IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ELLIOTT YOUNG — APPELLANT

V. — NO. 2007-KA-2026-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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ELLIOTT YOUNG	**APPELLANT**
V.	**NO. 2007-KA-2026-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. Elliott Young, Appellant
3. Honorable Dewitt (Dee) T. Bates, Jr., District Attorney
4. Honorable Michael M. Taylor, Circuit Court Judge

This the 21st day of April, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson

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STATEMENT OF THE CASE

Elliot Allen Young was indicted by a Walthall County Grand Jury in a two count indictment for the offense of unlawful sale of cocaine. In Count I, he was indicted for wilfully, unlawfully, feloniously and knowingly selling of cocaine, a controlled substance, on or about May 16, 2006, to one confidential informant, a human being, for money, contrary to and in violation of Section 41-29-139 of the Mississippi Code of 1972. Count II of the indictment was identical in language with the exception of the date being May 24, 2006 and the language added that all of said conduct alleged and set forth in counts one and two of this indictment having then and there been based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, and being against the peace and dignity of the State of Mississippi.

After a jury trial, Mr. Young was convicted in both Counts I and II. Immediately after the verdict, the State held a hearing on a Motion to Amend the indictment pursuant to Mississippi Code Ann. Sec. 99-19-83. After the hearing, the trial court found that the State proved beyond a reasonable doubt that Mr. Young was twice convicted of felonies. One being possession of cocaine and the other robbery, which was a violent crime. The trial court also found that Mr. Young had served in excess of one year on each of these offenses and granted the Motion to Amend the indictment. Thereafter, the trial court sentenced Mr. Young to a mandatory life in prison without the possibility of probation or parole in Counts I and II. Both sentences were run concurrently. Feeling aggrieved, Mr. Young filed this appeal.

STATEMENT OF THE FACTS

Agent Dan Hawn, deputy sheriff with the Walthall County Sheriff's Department and also an agent with the Southwest Mississippi Narcotics Unit, testified that upon getting complaints of drug

activity in Walthall County, he decided to use a confidential informant to locate drug dealers. **T. 77.** Dexter Cook had a possession of crack cocaine charge in Pike County and after Agent Hawn spoke with him concerning that charge he decided to ask him to work as a confidential informant. **T. 79.** The two occasions relevant in the present case where Mr. Cook acted as a confidential informant were May 16th and May 24th 2006.

On May 16, 2006, Agent Hawn along with Agent Deska Varnado decided to look for sources of narcotics. They met at a pre-buy location with Mr. Cook. They searched Mr. Cook and handed him $50.00 of official funds to make the drug transaction. **T. 81-82.** Agent Hawn dropped Mr. Cook off at Martin Luther King Road and he was to go to Magee Badon Road or thereof in the area to purchase illegal narcotics. **T.83.** He was issued a body wire, an audio transmission and a video recording. **T. 83.** As Mr. Cook proceeded Agent Hawn and Agent Varnado could hear him contacting several different people. Once he made contact with Mr. Cook Agent Hawn could not recognize his voice at that time however, he could understand a transaction was taking place. **T. 84.**

Mr. Cook returned walking after the transaction. Agent Hawn and Agent Varnado picked him up and got the narcotics from him. They proceeded back to the post-buy location for debriefing and to be informed what happened during the time that they did not hear or see what was happening. **T. 84.** They also recovered the surveillance equipment. They did not receive any money back from Mr. Cook when he returned to the vehicle the day of May 16, 2006. **T. 87.** However, once Agent Hawn reviewed the audio/video he could hear and see Mr. Young and Mr. Cook on the tape and heard Mr. Young say, "Let me go get my stuff." **T. 88.**

Agent Hawn further testified that Mr. Young was arrested by the Southwest Mississippi Narcotics Unit on May 27, 2006 and it was at that time he recovered $20.00 which was two $10 bills

from the May 16, 2006, buy. This money had the serial numbers recorded and he testified the photocopy was a fair and accurate copy of those two $10 bills. **T. 90.**

