

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FRANK SMITH

APPELLANT

VS.

NO. 2008-KA-0494

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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FRANK SMITH

APPELLANT

VERSUS

NO. 2008-KA-0494-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Frank Smith was convicted in the Circuit Court of Pike County on a charge of possession of at least one tenth of a gram but less than two grams of cocaine with intent to distribute. He was sentenced as an habitual offender to a term of life in the custody of the Mississippi Department of Corrections without the possibility of parole or early release. (C.P.) Aggrieved by the judgment rendered against him, Smith has perfected an appeal to this Court.

Substantive Facts

Kennis Montgomery testified that he was employed by the Pike County Sheriff's Department as a "shift sergeant and ... K-9 officer." On September 25, 2006, Deputy Montgomery was dispatched to the residence of Katrina Lyons on a report of "illegal activity." There, he spoke with Ms. Lyons and took her "complaint." As he was "sitting there taking a report, ... a black truck pulled

up in her yard, backed out, and then started back down the road, Frank Carver Road, toward Muddy Springs Road.” Deputy Montgomery “left her residence, got behind the vehicle, and stopped it after [it] had carelessly drove [sic] off, run off to the edge of a ditch and come [sic] back on the road.” He then “performed a traffic stop on that black vehicle.” (T.55-57)

When he “walked up to the driver’s side of the vehicle which was driven by Ms. [Daphne] Patterson,” Deputy Montgomery “asked her for her driver’s license.” Ms Patterson handed him some sort of identification card and informed him that she did not have a driver’s license. He “ran that through dispatch.” While he “was waiting on getting the information back,” he noticed two open cans of beer “on the passenger floorboard where Mr. Frank was sitting.” When Deputy Montgomery asked Ms. Patterson if she had “been drinking,” she “advised ... that she had and Mr. Frank also advised ... that he had been drinking also.” Deputy Montgomery “asked Ms. Patterson to step out of the vehicle” so that he “could perform the field sobriety on her.” (T.57)

Once Ms. Patterson was out of the vehicle, Deputy Montgomery asked her if there were any weapons or anything illegal on her person or in the truck, “and she advised ... that there wasn’t” and told him that he “could search the vehicle.” “She also advised ... that it was Mr. Smith’s vehicle.” After Officer Brian Ellison arrived to provide back-up, Deputy Montgomery asked Smith to “step out for a Terry pat down” for his (Deputy Montgomery’s) safety. He asked Smith “were there any firearms or anything illegal in the vehicle and he advised ... there wasn’t.” Deputy Montgomery “kept him at the front of the truck” while he had her [Ms. Patterson] at the back of the truck.” (T.58)

At that point, Deputy Montgomery asked Smith “for consent,” and Smith gave him permission to look inside the vehicle. Deputy Montgomery “got the two beer cans out and poured them off on the side of the road.” He then “proceeded to look for any firearms or anything illegal in the vehicle.” He found “[n]othing on the driver’s side.” Under the passenger’s side seat, he

“found a brown paper bag that had a pill bottle in it that had black electric tape wrapped around it.” He “looked inside the pill bottle and found some crack cocaine.” (T.58-59) Deputy Montgomery then “secured the bottle” in his vehicle and “placed Frank Smith and Daphne Patterson in custody and read them their rights, Mirandized them.” (T.60)

When asked whether he had attempted to recover fingerprints from the bottle, Deputy Montgomery answered, “No, sir, I didn’t. Anytime you’ve got something that slick, it’s like glass, it’s hard to take fingerprints off of something like that.” (T.60)

On cross-examination, defense counsel asked several questions about Deputy Montgomery’s failure to attempt to obtain fingerprints from the bottle. (T.62-64) On redirect examination, the prosecutor asked, “If you would, just tell us what evidence, what other evidence you had when you made the decision not to get fingerprints off of the pill bottle.” Deputy Montgomery responded,

Being that the drugs was [sic] found on his side of the vehicle where he was sitting under the seat where he was sitting, under the edge of the seat, she [Ms. Patterson] I.D.’d that it was going to be in a brown paper bag, pill bottle with black electric tape on it, and that’s where I would find the crack cocaine. And I did find that in the vehicle, on his side of the vehicle, under his seat, under the edge of his seat, just as she had described it to me.

(T.65)

Daphne Patterson, also known as “Penny,” testified that she had used crack cocaine for the past 21 years and that she had a “serious problem” with it. On September 25, 2006, she “was at the house in the bed” when her “stepdad” asked her to “drive him somewhere.” Ms. Patterson drove him “to Ms. Katrina’s house, “where Ms. Lyons informed them “that some police had been to her house and ... was still there, ... at the bottom of the hill.” After inquiring whether Ms. Lyons “need[ed] anything,” Ms. Patterson “pulled out and the police officer pulled out behind” them. (T.72-73) Ms. Patterson went on to testify as follows:

I stopped the truck and got out of the truck. The officers searched my purse, searched me, and he didn't find anything on my person. And he searched my stepdad and he found the pill bottle in a brown paper bag under his seat. He asked me was it mine and I told him, "No." He asked my stepdad was it his and he told him, "No," but when we was [sic] in the car, the police car, he asked me would I take the cover and I told him, "No," because it wasn't mine.

