IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT ELLIS, JR. — APPELLANT

VS. — NO. 2007-KA-2178

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT ELLIS, JR. **APPELLANT**

vs. **CAUSE No. 2007-KA-02178-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF FACTS

In the early morning hours of May 4th, 2006, three Columbus police officers responded to calls by a fellow officer that he was in pursuit of a fleeing suspect. He requested assistance in the chase. The initiating officer was deployed for military service and therefore not present at the trial. The three officers who responded were present to describe what happened after the fleeing suspect, the appellant, was apprehended. (R. Vol. 3, pp. 69, 82-82, 105). After catching and handcuffing the appellant, one of the officers realized he had something in his mouth. When the officer told the others that he had something in his mouth, the appellant began to chew on the item and crunching could be heard. Having experience with narcotics, the officer knew that people often tried to hide drugs in their mouths and that swallowing large quantities of drugs could cause cardiac arrest and even death. The appellant already looked as if he were under the influence of some intoxicant and officers were concerned that he may not realize what he was doing. (R. Vol. 2, p. 106).

Officers brought the appellant to the patrol car so that their actions could be recorded by the in-car camera. (R. Vol. 2, pp. 90-91). Officers pinched the appellant's nose closed so that he would be unable to swallow and would therefore spit the item out. (R. Vol. 2, p. 107). They also pressed his cheeks and manipulated his jaw in an attempt to remove the item from his mouth. White "stuff" all over the appellant's mouth confirmed that the bag inside had burst and the residue appeared to be cocaine. (R. Vol. 2, p. 75). When this failed to work, officers used a taser to try to shock the appellant into spitting out the drugs.[1] The appellant almost spit the drugs out when the officer tased him the first time but when the officer released the taser trigger, the appellant was able to get the bag of drugs back in his mouth. There it remained through three subsequent taser episodes. (R. Vol. 2, pp. 85-88). All three officers testified that they believed the appellant's life was in danger from the amount of cocaine he might ingest and that they needed to get bag out of his mouth in order to save his life. (R. Vol. 2, pp. 81, 84, 108). When the tasing failed, the officers realized the appellant was not going to spit out the bag. Knowing that the drugs were getting into the appellant's system, concern for the life of the appellant became even more urgent. (R. Vol. 2, pp. 88). Throughout the DVD from the officer's patrol car camera, the officers can be heard repeatedly instructing the appellant to spit out the drugs because he is going to die. The officers are not hostile or aggressive with the appellant. (State's Exhibit 2). They do what they can to get the drugs out of his mouth and call an ambulance when they realize that they are not going to be successful. (R. Vol. 2, p. 97).

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[1]The officers used the taser alone, removing the cartridge containing probes that actually break the skin. The use of the probes override all muscle control and incapacitates the target. Removal of these probes reduces the taser to something like a cattle prod, able only to inflict pain via an electric shock. This is less painful than tasing with the probes attached. The pain lasts only for as long as the taser is firing and in contact with the target. (R. Vol. 2, pp. 75, 79, 87).

The ambulance driver testified to the condition of the appellant when she arrived on the scene. He was laying on the ground and having difficulty breathing as if he were choking. He was sweating, had a rapid heartbeat, and his skin was clammy and the color was "not quite right." (R. Vol. 2, p. 112). She later testified that he was unresponsive to the emergency medical technicians and had mobility problems. She said that in her experience, these symptoms were consistent with the first stages of a drug overdose. She also stated that drug overdose can result in a wide variety of problems, including heart attack, stroke, brain damage, and seizures. (R. Vol. 2, pp. 126-27). The appellant did not show any signs of trauma, bruises, scrapes, cuts, or anything else to indicate that he had been in a fight or "beat up." (R. Vol. 2, p. 147).

