is so small that it cannot be seen.

SUMMARY OF THE ARGUMENT

When a sentence falls within a range permitted by statute then it will not be disturbed on appeal unless there is proof of gross disproportionality. *Willis v. State*, 911 So.2d 947 (Miss.2005); *Hoops v. State*, 681 So.2d 521 (Miss. 1996); *McCline v. State*, 856 So. 2d 556, 560 (Miss. Ct. App. 2003). Hudson's sentence of life imprisonment was not grossly disproportionate punishment and did not violate the Eighth Amendment. The trial court correctly considered Hudson's prior convictions for violent offenses with his present conviction for possession of cocaine when sentencing him as a habitual offender to life without the possibility of parole.

The standards of review applicable to Hudson's second assignment of error are familiar, and we bear them in mind while considering his contentions. *May v. State*, 460 So.2d 778 (Miss. 1984). The proof of Hudson's guilt is straightforward. Taking the evidence in support of the verdict as true, together with all reasonable inferences arising from that evidence as true, and disregarding any evidence opposed to the verdict, it is clear that a reasonable juror could have found Hudson guilty of possession of cocaine.

ARGUMENT

I. Hudson's life sentence as a habitual offender does not violate the Eighth Amendment and is not disproportionate to the crime.

In his first assignment of error, Hudson claims that his sentence of life without parole is grossly disproportionate punishment for mere possession of a trace amount of cocaine. The sentence was imposed according to *Miss. Code Ann.* § 99-19-83, as revised which states:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times ... shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

The Mississippi Supreme Court held in *Gray v. State*, 926 So.2d 961, 979 (Miss.2006) "Where a sentence is within the prescribed statutory limits, it will generally be upheld and not regarded as cruel and unusual." *Tate v. State,* 912 So.2d 919, 933 (Miss. 2005) (quoting *Stromas v. State*, 618 So2d. 116, 123-24 (Miss.1993)). When a sentence is grossly disproportionate to the crime committed, the sentence is subject to attack on the grounds that it violates the Eighth Amendment prohibition of cruel and unusual punishment." *Id.* at 933.

The appellate court must "look first at the question of whether an inference of disproportionality may be drawn from a comparison of the crime committed to the sentence meted out. *Williams v. State,* 784 So.2d 230, 236 (Miss.Ct.App.2000). We are to follow the direction of the United States Supreme Court in determining whether a sentence is unconstitutional.

In *Solem v. Helm,* 463 U.S. 277, 292-94, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), the Court mandated a three-prong analysis ***"to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of "gross disproportionality."*** *Williams* 784 So.2d at 236. (Emphasis added by Appellee.) However, the Supreme Court found that there is

no guarantee of proportionality found in the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 965, 111 S.Ct. 2680, 115 L.Ed.2d. 836 (1991); *Hoops v. State,* 681 So.2d 538 (Miss. 1996).

In *Oby v. State*, 827 So.2d 731 (Miss.App.2002) this court held that the correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statue. *Bell v. State*, 769 So.2d at 251 (citing McGruder v. Puckett, 954 So.2d at 313, 316 (5th Cir. 1992)). Hudson's case parallels *Oby* and *Walls*. Oby and Walls were convicted of possession of a controlled substance and sentenced as habitual offenders because of prior convictions for one violent felony and one non-violent felony. On its threshold inquiry, the *Wall* court found that the sentence of life without parole was not grossly disproportionate to a habitual offender's crime of possession of a controlled substance. *Oby*, at 735.

In *Baskin,* 2008 WL 73639, this court followed *Rummel v. Estelle,* 445 U.S. 263, 265-66, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) to determine threshold comparison. *Hoops v. State*, 681 So.2d 521, 538 (Miss.1996). In *Rummel,* the Supreme Court upheld the defendant's sentence of life imprisonment for committing three separate crimes involving theft by fraud, false pretenses, and forgery amounting to a total of less than $250, with the third offense totaling less than $100. *Rummel,* 445 U.S. at 265-66, 100 S.Ct. 1133. The Supreme Court held the "mandatory life sentence imposed... does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.* at 285, 100 S.Ct. 1133 (1980). It is clear under *Harmelin* and *Rummell,* and Mississippi cases, *Wall v. State*, 718 So.2d 1107 (Miss.1998); *Willis v. State,* 911 So.2d 947 (Miss. 2005) and *Oby v. State* 827 So.2d 731 (Miss.2002), that Hudson's sentence was not grossly disproportionate. It must be remembered that Hudson was given life without parole, not for his possession conviction, but for his status as a habitual recidivist, violent offender. As previously stated, this Honorable Court has found that a sentence such as that imposed upon Hudson is not