As to the May 24, 2006 buy, Agent Hawn and Commander Brandon Bright met with Mr. Cook and issued him the same equipment they had issued him in the previous buy. This equipment included the body wire, which was audio, and a digital voice video recording. They searched Mr. Cook and because he was using a vehicle they searched that vehicle also. **T. 91.**

They gave him $103.00 in official Southwest Mississippi Narcotics Funds. This time they did not listen to the transaction, but they have the audio and videotape of the transaction. Mr. Cook is shown from the video going to the house where the orange metallic automobile was. This was Elliot Young's house. **T. 100**. Once Mr. Cook finished the transaction, he returned to Agent Hawn and Agent Bright and Agent Hawn wrote out statements at the post-buy locations given by Mr. Cook stating the facts of both the May 16, 2006, and May 24, 2006 buy. Mr. Cook could not read or write well so after Agent Hawn wrote down what Mr. Cook told him, he read it back to him and Mr. Cook dated and signed both statements. **T. 102 and 106.**

Dexter Cook was the second witness called by the State. He testified that he was in custody with the Mississippi Department of Corrections, housed at the Pike County Jail for violation of the restitution center because he was charged with possession of cocaine April, 2006. **T. 115 and 120.** During trial, he was serving an 8 year sentence for the possession of cocaine conviction. He further testified that he purchased crack cocaine from Mr. Cook on May 16, 2006, and May 24, 2006 and that he had reviewed both videos and they fairly and accurately showed the transaction where he purchased crack cocaine from Mr. Young. **T. 112.**

The last witness called by the State was Allison Conville, forensic scientist specializing in drug analysis at the Mississippi State Crime Laboratory. She identified State's Exhibit No. 3 as containing 0.4 gram of cocaine and State's Exhibit No. 6 as .1 gram of cocaine. **T. 125 and 129.**

The only witness called by the defense was Elliot Young. He testified that he was aware that Dexter Cook was the police and he would sell him only Viagra at two dollars a pill. He said that he sold him Viagra numerous times and the last time he sold him Viagra was Friday, May 26, 2006. **T. 151.** He further testified that Mr. Cook was lying on him because he jumped on him about fighting with his cousin in front of his kids and also because he was trying to work out a deal to help himself with the possession of cocaine charge. **T. 150.** He further stated that he was being targeted because one of his friends had been killed and Agent Hawn wanted him to tell who the killer of his friend was. Agent Hawn believed that by charging him with these two crimes he would tell him the name of the person who murdered his friend. However, he does not know who killed his friend. **T. 162.**

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE PROBATIVE VALUE OF PRIOR CONVICTION FOR IMPEACHMENT OUTWEIGHED PREJUDICIAL EFFECT.

II. WHETHER THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THE PROBATIVE VALUE OF PRIOR CONVICTION FOR IMPEACHMENT OF MR. YOUNG OUTWEIGHED PREJUDICIAL EFFECT.

During trial, defense counsel informed the trial court that Mr. Young did intend to testify, and that he had informed Mr. Young and reminded him that he would be subject to cross-examination. At that time the prosecutor informed the trial court that Mr. Young had been convicted of unlawful possession of cocaine within 1,500 feet of a school and was sentenced to serve five years in the Mississippi Department of Corrections. **T. 135.** Also, in February 1996, that Mr. Young had been sentenced to serve 15 years with one year suspended for the crime of armed robbery. That when Mr. Young testifies, the State would seek to impeach him with his prior convictions. In support of its position the State cited *Peterson v. State, 518 So.2d 632 (Miss. 1987).* **T. 136.**

After argument of counsel, **the trial court made the following ruling:**

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 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 far 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 - - probative value, and the prejudicial effect would be minimal, if any. Certainly under Rule 403 would not be unduly or unfairly prejudicial. T. 141.

The Court found the robbery conviction inadmissible. T. 142

MISSISSIPPI RULES OF EVIDENCE
RULE 609. Impeachment by evidence of conviction of crime.