En route to the hospital, the ambulance attendant in the back of the truck asked the driver to slow down. She stopped and went to assist him. There was an object blocking the appellant's airway. A clamp was used to reach into the appellant's throat and remove a plastic bag. (R. Vol. 2, pp. 114-15). The bag was laid on the seat of the ambulance next to the officer who had ridden with the appellant. The driver instructed him not to touch it until she provided him with a bio-hazard bag in which to place the bag. (R. Vol. 2, pp. 115-16). The driver was presented with a bio-hazard bag containing another plastic bag. She testified that the bag in question was marked with the word "evidence," the date of May 4th, 2006, and the initials and the badge number of the officer who initiated the arrest but was unavailable to testify. She also testified that the bag appeared to be that retrieved on the night in question. (R. Vol. 2, p. 125). The member of the narcotics unit who had retrieved the bag from the evidence locker testified that the number on the bag matched that on the arresting officer's report. There was no indication that procedures for the collection, logging, storage, and handling of evidence were not properly followed by the arresting officer. (R. Vol. 3, pp. 151-52).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS ON DUE PROCESS GROUNDS THE COCAINE TAKEN FROM THE APPELLANT'S MOUTH?

2. DID THE TRIAL COURT ERR IN ADMITTING CERTAIN STATEMENTS BY AW ENFORCEMENT OFFICERS?

3. WAS THE CHAIN OF CUSTODY FOR THE COCAINE SUFFICIENTLY PROVEN?

SUMMARY OF THE ARGUMENT

I. THE TRIAL JUDGE'S ADMISSION OF THE COCAINE TAKEN FROM THE APPELLANT'S MOUTH WAS NOT ERROR

II. THE TRIAL JUDGE DID NOT ERR IN ADMITTING COMMENTS BY THE POLICE OFFICERS THAT THE APPELLANT WAS FLEEING POLICE

III. ADMISSION OF THE PHYSICAL EVIDENCE WAS NOT ERROR AS THERE WAS NO INDICATION OF TAMPERING OR ALTERATION

ARGUMENT

I. THE TRIAL JUDGE'S ADMISSION OF THE COCAINE TAKEN FROM THE APPELLANT'S MOUTH WAS NOT ERROR

The appellant contends that the bag of cocaine presented at trial was obtained from his body in violation of the Due Process clause of the 14th Amendment and the Fourth Amendment of the United States Constitution.

Preliminarily, we submit that since the officers did not actually seize the evidence, there was no potential violation of the 4th Amendment. The cocaine was taken from the Appellant's mouth by medical personnel. They were not acting at the command of the police or as agents of the police. They did so for medical reasons because the Appellant was having respiratory distress. There was, to be sure, an attempt to seize the cocaine by the police prior to the time medical personnel took the cocaine from the Appellant's mouth, but they failed in their attempt. A failed attempt to make a search or seizure is not the same thing as a successful attempt. An

ineffectual attempt does not implicate the 4th Amendment. *City of Sacramento v. Lewis*, 523 U.S. 833 (1998). The facts of the case at bar do not support a claim of a violation of the 4th Amendment.

In *Rochin v. California*, 342 U.S. 165 (1952) police officers, without probable cause and without a warrant, entered Rochin's residence. When Rochin swallowed what appeared to be capsules of morphine, the officers attempted to physically extract them. When this attempt failed, Rochin was taken into custody, taken to the hospital, and at the direction of one of the officers Rochin's stomach was pumped. Rochin then vomited the capsules. The officers admitted that their purpose in having Rochin's stomach pumped was to preserve evidence. Rochin's well-being does not appear to have been a significant concern. The conduct of the officers shocked the conscience of the Supreme Court. The Supreme Court therefore found that such conduct violated the Due Process clause.

Rochin was decided in 1952, some nine years before the Supreme Court "incorporated" the 4th Amendment into the 14th Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961). *Rochin* did not rest on 4th Amendment considerations since, at the time, the 4th Amendment had no application to the States of the union. *Rochin* was a part of a class of decisions in which the Supreme Court found it necessary to invoke the Due Process clause in order to address particularly shocking instances of violations of basic rights. *E.g. Brown v. Mississippi*, 297 U.S. 278 (1936)(confession induced by a beating); *Powell v. Alabama*, 287 U.S. 45 (1932)(denial of counsel in a capital case was a violation of Due Process clause).

