IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ELLIOTT ALLEN YOUNG — APPELLANT



VS. — NO. 2007-KA-2026-COA

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### STATE CASES

**STATE RULES**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**ELLIOTT ALLEN YOUNG** **APPELLANT**

**VS.** **NO. 2007-KA-2026-COA**

**STATE OF MISSISSIPPI** **APPELLEE**

## BRIEF FOR THE APPELLEE

### PROCEDURAL HISTORY:

On October 4, 2007 , Elliott Young, "Young" was tried for two counts of sale of cocaine as a M. C. A. §99-19-83 habitual offender before a Walthall County Circuit Court jury, the Honorable Michael Taylor presiding. R. 1; C.P. 41.

Young was found guilty on both counts and given two concurrent life sentences in the custody of the Mississippi Department of Corrections. R. 188. From these convictions he appealed to the Supreme Court. C.P. 102.

## ISSUES ON APPEAL

**I.**

**WAS EVIDENCE OF A PRIOR CONVICTION AS IMPEACHMENT EVIDENCE PROPER?**

**II.**

**WAS THE VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?**

## STATEMENT OF THE FACTS

On September 13, 2006 , Young was indicted for two counts of sale of cocaine by a Walthall County Grand jury. Count 1 was for a sale of cocaine on May 16, 2006. Count 2 was for a sale on May 24, 2006. C.P. 6. On February 2007, Young's indictment was amended to reflect his habitual offender status under M. C. A. §99-19-83. C.P. 41.

On October 4, 2007 , Elliott Young was tried for two counts of sale of cocaine as a M. C.A. § 99-19-83 habitual offender before a Walthall County Circuit Court jury, the Honorable Michael Taylor presiding. R. 1; C.P. 41. Young was represented by Mr. Gus Sermos. R. 1.

During opening argument, Young's trial counsel stated that the charges were "absolutely preposterous" and a "set-up" R. 79.

Mr. Dexter Cook testified that he was the informant working with Officer Dan Hawn on the dates in question. R. 110. The dates were May 16, and 24, 2004. Officer Hawn with the Walthall Sheriff's department was working with a Southwest Mississippi regional drug task force. R. 77-78.

Prior to the two alleged sales, Cook was searched. R. 80-81. Cook was fitted with a video and audio camera concealed on his person. He was also given money for making any drug purchases he could arrange. Cook identified Young as the person from who he purchased what appeared to be cocaine on May 16 and 24, 2006. R. 110.

On cross examination, Cook was questioned about a prior conviction for possession of cocaine. R. 115-119. Cook testified that he was serving a prison sentence for that offense. On redirect, he admitted that he once had a cocaine problem. This was why he sought out Young for an alleged purchase of cocaine. R. 120.

On redirect, Cook identified state's exhibit 3 and 6 as being the apparent cocaine he purchased from Young. R. 119-120; 125-128.

Ms. Allison Conville with the Mississippi State Crime Laboratory identified state's exhibit 3 and 6 as containing cocaine. She determined this by using several scientific tests. R. 126; 129.

The audio and video tape made of the alleged cocaine purchases was played for the jury. R. 98. The video showed Young and money from the alleged cocaine purchase but not the actual hand to hand exchange of the money for the cocaine. R. 98. Young aka "Dut" is seen wearing a red Atlanta Falcons no. 7 jersey on the tape. R. 153. Young is heard saying, "Let me get my dope and I'll be back."

The twenty dollar bills used in the purchases were photocopied to record the serial numbers. When Young was arrested the two twenty dollar bills with the record serial numbers were recovered. R. 90.

Officer Hawn, who monitored the drug purchase over a concealed audio transmitter, also identified Young in the court room as being the person seen on the video of the alleged cocaine purchase. R. 86. Hawn was familiar with the voice of both Young and the informant, Mr. Cook. Hawn identified Young's voice as being on the audio tape of the alleged cocaine purchase. R. 84-85. Hawn also testified that the audio and video tapes made of the alleged cocaine purchase had not been altered in any way since they were made at the scene of the alleged purchase.