(a) General rule. For the purpose of attacking the credibility of a witness, (1) evidence that(A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the party;

During cross examination of Mr. Young, the State elicited the following testimony from Mr. Young:

T. 159-160.

Q. Okay. Thank you for clarifying that. During May of 2006 you knew that Dexter Cook was an informant?

A. I knew May, I knew May, the month of May and partially part of April, the last part of April.

Q. And that's why you would only sell him Viagra, and you wouldn't sell him cocaine, is 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 said. Say I possessed the one rock, one crack rock.

BY MR. TIDWELL: May I approach the witness, Your Honor.

BY THE COURT: You may.

BY MR. 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. Okay. So you've had cocaine before?

A. Yes, sir. Yeah, I used cocaine before.

The factors to be considered by the trial judge when weighing the probative value of the prior conviction against the prejudicial effect of its admissions are outlined below as follows:

A.

THE IMPEACHMENT VALUE OF THE PRIOR CRIME

In the Peterson Case, Mr. Peterson had previously been convicted of possessing more than one ounce of marijuana with intent to sale. During trial, it was elicited from Mr. Peterson that he had been convicted of felony marijuana possession. The Court stated that this crime had little, if any,

impeachment value. Accordingly, the Court stated that this factor weighed against the admissibility of the conviction.(*Peterson v. State, 518 So.2d at 637,* citing *Gordon v. United States, 383 F.2d 936, 940 (D. C. Cir. 1967) (Burger, J.))*

In the present case Mr. Young contends that the impeachment value of the prior crime of possession of cocaine within 1,500 feet of a school has little, if any, impeachment value for his charge of sale of cocaine and as the Court in *Peterson* provided, weighs against the admissibility of the possession of cocaine conviction. The only remarks made by defense counsel during opening statement were that the charges were preposterous and that it was a setup because his client certainly did not sell cocaine. **T. 75.** The remarks made by defense counsel did not change the impeachment value of Mr. Young's prior conviction.

B.

THE POINT IN TIME OF THE CONVICTION AND THE WITNESS' SUBSEQUENT HISTORY

In *Peterson* the Court found the previous conviction occurred less than a year before the crime for which he was being tried. The Court provided that the "freshness" of the conviction weighed in favor of its admissibility. Id.

Mr. Young's conviction for possession of cocaine within 1,500 feet of a school occurred March 20, 2000 and the sale of cocaine charges occurred six years after the previous conviction. **T. 141.** At the time of trial, the previous conviction was not ten years old, so it would weigh in favor of its admissibility.

C.

THE SIMILARITY BETWEEN THE PAST CRIME AND THE CHARGED CRIME

In *Peterson* the Court provided that the past crime, possession of marijuana with intent to

deliver, was so similar to the crime for which Peterson was being tried, sale of marijuana, that the prejudicial effect of the conviction was very high. In such a situation, the Court stated, the jury is very likely to infer present guilt from past conviction for a similar offense. Id. (Citing *Gordon v. U.S., 383 F.2d at 940.)* The Court in *Peterson* further stated that the "likeness" of the conviction and the present charge weighs very heavily against admissibility. *Peterson v. State, 518 So.2d at 637.*

Mr. Young argues that the past crime of possession of cocaine within 1,500 feet of a school and sale of cocaine was so similar that the jury very likely inferred guilt from the past conviction. The likeness of the mere possession of cocaine and the present charged crimes of sale of cocaine weighed heavily against admissibility. The impeachment evidence was so similar to the crime for which Mr. Young was being tried that the prejudicial effect outweighed the value of the conviction for impeachment purposes.

D.

THE IMPORTANCE OF THE DEFENDANT'S TESTIMONY

In *Peterson*, Peterson and his mother were the only defense witnesses. Under his theory of the case (alibi), Peterson was one of the only witnesses who could establish his defense. The Court stated that Rule 609(a)(1) aids in the search for truth by insuring that important testimony from the defendant will not be excluded because he fears the prejudicial effect his previous conviction might have on the jury. The Court believed that the importance of Peterson's testimony weighs against the admissibility of the conviction. Id.