There is some question as to whether *Rochin* provides a basis for exclusion of evidence in a criminal trial in light of *Mapp*. Certainly cases will be found in which *Rochin* figures prominently, but these, as the Appellant's citations show, are civil cases under 42 U.S.C. Section

1983. And even so, the United States Supreme Court has limited the ambit of *Rochin* considerably. It has made it clear that, where a particular provision of the constitution "covers" an issue, that provision and not the "shock - the - conscience" standard of *Rochin* is to be applied. *Graham v. Connor*, 490 U.S. 386 (1989).[2] On the other hand, we have not found an instance since the decision in *Rochin* in which evidence was found by the United States Supreme Court to have been improperly admitted on account of shocked judicial conscience. We submit that *Rochin* is not a basis for exclusion of allegedly improperly seized evidence in light of *Mapp, supra*. Search and seizure issues, where there has been a completed search or seizure by law enforcement, are to be analyzed under the 4th Amendment. Rather than a "shock - the - conscience" standard, claims of excessive force by law enforcement should be analyzed in terms of whether law enforcement acted reasonably.

Assuming, however, that this Court will find *Rochin* yet relevant to search and seizure issues, there is no merit to the Appellant's contention under that decision.

Nothing in the trial record or on the patrol car DVD indicates that the officers were hostile or abusive toward the appellant. They continually told him that he was going to die if he did not get the bag of drugs out of his mouth. (State's Exhibit 2). The officers attempted to force

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[2] The Appellant says that *Graham* was overruled on other grounds by *Saucier v. Katz*, 533 U.S. 194 (2001). It is true that one court indicated that *Graham* was in some part overruled by this decision, *Niemyski v. City of Albuquerque*, 379 F. Supp.2d 1221 (D.C. N.M 2005), but having read the *Katz* opinion twice, we have failed to find where the *Graham* decision was overruled. If so, it was done in the most subtle of ways. On the other hand, other courts have continued to happily cite *Graham*, with no indication that *Graham* has been in any way overruled. *E.g. Lanman v, Hinson*, 529 F.3rd 673 (6th Cir. 2008).

Lanman noted, moreover, that the principle of law we have cited *Graham* for was restated by the United States Supreme Court in *United States v. Lanier*, 520 U.S. 259 (1997). Interestingly, the United States Supreme Court, when discussing *Graham*, did not note that *Graham* was overruled in some part. Consequently, whatever the Appellant means by *Graham* having been "overruled on other grounds" is of no significance.

the appellant to spit out the bag in his mouth by holding his nose and preventing him from swallowing. (R. Vol. 2, p. 107). When efforts to hold his nose and manipulate his jaw failed to produce the bag and the appellant continued to ingest the cocaine contained in the bag, the officers resorted to other, non - invasive measures. They tased the appellant believing that he might react by spitting the bag out. After a near success, they tried three more times. (R. Vol. 2, pp. 74-75, 88). When it became clear to the officers that they were not going to get the bag out and that his condition was clearly deteriorating from the amount of cocaine he had ingested, the officers ceased trying to get the appellant to spit the bag out, and sought emergency medical help. (R. Vol. 2, p. 99). The officers did not hold his mouth closed or otherwise prevent him from breathing. (State's Exhibit 2).

The appellant's airway became blocked when the bag went into his throat. The bag had to be removed by the emergency medical technicians in order to allow the appellant to breathe. The ambulance driver gave no indication that the removal of the bag was at the request of the officer riding in the ambulance. (R. Vol. 2, 112-15).

The facts of the case at bar are materially different from those in *Rochin*. First of all, while the officer who made the traffic stop was not available to testify, it does not appear that there was any serious issue about the propriety of the stop. Certainly it is not argued here that the stop was not proper. In *Rochin*, the officers had no legitimate reason to be within the house.