constitutionally disproportionate. *Gray v. State,* 926 So.2d 961, (Miss.2006); *Oby v. State*, 827 So.2d 731 (Miss.Ct.App.2002).

If a sentence fails the threshold comparison we are to use the three-prong test set out in *Solem. Baskin v. State,* 2008 WL 73639 (Miss.App.2008). The three factors to look at when determining whether a sentence is proportional are: "(1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals n the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions." *Willis v. State*, 911 So.2d 947, 951 (Miss.2005) (quoting *Solem v. Helm,* 463 U.S. 277, 292-94, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

In the event this court should find Hudson met the threshold of disproportionate sentence compared to the crime, he still fails the burden in the three-prong test. No attempt was made by Hudson to address the three proportionality factors at the trial level and he is therefore barred. In addition, Hudson failed to properly address the second and third factors in his appeal. In *Gray v. State,* at 926, the court upheld Gray's life imprisonment as a habitual offender for possession of more than 30 grams of cocaine stating that Gray was unable to show that his sentence was grossly disproportionate to the crime. In discussing *Willis v. State*, 911 So.2d 947 (Miss. 2005), the *Gray* court went on to say:

> The *Willis* court held that failure to address all three factors bars a defendant's claim on appeal. In the present case, Gray has only attempted to address one of the factors. Therefore, his claim is procedurally barred. We note that, even if Gray's claim were not procedurally barred, we have already found in prior cases that defendants convicted of possession of a controlled substance may be sentenced to life without the possibility of parole under the habitual offender provisions. *See Wall v. State,* 718 So.2d 1107, 1114-15 (Miss.1998)(citations omitted); *Oby v. State*, 827 So.2d 731, 734-35 (Miss.Ct.App.202) (citations omitted).

Hudson relies on *Davis v. State,* 742 So2d. 342 (Miss. 1998) as a basis for a proportionality review, but that reliance is misplaced. Davis was convicted of the sale of two rocks of cocaine within fifteen hundred feet of a church. The trial court sentenced Davis to the maximum thirty years and then doubled the sentence because of the proximity to the church. Davis was not convicted as a habitual offender and therefore the court was not bound by a mandatory prison sentence. The appellate court in *Davis* noted there was no basis or justification for the sentence in the trial record. The case was remanded for re-sentencing because the appellate court " ... did not have enough information to determine if the trial court abused its discretion in sentencing." *Id.* 346.

Vincent Hudson on the other hand had five (5) separate felony convictions, two of which were violent crimes. The trial judge noted on the record that he considered Hudson's two violent criminal convictions when he followed the legislative mandate in Miss. Code Ann. § 99-19-83 and sentenced Hudson to life without parole. (T 123).

Since Hudson's sentence was within the statutory range, and was in fact mandatory, and since Hudson was unable to show that his sentence is grossly disproportionate to his crime, the court should affirm his sentence of life without the possibility of parole.

II. The jury verdict is supported by legally sufficient evidence and is not contrary to the overwhelming weight of the evidence.

Hudson asserts that the trial court should have granted a J.N.O.V. or ordered a new trial because the State failed to prove Hudson knowingly possessed cocaine and because of the small amount of cocaine recovered.

A. Sufficiency of the Evidence

In *Gray v. State*, 926 So2d 961, 968 the Mississippi Supreme Court stated "When reviewing the sufficiency of evidence in a case, we examine "whether, after viewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Dilworth v. State* 909 So.2d 731, 736 (citing *Jackson v. Virginia*, 443 U.S., 307, 315, 99 S.Ct 2781, 61 L.Ed.2d 560 (1979)). We will reverse only if we find that the court abused its discretion in upholding the jury's determination. *Id.* (Citing *Howell v. State,* 860 Sol2d 704, 764 (Miss.2003)).