Mr. Elliott Young testified in his own defense. R. 142-168. This was after being advised that should he chose to testify he could be subject to cross examination concerning his prior conviction for possession of cocaine. R. 135-142

Young testified that he had never sold any cocaine to Dexter Cook. Young claimed to have sold him not cocaine but allegedly Viagra. R. 155. He supposedly sold him 20 Viagra pills for $2.00 each. He accused Cook of having stolen "a lot of air conditioners." R. 146. He testified that at the time of the alleged sales he knew Cook was working for the police and therefore would not

sell him any substance other than Viagra. R. 148.

Young testified that while his image was shown on the video previously played for the jury, it had been altered. R. 155.

Young also claimed that there was a "conspiracy" against him. This was an attempt to charge him so that he could be forced into providing investigators with information about a murder. The police allegedly thought he knew who had murdered his friend, Kelvin Magee.

On cross examination the prosecution questioned Young about why the prosecution was allegedly pressuring him about the murder since Mr. Roderick Foriest had been indicted for Mr. Magee's murder. R. 163.

Young's counsel argued in closing that the charges against Young were "preposterous." He argued that the video did not show any cocaine purchase. He argued that Cook's testimony was not credible since he was serving a sentence for drug possession. He also claimed that there had been tampering or substitution of evidence in the instant cause. R. 171-173.

Young was found guilty on both counts and given two concurrent life sentences in the custody of the Mississippi Department of Corrections. This was after a sentencing hearing and offer of proof of Young's prior felony convictions. R. 188. From the conviction he appealed to the Supreme Court. C.P. 102.

## SUMMARY OF THE ARGUMENT

1. The record reflects that the trial court properly admitted impeachment evidence. In opening argument, Young informed the jury that he had been "set-up." R. 75-76.

Young had been advised by the trial court that should he chose to testify that he would be subject to cross examination. R. 134-142. He was also advised that should he testify his prior conviction for sale of cocaine could be found more probative than unfairly prejudicial. R. 134-142. After being warned, Young chose to deny that he had any cocaine "before" the current charges against him. R. 159-160.

The record reflects that Young used the informant's prior conviction for possession of cocaine to impeach his testimony before the jury. R. 116. This was prior to his own testimony.

Young chose to accuse the undercover agent and the informant of being liars. He accused them of tampering with the evidence against him. R. 155. He also testified there was a "conspiracy" against him on the part of Officer Hawn and Mr. Cook. R. 161-162.

Contrary to appellant's argument, Young's denial of having possessed cocaine "before" would imply not having sold cocaine in the past. One can not sell cocaine unless one has it in his or her possession. See Appellant's brief page 11.

Young chose to make his "intent" relevant to his credibility with the jury. **Carter v. State**, 953 So. 2d 224, 229 (Miss. 2007).

Therefore, the Appellee would submit that the trial court's finding on the record that the **Peterson** factors for admission of impeachment by a prior possession conviction had been met under the facts of this case.

The jury was instructed that a person can not be convicted based upon his reputation. He could only be convicted based upon proof beyond a reasonable doubt. C.P. 84. They were also

instructed that they were the judge of the facts and of the credibility of all the witnesses appearing before them. C.P. 77-79.

2. There was credible, substantial corroborated evidence in support of the trial court's denial of all peremptory instructions and a motion for a new trial. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993). Young was identified as the person who was seen and heard on the audio and video tapes of an alleged drug sale. He was also identified by the informant as being the person who sold him cocaine on May 16 and 24, 2006. R. 86; 110.

Young's defense that he sold the agent Viagra, 20 pills for $2 each , was an admission that he sold something to Cook on the dates in question. R. 147. This made Young's uncorroborated denials of sale of cocaine, as opposed to Viagra, an issue for the jury to resolve. Additionally, the alleged cocaine was identified as that which Cook purchased from Young. R. 119-120. It was determined by scientific test to be cocaine by a forensic analyst. R. 125-128. The record also reflects that Cook was searched before and after his two separate alleged purchases of cocaine from Young. R. 114.