Secondly, unlike the facts in *Rochin*, the officers in the case at bar were motivated by the concern that the Appellant might seriously injure or kill himself if they did not get the cocaine out of his mouth. This was not an insignificant concern.

Thirdly, the procedure used here was not nearly as invasive as that used in *Rochin* The medical procedure does not appear to have been administered at the command of law

enforcement. Indeed, this procedure was not as invasive as taking blood from an unconscious suspect, a thing that the United States Supreme Court did not find offensive. *Breithaupt v. Abram*, 352 U.S. 432 (1957)

Fourthly, the use of force by the officers, unavailing as it was, was not deadly or unreasonable. The tasers were used in such a way that they only caused discomfort for the time they were in contact with the Appellant's body.[3] There was no lingering pain or discomfort once contact was broken. Furthermore, the officers eschewed using certain other techniques, such as holding the Appellant nostrils shut. In *Brown v. State*, 854 So.2d 1081 (Miss. Ct. App. 2003), a police officer seized the throat of a person he suspected of having contraband in his mouth, and made that person spit it out. The Court did not find this conduct by the police officer to be shocking.

There appear to be very few decisions in Mississippi involving *Rochin*, so we think the decisions from other jurisdictions will be informative. In *Lewis v. State*, 56 S.W.3rd 617 (Tx. App. 2001), the facts were that police officers observed a white substance inside that appellant's mouth at the time they arrested him. He would not voluntarily spit the substance out, so they used pepper spray to try to get him to spit it out. When that did not work, they used tweezers to try to get inside his mouth and caused the lips to bleed. Concerned about the medical consequences that might occur from Lewis' ingestion of the substance, they called for paramedics. The paramedics took Lewis to hospital, where a doctor administered a gastric lavage and, at long last, removed a package from Lewis' mouth. The doctor did not perform these procedures at the behest of the police, but only because he was following the procedures of

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[3] To create an analogy, borrowed from the venerable television series "Star Trek", they appear to have been set on stun rather than kill. (R. Vol. 2, pg. 87).

the hospital.

The Texas court, noting that it was the entire chain of events in *Rochin* that caused the United States Supreme Court to find a violation of the Due Process, and not simply the episode involving the stomach pump, found no violation of Due Process. Lewis was validly under arrest; Rochin was not. There was a legitimate concern about Lewis' medical well - being, whereas in *Rochin* there was no evidence as to the purpose of the stomach pump except that the officers wished to preserve evidence. And, as in the case at bar, the police did not order the doctor to administer medical procedures to Lewis' person. Considering the entire chain of events, the Texas court found no Due Process violation. *Lewis, supra*, at 620 - 623.

In *People v. Holloway*, 416 Mich. 288, 330 N.W. 2d 405, 409 - 410 (1982), the Michigan court canvassed a number of decisions from around the country and concluded that the weight of authority is that law enforcement may use a reasonable amount of force to accomplish a search of a person's mouth for the purpose of prevention of destruction of evidence.

The Appellant cites some decisions in which a suspect was choked. However, this did not occur in the case at bar. In any event, the decisions nationwide are hardly uniform on this point. *Brown, supra.* The Officers called for medical assistance as soon as it became clear that the Appellant was not going to respond to their commands to spit the cocaine out. Medical personnel, acting on their own and for medical reasons, extracted the cocaine. The officers did not order them to do so.