(T.73)

Ms. Patterson testified additionally that because Smith was her "stepdaddy" who had helped rear her, it was difficult for her to testify in this case. She had not been promised anything in exchange for her testimony. (T.74)

Finally, Ms. Patterson identified State's Exhibit 1 as "Daddy Frank's pill bottle with his dope in it." She had seen it many times. She testified that she and Smith had gone to Ms. Lyons' house that day "[t]o sell her some dope." When they were stopped by Deputy Montgomery, Ms. Patterson offered to take the bottle and hide it on her person because she thought the police might not search her undergarments. Smith, however, "wouldn't give it" to her. (T.75-76)

On cross-examination, Ms. Patterson testified that she also had wanted to collect ten dollars owed to her by "Ms. Ouida," Ms. Lyons's mother-in-law. (T.77-78) On redirect examination, the assistant district attorney asked "whose idea" it was to go to Ms. Lyons' house that day and why they had done so. (T.79) Ms. Patterson answered,

Why did we go there, he wanted to go collect some money. He had money; she had money of his, too, and he wanted to go get some money of his, so I said I might as well get mine from Ouida myself. But he went there because I think Katrina owed him forty-something dollars for some drugs that he had already credited her and that's the reason, the real reason, why we went there because he was propositioning her sexually and she owed him for some of his drugs.

(T.79)

Ms. Lyons testified that she, too, had struggled with a “drug problem” but she had “quit” after her family had threatened to send her “to a treatment.” On September 25, 2006, Ms. Lyons was cleaning her house and cooking supper for her children when “looked out” her window and saw “a black truck and it was Penny and Frank” in the driveway. Ms. Lyons “walked out there and told ‘em[sic], ... ‘Y’all need to leave; the law is watching my house.’” They left, but returned in an hour or two “and that’s when the police came.” Ms. Lyons told the officer that Ms. Patterson and Smith had tried to sell her “some crack,” but that she had declined. She also described the pill bottle and the brown paper bag which Smith had shown her that day. She did not see Ms. Patterson in possession of the bottle. (T.66-68)

Archie Nichols was accepted by the court as “an expert in the field of forensic science specializing in drug analysis.” Mr. Nichols testified that the substance in the pill bottle was cocaine in the amount of “[t]hree-tenths of a gram.” (T.81-83)

The defendant testified that Ms. Patterson had asked him “to take her by Katrina’s house because she owed her some money.” En route to Ms. Lyons’s house, Ms. Patterson “kept begging to drive.” When Smith “stopped to take a leak,” his stepdaughter took over the wheel. Both of them were drinking beer. He acknowledged that he consented to the search of the truck. He also stated that he told Officer Montgomery, “‘I ain’t got nothing in there.’” He disavowed knowledge or ownership of the cocaine. (T.89-92)

SUMMARY OF THE ARGUMENT

The verdict is not against the overwhelming weight of the evidence. The proof presented a straight issue of fact which was properly resolved by the jury. Accordingly, the trial court did not err in overruling the defendant's motion for new trial.

PROPOSITION ONE:

THE VERDICT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

The sole issue presented on this appeal is whether the trial court erred in overruling the motion for new trial on the ground that the verdict is against the overwhelming weight of the evidence. (C.P.34, 37) To prevail on this point, Smith must satisfy the rigorous standard set out below:

The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182. **"This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible."** *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).

(emphasis added) *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss.App.2004),

Furthermore,

The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of

witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).

(emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court recently reiterated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury." [citations omitted] See also *Miller v. State*, 983 So.2d 1051 (Miss.2008) (except that in Smith, the defendant did testify).

The state respectfully submits that Smith's challenge to the weight of the evidence is essentially an attempt to relitigate factual issues, specifically the credibility of the witnesses, properly resolved by the jury. Incorporating by reference the facts set out under the Statement of Substantive Facts, the state asserts the trial court did not abuse its discretion in overruling the motion for new

trial.¹ The evidence is not such that allowing the verdict to stand would be to sanction an unconscionable injustice.

CONCLUSION

The state respectfully submits that the proposition presented by Smith is without merit. Accordingly, the judgment of the circuit court should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**


BY: DEIRDRE McCRORY
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¹As the assistant district attorney argued in closing,

You have heard from eyewitnesses to a crime. Two independent and unrelated eyewitnesses. You've heard from the person who called the police and one of the people who was arrested, that told consistent stories. Each of them described the pill bottle to Deputy Montgomery before Deputy Montgomery found it. They're not preachers. ... But through their addiction, their testimony today was brutally honest. They told things that most people would be very uncomfortable talking about; admitting their problems ... Daphne Patterson, or Penny, was testifying against herself as she testified today. Why would she do that? Why would she implicate herself in a crime if she were not telling the truth? She hasn't been promised anything. ... She's telling the truth because she's ready to move on. ...

This is constructive possession, under the defendant's seat. The cocaine was found by Deputy Montgomery under the seat of the defendant's truck, his work truck, where he was sitting. Daphne Patterson, or Penny, gave a good explanation that [she] asked him to give her the cocaine before the traffic stop because she could hide it from a male officer.

(T.106-07)

CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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