Officer Hawn testified that the audio and video tapes made at the scene of the alleged purchase had not been altered or changed. They were accurate and faithful recordings of what occurred at that time. R. 84-85.

Therefore, there was a lack of record evidence for finding any mingling or substitution of evidence occurred. And it goes without saying, that there was no finding of any Viagra among the substances Cook turned over to members of the drug task force shortly after the sales.

The rock like substances recovered from Cook were both identified as having come from him shortly after the alleged purchase. R. 89; 94; 125; 128.

## ARGUMENT

## PROPOSITION I

### IMPEACHMENT EVIDENCE WAS PROPERLY ADMITTED.

Young believes that the trial court erred in allowing him to be impeached by his prior convictions. He thinks the trial court erred in finding that the probative value of the prior convictions were more probative than unfairly prejudicial to Young's defense to the sale of cocaine charge. Young thinks that the fact that his prior conviction was similar to the charge with which he was being tried made it unfairly prejudicial to his defense. Appellant's brief page 5-16.

To the contrary, the record reflects that the trial court found that Young's prior conviction for possession of cocaine was more probative than unfairly prejudicial.

> Court:... **The Court finds that the Peterson test is satisfied by the possession conviction March 20 of 2000, and that the Court finds that the probative value of admitting the evidence outweighs any prejudicial effect. The crime has impeachment value, given the posture of the case, and given the remarks of counsel for defense in opening statement.** It was within the last I guess seven years, around seven years ago, so the timeliness of it weighs in favor of the admissibility. There's a similarity between that and the act charged here which, as prejudicial effect, weighs in the defendant's favor–the third factor in **Peterson**, but the importance of the defendant's testimony and the centrality of the credibility issue I think very clearly tipped the scales in favor of admissibility, and it has great–it has probative value, and the prejudicial effect would be minimal, if any. **Certainly under Rule 403 would not be unduly or unfairly prejudicial.** The Court is going to grant the motion in limine with regard to the robbery conviction, although extrapalation and quick math would–So that would be inadmissible. R. 141-142. (Emphasis by Appellee).

In his opening statement, Young's counsel told the jury that "these charges are preposterous, and it's a set up situation and he certainly did not sell cocaine to the confidential informant..." R. 75. In addition, on cross examination the informant, Dexter Cook , was impeached by evidence of his prior conviction for possession of cocaine. R. 116.

Q. Mr. Cook are you currently in custody with the Department of Corrections?

A. Yes, sir, I am.

...

Q. So it was after you had worked for the agents in this case? (When he was charged for possession of cocaine, which was May, 2006.)

A. Yes, sir.

...

Q. So when you leave here, you have to go back to the penitentiary?

A. Right.

Mr. Elliott Young testified in his own defense. R. 142-168. This was after being advised that should he chose to testify he could be subject to cross examination. This would include questions about his prior conviction for possession of cocaine. R. 135-142

Young testified that he had never sold any cocaine to Dexter Cook. Young chose to admit that he sold Viagra rather than cocaine to Cook. R. 155. He supposedly sold him 20 Viagra pills for $2.00 each. He accused Cook of having stolen "a lot of air conditioners." R. 146. He testified that at the time of the alleged sales he knew Cook was working for the police and therefore would not sell him any substance other than Viagra. R. 148.

Young testified that while his image was shown on the video previously played for the jury, it had been altered. R. 155.

Young also claimed that there was a "conspiracy" against him. This was an attempt to charge him so that he could be forced into telling the police who had murdered his friend, Kelvin Magee. However, on cross examination the prosecution pointed out that a Mr. Roderick Foriest had already been indicted for Magee's murder. R. 163.

Young testified that he sold Viagra to Cook rather than cocaine.