A number of courts have noted that it was the entire sequence of events in *Rochin* that shocked the conscience of the Supreme Court, not simply the stomach pumping incident. Consequently, courts have held that where an officer observes a substance that appears to be contraband in a suspect's mouth, the officer may have the suspects's stomach pumped or avail

themselves of minor force without offending the conscience of courts and without offending the 4th Amendment. *Lindsey v. State*, 895 So.2d 1018 (Ala. Crim App. 2004); *State v. Lomack*, 4 Neb. App. 465, 545 N.W.2d 455 (1996)(Suspect rendered briefly unconscious due to the means used by police officers to remove contraband from his mouth); *State v. Strong*, 493 N.W.2d 834 (Iowa 1992); *People v. Holloway*, 416 Mich. 288, 330 N.W.2d 405 (1982).[4]

In the case at bar, the facts did not show that the Appellant was harmed by the officers. It is true that they attempted to get him to spit the cocaine out by use of a taser. But the way the taser was used only caused discomfort for so long as it was in contact with the Appellant. Once contact was lost, there was no more discomfort, no lingering discomfort. The Appellant was not injured.

As we have demonstrated in the decisions we have cited here, courts have upheld actions of police officers involving pepper spray, tweezers and choke holds. Notwithstanding *Rochin*, contraband recovered from a stomach pump has not been suppressed. The actions of the police officers in the case at bar do not shock the conscience.

Evidently in an attempt to assert that the officers actions were not reasonable under the 4th Amendment, the Appellant attempts, under *Winston v. Lee*, 470 U.S. 753 (1985), to demonstrate that the search was unreasonable. Initially, we will point out that the officers certainly had

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[4] The Appellant cites decisions from California and Florida which find choking to be offensive to the gentle consciences of the members of those courts. We need only to point out that the Appellant was not choked. In any event, in Mississippi, it is permissible to some degree to seize the throat of a suspect in order to make him spit out the contents of his mouth.

In *Locke v. State*, 588 So.2d 1082 (Fla. App. 4th Dist. 1991), cited by the appellant, the Florida appellate court found it impermissible to choke a suspect to prevent him from swallowing a small dosage of drugs and destroying the evidence. The court noted, however, that it might be permissible to choke a suspect in order to protect his life and prevent him from swallowing a potentially lethal quantity of drug. *Id.* at 1084..

probable cause to believe that the Appellant might have contraband in his mouth. Because of the medical problem that could pose, together with the need to preserve evidence, the exigent circumstances exception to the warrant requirement were clearly present

As for the first consideration in *Winston* – the extent to which the procedure threatened the safety and health of the Appellant – the short and sufficient answer is that his safety and health were not threatened by the use of the taser. If anything, his safety and health would have been preserved had he obeyed the officers. The taser caused no injury, no lasting discomfort or pain. Pepper spray would have been more painful, if only because its effects would have lasted longer than the momentary contact with the taser, used in the manner as it was in this case.

As for the second consideration – the extent of intrusion into the Appellant's bodily integrity – this was minimal. There is simply no comparison between attempting to open a mouth and surgery. Indeed, the giving of a blood sample is more intrusive.

As for the third consideration – the interest in fairly and accurately determining guilt – it should hardly be necessary to say that there is a significant interest in combating drug usage and dealing.

The Appellant concedes that the initial stop may have been proper but that the subsequent actions of the police officers were unreasonable. However, it does not appear that the actions committed by the Appellant that caused the stop were what caused the police to try to get him to spit out the contents of his mouth. It was the fact that the police could see that something was in the Appellant's mouth and that there was a white substance around his mouth that caused them to engage in these actions. They were reasonable under the circumstances, as the cases we have cited above demonstrate. The taser, used in the manner it was, was not dangerous, caused no lasting pain. *Conwell v. State*, 714 N.E.2d 764 (Ind. App. 1999) is of no use here. In that case,

the officer had no cause to require the suspect to spit anything out of his mouth, and the choke hold utilized was described by the court as "dangerous." Here there was probable cause, and taser was not dangerous.

The Appellant then attempts to make some point over the fact that the ambulance was called only after the police were unsuccessful in getting him to spit the cocaine out. We see nothing untoward in this. While the Appellant would have this Court believe that the police were not interested in his health and safety, but only in retrieving evidence, this is not borne out by the record. In any event, as a number of cases we have cited have held, there is nothing of itself improper about wishing to preserve evidence in addition too caring for one in custody.