The only evidence before the trial court established that the clothes Vincent Hudson was wearing at the time of his arrest were submitted to the Crime Lab for testing. Brandy Goodman, the Mississippi Crime Laboratory forensic examiner testified that cocaine was found in a shirt pocket and in a pants pocket, not on the outside of the clothing, but in the two pockets. (T 72-3). Although the substance was too little to weigh, it was visible with the naked eye and tested positive for cocaine, a Schedule II substance. (T 74, 76). Under *Miss Code Ann.* § 41-29-139(c)(1)(A) the possession of a Schedule II substance is a crime; if charged by indictment it is a felony even if the amount is less than one tenth (.10) gram.

One could reasonably infer that because the cocaine was in the shirt and pants pockets Hudson was wearing at the time of arrest that he had knowledge that he possessed the drug. We are not talking about a coat or jacket someone else could have been wearing, we are talking about the clothes Hudson had on his body. In the case *sub judice*, the record reflects that Officer Estes testified

> **Q.** Now I'm going to hand you what has been marked for identification purposes as State's Exhibit 4 ... take those items out and see if you **can identify what those items appear to be.**
> (Witness opens box and takes out clothing.)
> **A. This appears to be the clothing that Mr. Hudson was wearing the evening of the traffic stop.**
> **Q. That's the clothing that he was wearing on the traffic stop?**
> **A. Yes, sir.** *(T 38). (Emphasis added by Appellee)*

Narcotics detective Barry McWhirter who questioned Hillute and Hudson at the scene of the

traffic stop and then transported them to jail testified about taking possession of the seized drugs and Hudson's clothing and submitting the evidence to the Crime Lab for testing.

> **Q.** What is that in that box? *(Referring to State's Exhibit 4)*
> **A.** ***These are the clothes that I collected from the Winston County Correctional Facility that belonged to Vincent Hudson.***
> **Q.** And what did you do, when you collected those clothes, what did you do with them at that time?
> **A.** ***I secured them. I transported them to the police department, secured them in the evidence locker until which time they could be transported to the Mississippi Crime Lab for analysis.*** (T 59). *(Emphasis added by Appellee)*

Hudson contends in his brief that at the time of his arrest, he denied any knowledge of the "drugs found in the vehicle." (Appellant's brief p. 20). However, we are concerned with the drugs found in Hudson's clothes not the drugs found in the vehicle. Detective McWhirter testified that at the time of his arrest Hudson denied any knowledge of the drugs "found in the vehicle" he did not deny knowledge of the cocaine found on his person in his shirt and pants pockets. (T. 57).

The State established the clothes belonged to Hudson, the clothes contained cocaine and a juror could reasonably infer Hudson knew the clothes contained contain. Hence, from the evidence produced by the State a jury could reasonably find Hudson guilty beyond a reasonable doubt.

B. Weight of the Evidence

A motion for a new trial challenges the weight of the evidence. *Bush v. State,* 895 So.2d 836, 844 (Miss. 2005). When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, the appellate court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Willis v. State*, 911 So.2d 947, 950 (Citing *Stewart v. State*, 909 So.2d 52 (Miss.2005)); *Baskin v. State*, 2008 WL 73639 (Miss.App.); Gray v. State 926 So.2d 961, 967 (Miss.2006).

Given the evidence provided by the State and the lack of contradicting evidence provided by

Hudson, the verdict was not against the overwhelming weight of the evidence, no unconscionable injustice occurred and the court did not abuse its discretion in failing to grant Hudson a new trial.

For the purpose of determining whether possession of an illegal substance is a crime, the amount in possession is irrelevant. Hudson argues that he was found in possession of such a small amount of cocaine that it could not be seen with the naked eye. The forensics examiner testified that although the substance was too little to weigh, it was visible with the naked eye and tested positive for cocaine, a Schedule II substance. (T 74, 76). Possession of any amount of cocaine, whether it be a trace amount or a kilogram, is illegal. *Miss Code Ann.* § 41-29-139(c)(1)(A).

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's verdict and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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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