Q. Back in mid May, what items had you sold him?

A. Viagra.

Q. You sold Viagra to Dexter Cook?

A. Yes, sir.

Q. How much did you sell him? How many pills?

A. Sell them to him for $2 apiece.

Q. And how many did he buy? 20.

A. I'm sorry.

Q. 20. R. 147.

...

Q. And that's why you would only sell him Viagra and you wouldn't sell him cocaine, because you knew he was a–

A. No, no, that's not the reason. Because I didn't sell cocaine.

Q. **Oh. okay. You don't sell cocaine. Well, Mr Young, you've had cocaine before, haven't you?**

A. **I didn't have no–I didn't have no sale charge.**

Q. **I didn't ask you that. I said you've possessed cocaine before, haven't you?**

A. **That what they say. Say I possessed the one rock, the crack rock.**

Tidwell: May I approach the witness, Your Honor?

Court: You may.

Tidwell: For the record, I'm handing the witness a document consisting of one page.

Q. I ask you to look at that, if you would, Mr. Young.

A. Yes, sir.

Q. Do you know what that is?

A. Yes, sir.

Q. Okay. What is that?

A. That's a sentencing when I was sentenced to five years in the Mississippi Department of Corrections, possession of one gram of cocaine.

Q. **So you have had cocaine before?**

A. **Yes, sir. Yeah, I used cocaine before.** R. 159-160. (Emphasis by Appellee).

...

Young was also questioned about why he thought there was some conspiracy against him. This was a conspiracy on the part of Officer Hawn and informant Cook.

Q. Okay. **So you think that Dexter Cook and Dan Hawn, the narcotics agent, made all this up in some kind of conspiracy to get Elliott Young? Is that what you want his jury to believe, right?**

A. **Yes.**

Q. Okay.

A. Because of one reason.

Q. Okay

A. They feel like by me being convicted of a felony charge before, and the guy that I was seen with, he come up murdered. They figured they' d put these charges on me, which they–numerous times before. Feel like they put these charges on me–send me away for life, and maybe I might tell who killed the guy. But I don't know who killed the guy. But that's the whole purpose of the situation. R. 161-162.

Young was cross examined about why the state was conspiring against him since a Mr. Foriest had already been indicted for the murder of Kelvin Magee.

Q. Okay. So Marion County–and I'm not from Marion County, and I don't work for the DA's office in Marion County. But they have an indictment for Roderick Foriest, and in spite of that they're wanting to put pressure on you in Walthall County to find out who killed Kelvin "Silo" Magee?

A. I've been questioned–I've been questioned numerous times in Walthall County by Marion County. R. 163.

In **Peterson v. State** 518 So.2d 632, 638 (Miss. 1987), the Court reversed and remanded

because the trial court admitted a prior conviction without making a finding on the record that the probative value of the conviction outweighed any unfair prejudice. As previously shown with a cite to the record, in the instant cause, the trial court did make his determination on this issue on the record of this cause. R. 141-142.

> Because we find that the admission of Peterson's previous marijuana conviction into evidence without a determination on the record under Rule 609(a)(1), that the probative value of the evidence outweighed its prejudicial effect was erroneous, this case must be reversed and remanded. In the future in such situations the trial judge must specifically weigh, on-the-record, those factors which make the conviction probative against those factors which make the evidence of the conviction prejudicial. Since the evidence in this case was manifestly prejudicial, the Preston procedure of remanding only for a finding under Rule 609 does not apply and a new trial must be granted.

In **Jones v. State** 904 So.2d 149, 153 (Miss.2005), the Supreme Court found the trial court did not err in admitting Jones' prior convictions for burglary. Intent was a central issue in the case since Jones claimed to be in someone's house to obtain help. The trial court correctly found that the probative value of the burglary convictions was not substantially outweighed by the danger of unfair prejudice under M. R. E. 403.