In *Graham v. Connor*, 490 U.S. 386, 395 (1989) the court stated that the proper test for determining whether a seizure is reasonable requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." The reasonableness of the use of force should be judged from the perspective of the officer on the scene rather than by hindsight. Courts are to consider the fact that police officers must make immediate decisions in unstable circumstances about the amount of force necessary. The test is an objective one rather than subjective one, considering what was objectively reasonable under the circumstances rather than the officers' "underlying intent or motivation." *Id.* at 396-97; *see also Tennessee v. Garner*, 471 U.S. 1 (1985)(citing *Terry v. Ohio*, 392 U.S. 1 (1968)

The officers knew or had very good reason to suspect that the appellant was chewing on a bag of drugs in his mouth. They also knew that ingesting too much cocaine over too short a span of time can be fatal. (R. Vol. 2, p. 106). After initial attempts and verbal entreaties failed to get the bag out of the appellant's mouth, the officers resorted to tasing him. (R. Vol. 2, p. 75). When

the tasing was ineffective, the officers realized that they were not going to be successful. Just prior to the arrival of the ambulance, the officers were preparing to take him to the hospital themselves because they believed he might die. (R. Vol. 2, p. 97). When the ambulance arrived, the appellant was given over to the medical personnel for treatment. The officers' use of what means were available to them to prevent a fatal overdose was reasonable in light of the urgency of the situation. The appellant cannot claim Fourth Amendment violations to suppress evidence recovered when his life appeared to be in danger and "the officers acted in good faith to prevent further harm to him," especially where that evidence was not recovered by law enforcement but by medical personnel. *U.S. v. Owens*, 475 F.2d 759, 760 (5th Cir.1973).

In the case at bar, the Appellant attempted to swallow a quantity of cocaine in the presence of the police officers. Recognizing the danger to the Appellant if he succeeded in swallowing the cocaine, the officers used reasonable attempts to have him disgorge it, attempts that were unsuccessful. The use of the taser was not unreasonable, no more than the use of pepper spray would have been. So far as we know, the only other options would have been to choke the Appellant, or strike him, or engage in some other kind of physical force upon his person, all of which might have been worse than the use of the taser. Once the officers saw that their efforts were unavailing, the called for medical assistance for the Appellant. The only reason they would have done that was for the Appellant's physical well - being. Under all the circumstances of this case, the actions of the officers were entirely reasonable.

The First Assignment of Error is without merit.

II. THE TRIAL JUDGE DID NOT ERR IN ADMITTING COMMENTS BY THE POLICE OFFICERS THAT THE APPELLANT WAS FLEEING POLICE

During the trial, the three testifying police officers were asked how they came to be at the scene of the appellant's arrest. They each responded that they had heard a broadcast in which the officer who initialized the arrest requested assistance in apprehending a fleeing suspect. The officer who made the broadcast was unavailable to testify as he was called away for military service. The appellant objected to the admission of these statements as hearsay if "offered for the truth of the matter asserted." (R. Vol. 2, p. 69). On appeal, the appellant contends that the statements should not have been admitted because they do not fall under one of the exceptions listed in Mississippi Rules of Evidence Rule 404(b) and because the balancing analysis of Rule 403 was not employed by the trial court. The appellant, however, failed to raise 404(b) and 403 grounds at trial and is therefore barred from raising them on appeal. *Carter v. State*, 722 So.2d 1258 (Miss. 1998). As for the third instance complained of by the Appellant, there was no objection on any ground. (R. Vol. 2, pg. 105).

We do not find that the Appellant here takes issue with the trial court's ruling to the effect that the statements were not inadmissible hearsay. In any event, the trial court did not err by allowing these statements.