In the present case Mr. Young was the only defense witness. Basically his theory of the case was that he sold Viagra to Mr. Cook. As in Peterson, the importance of Mr. Young's testimony weighed against the admissibility of the conviction. Mr. Young had been informed prior to testifying

that the prosecution intended to seek to impeach his testimony with his possession and robbery convictions. **T. 136.** He was placed in fear of testifying knowing the previous conviction would have a prejudicial effect on the jury.

E.

THE CENTRALITY OF THE CREDIBILITY ISSUE

In *Peterson* the Court believed that since Peterson's alibi defense was conditioned on his credibility, the evidence which beared on his credibility was important. The Court stated that the nature of Peterson's defense heightened the importance of his credibility since in his case, he was one of the only witnesses who could establish his defense. The Court believed that the importance of his credibility to the particular facts of the case weighed in favor of the admissibility of his prior conviction, but only to the extent, if any, that his prior conviction reflects adversely on his credibility. Id.

The Court further provided that in this context the prejudicial effect of the similarity of Peterson's prior conviction and the crime charged was so great that it outweighed the value of the conviction for impeachment purposes. *Id.*

The Court reversed the Peterson decision for failure of the trial court to make a determination on the record under Rule 609(a)(1), that the probative value of the evidence outweighed its prejudicial effect prior to the admission of Peterson's previous marijuana conviction into evidence.

In the present case, Mr. Young was the only witness to his defense. As in *Peterson* the importance of his credibility to the particular facts of the case weigh in favor of the admissibility of his prior conviction, but only to the extent, if any, that his prior conviction reflects adversely on his credibility. As in *Peterson*, Mr. Young contends that the prejudicial effect of the similarity of his prior possession conviction and the crime charged were so great that it outweighed the value of the

conviction for impeachment purposes.

It is within the trial court's sound discretion whether prejudicial evidence possesses sufficient probative value and whether or not to admit the evidence, since M.R.E. 403 does not mandate exclusion but rather provides that the evidence may be excluded. *Baldwin v. State, 784 So.2d 148, 156 (Miss. 2001).* In reviewing the trial court's decision to admit or exclude evidence the task of an appellate court is not to engage anew in the Rule 403 balancing, but simply determine whether the trial court abused its discretion in weighing the factors and in admitting or excluding the evidence. Id. citing *Foster v. State, 508 So.2d 1111, 1117-18 (Miss. 1987), overruled on other grounds, Powell v. State, 806 So.2d, 1069, 1080 (Miss. 2001).* Mr. Young contends that the trial court abused its discretion by admitting the prior conviction for possession of cocaine because the probative value of the prior conviction was substantially outweighed by the prejudicial effect in that the prior possession charge's purpose only served to cause the jury to infer guilt. Mr. Young testified that he never sold cocaine before, not that he never used cocaine before. There was no other basis to admit the prior possession charge. Mr. Young offers the following testimony in support of his position.

T. 159-160.

Q. And that's why you would only sell him Viagra, and you wouldn't sell him cocaine, is 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.

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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. Okay. So you've had cocaine before?

A. Yes, sir. Yeah, I used cocaine before.

The possession charge did not serve any basis other than to prejudice the jury. It was used by the State so the jury could infer guilt. It was not used for impeachment purposes because Mr. Young denied selling cocaine. He never denied use of cocaine. The prior possession conviction did not weigh adversely on his credibility and should not have been admitted. The trial court abused its discretion in weighing the factors and admitting the prior possession conviction.

II. WEIGHT OF THE EVIDENCE.

Mr. Young contends that the jury's guilty verdict is against the overwhelming weight of the evidence.