> ¶ 9. We find that evidence regarding the underlying facts of each conviction is irrelevant in this case. The convictions were introduced to show intent. Intent was shown by the fact that Jones admitted (by pleading guilty) to five prior burglaries and to one attempted burglary. Jones argued that the only reason he was at the Voyles' house was to obtain help after his vehicle broke down. The prior convictions tend to prove, along with other facts, that Jones' intent was to burglarize the house, not to obtain help. The underlying facts of the six prior convictions were irrelevant to the issue of intent, and the circuit court would have erred if it had admitted such evidence.

In **Carter v. State** , 953 So. 2d 224, 229 (Miss. 2007), the Supreme Court found the trial court did not abuse its discretion in admitting Carter's prior convictions. This was in another case where intent was a critical evidentiary issue. The Court pointed out that on appeal, an appeal court does not attempt to engage in a new balancing of the M.R.E. 403 and 404 factors considered by the

trial court.

> In admitting evidence of Carter's prior felony convictions for the limited purposes of showing intent, the circuit court determined that "in this particular case, given the facts thus far, the intent of [Carter] is greatly an issue." (Emphasis added). That determination was permissible under Miss. R. Evid. 404(b). See Miss. R. Evid. 404(b) ( "may ... be admissible for ... proof of ... intent...."). Moreover, the circuit court analyzed the evidence under Miss. R. Evid. 403 FN7 and found that it was "extremely probative of [Carter's] intent, a necessary element, and that outweighs the prejudicial effect in this case." "**[O]ur task as an appellate court reviewing a Rule 403 determination is not to engage anew in the Rule 403 balancing process. Rather, this Court must simply determine whether the trial court abused its discretion in weighing the factors and admitting or excluding the evidence.**" **Baldwin v. State**, 784 So.2d 148, 156 (Miss.2001) (citations omitted) (emphasis added).

The Appellee would submit that the record reflects that the trial court did not err in finding on the record that the probative value of Young's prior conviction for possession of cocaine was not substantially outweighed by the danger of unfair prejudice under the facts of this case.

The jury was instructed that a person could not be convicted based upon his reputation. He could only be convicted based upon prove beyond a reasonable doubt. C.P. 84. They were also instructed that they were the judge of the facts and of the credibility of all the witnesses appearing before them. C.P. 77-79.

Young's defense was not merely to deny having sold cocaine on the dates at issue. Rather he chose to accuse the prosecution as well as the informant of conspiring against him and setting him up. He chose to question the informant about his prior possession of cocaine conviction. His testimony made his prior conviction for possession of cocaine relevant to his veracity and credibility before the jury. Young's testimony made his intent under the circumstances of this case relevant. The Appellee would submit that this issue is lacking in merit.

## PROPOSITION II

### THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF YOUNG'S CONVICTIONS.

Young believes that the verdict was against the overwhelming weight of the evidence. He believes that this case was simply a case of his word versus that of Mr. Cook. While there was an video and audio tape of the alleged cocaine sale, Young denied having sold Cook anything other than Viagra. The video does not show any actual transaction and the audio contains no express statements about any cocaine sale . He also thinks the prosecution failed to show that the substance sold to Cook was actually not Viagra. Appellant's brief page 12-15.

The record contains credible, substantial corroborated evidence in support of the trial court's denial of a motion for a new trial. C.P. 97.

In **Mamon v. State**, 724 So. 2d 878, 881 (Miss. 1998), this Court stated that the jury is responsible for resolving the credibility of witnesses. All the evidence consistent with the verdict must be accepted as true along with all reasonable inferences. The court must also disregard evidence favorable to the defendant.

> Reasonably, matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. **Wetz v. State**, 503 So. 2d 803, 808 (Miss. 1987). Once a jury has found a defendant guilty, however, this Court's authority on appeal is by law considerably constricted, **Davis v. State**, 586 So. 2d 817, 819 (Miss. 1991). When viewing the sufficiency of the evidence, this Court looks at the trial court's ruling on the most recent occasion when such sufficiency was challenged. **Green v. State** , 631 So. 2d 167, 174 (Miss. 1994). We must, as to each element of the offense, consider all of the evidence-not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict. **Cooper v. State** , 639 So. 2d 1320,1324 (Miss. 1994). Credible evidence which is consistent with the guilt must be accepted as true. ***Wetz***, 503 So. 2d at 808. The recipient of the verdict, here the state, must be given the benefit of all reasonable inferences that may be drawn from that evidence. **Smith v. State** , 646 So. 2d 538, 542 (Miss. 1994).