The admission of evidence is left to the discretion of the trial judge and is only to be reversed where that discretion was abused. *Lewis v. State*, 573 So.2d 719, 722 (Miss. 1990). M.R.E. Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The comment to Rule 801 says that "if the significance of a statement is simply that it was made and there is no issue about the truth of the matter asserted, then the statement is not hearsay." The

Mississippi Supreme Court has allowed, against an objection, an officer's testimony to explain why the officer acted in a certain way, holding that testimony of that kind is not offered to prove the truth of the matter asserted. *Outerbridge v. State*, 947 So. 2d 279, 285 (Miss. 2006). Statements are "not hearsay unless the part offering the statement is attempting to prove that the statement is true." *Brown v. State*, 969 So. 2d 855, 861 (Miss. 2007). The statements about the call for assistance were merely to demonstrate how the officers came to be on the scene. The statements do not fall within the definition of hearsay in the Mississippi Rules of Evidence.

The Appellant, in something of a flight of fancy, tells this Court that the evidence was not proper evidence of flight. That was not the purpose of the evidence. In any event, as we have said, the sole ground advanced to bar admission of the evidence was hearsay, not relevance.

The Appellant also alleges that the trial court instructed the State that it could not attempt to prove what the absent police officer heard and saw. The trial court did so rule. (R. Vol. 2, pp. 55 - 56). However, we fail to see that the State attempted to circumvent the ruling or that the ruling was violated. The State did not attempt to prove through hearsay testimony what the officer who stopped the Appellant saw and heard. It is true that there was an explanation attached to the reason why the officer needed assistance, but that was the extent of it. (R. Vol. 3, pg. 69; 82). It might be argued that the officer in the third instance said a little more than was necessary (R. Vol. 2, pg. 105), but, as we have said, there was no objection to this testimony on any ground. Thus, no complaint may be made of it here. *Dixon v. State*, 953 So.2d 1108 (Miss. 2007).

In the event, however, that this Court should find error in the admission of the reason for the officers presence at the scene was error, any such error should be deemed harmless. There is no question about the guilt of the Appellant. The admission of these snatches of testimony

cannot be reasonably seen to have prejudiced the Appellant. Since there was not prejudice, there is no basis to find reversible error, assuming for argument only that error was committed. *Nicholson ex rel Gollot v. State*, 672 So.2d 744, 751 (Miss. 1996).

The second assignment of error is without merit.

III. ADMISSION OF THE PHYSICAL EVIDENCE WAS NOT ERROR AS THERE WAS NO INDICATION OF TAMPERING OR ALTERATION

The appellant contends that the admission of the cocaine at trial was error because the chain of custody of that evidence was not sufficiently established. "The chain of custody of evidence in control of the authorities is usually determined within the sound discretion of the trial judge and unless this judicial discretion has been so abused as to be prejudicial to the defendant this Court will not reverse the rulings of the trial court." *Nix v. State*, 276 So. 2d 652, 653 (Miss. 1973)(citing *Wright v. State*, 236 So. 2d 408 (Miss. 1970)).

The Appellant claims that the chain of custody was not sufficiently establish because the officer who first took the cocaine into custody did not testify.

The bag of cocaine was removed from the appellant's throat in the ambulance. Once removed, the bag was placed on a seat next to the police officer. The officer was told not to touch the bag, that it was a bio-hazard since it had been in contact with body fluids. The bag taken from the Appellant's mouth was placed into another bag. The EMT who testified stated that the bag that was put into the other bag was the bag taken from the Appellant's mouth or throat. (R. Vol. 2, pp. 115 - 116).

The next person who handled the evidence was a member of the narcotics unit who removed the evidence from the locked evidence locker the day after the arrest. Nothing in his testimony indicated that the procedures for collecting and processing evidence had not been

properly followed by the arresting officer. (R. Vol. 3, pp. 151-52). The bag had all of the required markings and had been sealed. (R. Vol. 2, p. 125). The missing officer's initials and badge number were on the bag, and the complaint number for the report he wrote was on the bag too.