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we 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. *Bush v. State, 895 So.2d 836, 844-45 (Miss. 2005)(citing Herring v. State, 691 So.2d 948, 957 (Miss. 1997).* We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs For Less*, Inc., 796 So.2d 942, 947 (Miss. 2000). However, the evidence should be weighed in the light most favorable to the verdict. *Bush v. State, 895 So.2d at 844 citing Herring v. State, 691 So.2d at 957.* A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *Bush v. State, 895 So.2d at 844 citing McQueen v. State, 423 So.2d 800, 803 (Miss. 1982).* Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. Id. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Id. Instead the proper remedy is to grant a new trial.

In Count I one of the indictment Mr. Young was charged with selling cocaine to Mr. Cook on May 16, 2006. Mr. Young testified that he sold Dexter Cook Viagra on several occasions. The last time being May 26, 2006. **T. 150.** However, he testified he never sold cocaine to Mr. Cook or anyone. From a review of the video tape, May 16, 2006, Mr. Young is seen exchanging something with Mr. Cook. Prior to Mr. Cook going to Mr. Young's trailer, he informed Agent Hawn that he was going to pause prior to going to the trailer because Mr. Young had previously told him he did not want to sell to him because the police were looking for him. Mr. Young testified that he did not sell cocaine to Mr. Cook because he knew Mr. Cook was a confidential informant. He stated he had known this from the last part of April 2006 through May 2006 when he sold him the Viagra. **T. 159.**

While listening to the audio there was not any language during the exchange by Mr. Young or Mr. Cook to identify the substance as cocaine. Mr. Cook didn't try to place the substance in front of the video he had on him. Prior to the exchange, Mr. Cook was heavily talking about his girlfriend and that he ought to ask her for some sex. However, he used a more graphic word. This graphic language used makes it very likely that he was going to buy Viagra. After the exchange, the only thing Mr. Cook said was, "appreciate you my brother." He never referenced the substance as cocaine even when he talked back to Agent Hawn he only said, dam show sold it to me, but did not refer to the substance as cocaine. Also, very important is the fact that there was plenty of opportunity for Mr. Cook to have gotten rid of the Viagra and supplemented it with cocaine he had stashed away or gotten from one of the people he passed on the rode in route back to the area where Agent Hawn picked him up.

There was only Mr. Cook's word against Mr. Young's word. These are the only two witnesses to the transaction. Mr. Cook had a possession charge pending at the time of the transaction. It is only reasonable to believe that he was hoping for and did get some favor in his sentence for helping the police. **T. 79.** The video tape does not show any evidence of cocaine, nor does the language indicate Mr. Young sold Mr. Cook cocaine. The verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Reasonable jurors could have not found guilt beyond a reasonable doubt. A new trial should therefore be granted.

In Count II, Mr. Young was charged with selling cocaine to Mr. Cook on May 24, 2006. Again, the tape fails to show any cocaine. Mr. Cook could have and should have place the substance in front of the camera after he purchased it. Especially after not displaying the substance for the camera after the May 16, 2006, purchase. Then, after he gets back in the car you cannot see anything

for a couple of minutes. During this time, Mr. Cook very well could have thrown the Viagra from the car window and replaced it with stashed cocaine. As stated in argument for Count I, he had a possession of cocaine charge and it is reasonable to believe he received favor from the police on that charge for being a confidential informant. There is not any evidence presented to dispute that Viagra was sold to Mr. Cook instead of cocaine. Here, again the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Reasonable jurors could not have found guilt beyond a reasonable doubt. A new trial should therefore be granted.

CONCLUSION

Because the trial court abused its discretion in admitting the prior possession conviction the convictions for sale of cocaine Count I and Count II should be reversed and remanded for a new trial. Also, because the verdict of the jury is against the overwhelming weight of the evidence, these cases should be remanded for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Elliott Young, 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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Honorable Dewitt (Dee) T. Bates, Jr.
District Attorney, District 14
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Honorable Jim Hood
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This the 21st day of April, 2008.

Brenda Jackson Patterson

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