Mr. Dexter Cook testified that he was the informant working with Officer Dan Hawn on the

dates in question. R. 110. Officer Dan Hawn with the Walthall Sheriff's department was working with a Southwest Mississippi Regional drug task force. It was Hawn who employed, supervised and monitored Cook's involvement in purchasing the alleged cocaine from Young on May 16, and 24, 2006.

Prior to the two alleged sales, Cook was searched. He was fitted with a video camera and an audio transmitter. This equipment was concealed on his person. He was also given marked money for making any drug purchases he could arrange. Cook identified Young as the person from who he purchased what appeared to be cocaine on May 16 and 24, 2006. R. 110.

Q. **Do you see Elliott Young in the courtroom here today?**

A. **Yes, sir.**

Tidwell: **Ask that the record reflect that the witness has identified the defendant.**

Court: **Record will so reflect.** R. 110. (Emphasis by Appellee).

Cook also identified the apparent cocaine he purchased from Young on those two occasions. R. 119; 125-128.

Q. **Okay. Does that appear to be what you purchased on those two days?**(State's exhibit 3 and 6, which was what appeared to be cocaine purchased on the two dates at issue.)

A. **Yes.** (Emphasis by Appellee).

Young was also searched both before and after the alleged cocaine purchases. R. 114; 104-105.

Ms. Allison Conville with the Mississippi State Crime Laboratory identified state's exhibit 3 and 6 as containing cocaine. She determined this by several separate scientific tests. R. 126; 129.

The video tape made of the alleged cocaine purchases was played for the jury. R. 98. The video showed Young and money from the alleged cocaine purchase but not the actual hand to hand

exchange of the money for the cocaine. R. 98. The twenty dollar bills used in the purchase were photocopied to record the serial numbers. When Young was arrested the two twenty dollar bills with the record serial numbers were recovered and placed into evidence. R. 90. See State's Exhibit 4 for photocopy of the two twenty dollar bills issued to Dexter Cook to consummate a cocaine purchase in Walthall County.

> Q. Mr. Hawn, you had mentioned earlier that you had wrote some serial numbers down of some bills. When, after May the 16th did Mr. Elliott Young come into the custody of the Southwest Mississippi Narcotics Unit?
>
> A. On May the 27th at approximately 5:45 in the morning.
>
> Q. **What if anything was recovered that related to your case on May the 16th of 2006**?
>
> A. **$20 in official funds which were two $10 bills in which the serial numbers had been recorded prior to the buy.** R. 89-90. (Emphasis by Appellee).

Officer Hawn, who monitored the alleged drug purchase, also identified Young in the court room as being the person seen on the video of the alleged cocaine purchase. He was familiar with his voice as well as his face, physical features and mannerism. R. 86.

Dexter Cook testified that he was searched both before and after the alleged cocaine purchases from Young.

> Q. **Let me ask you this: Were you searched or not searched prior to going?**
>
> A. **Yes, I was searched prior to going and coming back, after I come back.** (Emphasis by Appellee). R. 114.

The record reflects that at the conclusion of the prosecution's case, the trial court overruled a motion for a directed verdict. 133.

> Tidwell; Your Honor, the agent testified. The video and audio recording were played. A reasonable inference from the video and audio recordings is that sales occurred from this defendant to Dexter Cook on May the 16th of 2006 and on May the 24th of 2006. In addition to that, Dexter Cook provided direct evidence that indeed Elliott

> Young sold him cocaine on those days and the crime lab has testified that the substance is, in fact, cocaine. Based on the evidence as presented and all reasonable inferences that can be drawn from it, the defendant's motion should be denied.
>
> Court: The court finds, when applying the standard for directed verdict, that if the evidence offered by the state is taken as true together with all reasonable inferences flowing from it, that the motions should be overruled, and it is. R. 133.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not this court.