One of the officers involved in the arrest of the Appellant identified the bag inside the bio-hazard bag as being "consistent" with the bag he saw in the Appellant's mouth. (R. Vol. 2, pp. 85 - 86).

The appellant argues that because the officer who initially collected the evidence was not there to testify, the chain of custody has not been established. His only contention that the evidence was tampered with, altered or otherwise contaminated is based in the testimony of the forensic analyst. When asked about the weight of the cocaine in the bag, the analyst testified that he was unable to accurately weigh the evidence because it was wet at the time of analysis. He did not attempt to dry the cocaine because doing so would have been difficult and could possibly have resulted in contamination. He never said that the evidence was contaminated or even possibly contaminated. In fact, he specifically said that he did not dry the evidence in an open room because of possible resulting contamination. (R. Vol. 3, pp. 159-60). The contents of the bag was considered to be a bio-hazard. The analyst wanted to limit his contact with it and did not feel it necessary to dry the contents and weigh it. (R. Vol. 3, p. 161). The analyst did not mean that the evidence was contaminated by being tampered with, but that it posed a possible danger to persons handling it for analysis.

The Mississippi Supreme Court has clearly stated that every single person who handles evidence is not required to testify at trial in order to establish the chain of custody. Rather, "the proponent must satisfy the trial court that there is no reasonable inference of material tampering with (or deliberate or accidental) substitution of the evidence." *Butler v. State*, 592 So. 2d 985

(Miss. 1991). The test is whether there is indication of tampering and there is a presumption that authorities performed their duties with regularity. *Nix*, 276 So. 2d 653. The Court has also found that in the absence of a contention that the evidence was tampered with or altered in some way, the chain of custody is satisfactory. *Ellis v. State*, 934 So. 2d 1000, 1005 (Miss. 2006). Where a case does not present evidence of such alteration or tampering, the abuse of discretion test requires that, even though a chain of custody may not have been thoroughly established, the trial court's decision should not be reversed. *Ormond v. State*, 599 So. 2d 951, 959 (Miss. 1992).

Contamination of evidence by the presence of bodily fluids from the defendant does not contaminate the evidence for purposes of establishing a chain of custody. Neither does the absence of the collecting officer for testimony overcome the presumption that the evidence was handled properly. There is no evidence of tampering, alteration, or substitution of the evidence presented at trial and no evidence offered to overcome the presumption that the evidence was handled properly.

The EMT who testified stated that the bag within the bio-hazard bag was the bag taken from the Appellant's mouth. This testimony, together with the fact that there was nothing shown to reasonably suggest that the substance within the bag within the Appellant's mouth was tampered with or substituted was sufficient to adequately establish the chain of custody.

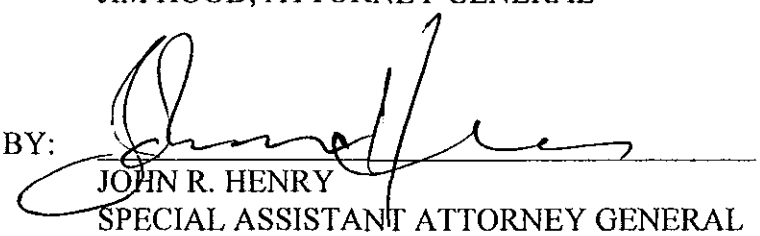
The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, 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 Lee J. Howard
Circuit Court Judge
P. O. Box 1344
Starkville, MS 39760

Honorable Forrest Allgood
District Attorney
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Leslie S. Lee, Esquire
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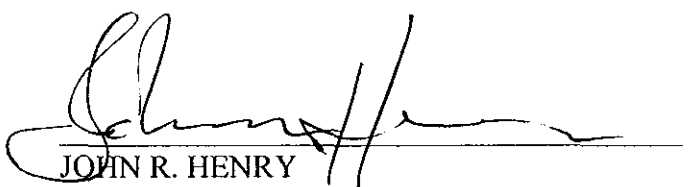
This the 28th day of July, 2008.



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