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the testimony presented by the prosecution was taken as true with reasonable inferences there was more than sufficient credible, corroborated evidence in support of the trial court denying all peremptory instructions. That evidence, as summarized above with cites to the record, included Cook, the informant's, identification of Young as the person who sold him the cocaine on May 16 and 24, 2006. R. 110. Cook also identified state's exhibit 3 and 6 as being the apparent

cocaine he purchased from Young. R. 119. The evidence also included Young's image on the video tape made of the alleged transaction in a red Atlanta Falcons jersey. R. 98.. It included Young saying on an audio tape, "Let me get my dope and stuff and I'll be back." R. 71.

It included the identification of the alleged cocaine as being actual cocaine by Mrs. Conville with the State Crime Lab. R. 126; 129. It also included finding the twenty dollar bills with the recorded serial numbers on Young's person when he was arrested. R. 89-90.

This was more than sufficient credible, corroborated evidence in support of the trial court denying all peremptory instructions. All the elements of sale of cocaine had been established by credible evidence. C.P. 87.

Young's argument about the weight of the evidence depends upon giving himself the benefit of favorable inferences from gaps, ambiguities or conflicts created by his own self serving uncorroborated testimony.

Whereas, it is the Appellee who is entitled to have such reasonable inferences along with the evidence presented taken as true. **Hammond v. State,** 465 So. 2d 1031, 1035 (Miss. 1985). Evidence favorable to Young is to be ignored. In other words, conflicts about Viagra from the testimony of Young were for the jury to resolve. This would be based upon all the evidence. This would include the video and audio tapes, exhibits 3 and 6 identified as being cocaine. And finally it would include the testimony of Officer Hawn, informant Cook and the forensic analyst, Ms. Conville. R. 126-129.

The prosecution presented sufficient evidence in support of inferring from all the evidence that the substances delivered by the informant to Officer Hawn were composed of cocaine. There was no basis for inferring that the substances were composed of Viagra. To the contrary, the record contains fully corroborated testimony indicating that State's exhibit 3 and 6 were the pieces of alleged cocaine which Cook returned after the monitored sales. These alleged cocaine pieces were

determined by scientific tests to contain cocaine. R. 89;94; 125; 128.

In **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993), this Court stated that when the sufficiency of the evidence is challenged that the evidence favorable to the State must be accepted as true with all reasonable inferences. Evidence favorable to the defense must be disregarded.

> In judging the sufficiency of the evidence on a motion for a directed verdict, or request for peremptory instruction, the trial judge is required to accept as true all of the evidence that is favorable to the state, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. **Clemons v. State**, 460 So. 2d 835 (Miss. 1984).

In **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988) , the Supreme Court stated that the uncorroborated testimony of a single witness was sufficient for supporting a conviction on appeal:

> With this reasoning in mind, the Court holds that the testimony of Conner was legally sufficient to support Doby's conviction for the sale of cocaine. This Court recognizes the rule that persons may be found guilty on the uncorroborated testimony of a single witness. See **Ragland v. State**, 403 So. 2d 146 (Miss. 1981);..

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion challenging the weight of the evidence was in the trial court's discretion. However, it should be denied except to prevent "an unconscionable injustice."

> Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987).We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State** , 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

The Appellee would submit that there was no "unconscionable injustice" involved in denying Mr. Young a new trial. This issue is also lacking in merit.

## CONCLUSION

Young's convictions should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

## CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 Michael M. Taylor
Circuit Court Judge
Post Office Drawer 1350
Brookhaven, MS 39602

Honorable DeWitt (Dee) Bates
District Attorney
284 E. Bay Street
Magnolia, MS 39652

Brenda Jackson Patterson, Esquire
Attorney At Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 24th day of June, 2008.

W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680