

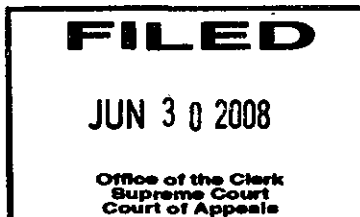
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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**FRANK SMITH**

**APPELLANT**

**V.**



**NO. 2008-KA-00494-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF OF THE APPELLANT**

**ORAL ARGUMENT NOT REQUESTED**

**MISSISSIPPI OFFICE OF INDIGENT APPEALS**

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**FRANK SMITH**

**APPELLANT**

**V.**

**NO. 2008-KA-00494-COA**

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**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. Frank Smith, Appellant
3. Honorable Dewitt (Dee) T. Bates, Jr., District Attorney
4. Honorable David Strong, Circuit Court Judge

This the 30th day of June, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



\_\_\_\_\_  
LESLIE S. LEE  
COUNSEL FOR APPELLANT

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## **STATEMENT OF THE ISSUES**

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

## **STATEMENT OF JURISDICTION**

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution and Miss. Code Ann. 99-35-101.**

## **STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Pike County, Mississippi, and a judgment of conviction for the crime of unlawful possession of at least one tenth (0.1) but less than two (2) grams of cocaine with intent to distribute against the appellant, Frank Smith. Smith was subsequently found to be a habitual offender under Miss. Code Ann. §99-19-83. He was therefore sentenced to life without the possibility of parole or early release. This sentence followed a jury trial on January 15, 2008, Honorable David H. Strong, Jr., Circuit Judge, presiding. Smith is currently incarcerated with the Mississippi Department of Corrections.

## **FACTS**

According to the trial testimony, on September 25, 2006, Deputy Kennis Montgomery responded to a call about illegal activity occurring at 1036 Frank Carver Road, the residence of Ms. Katrina Lyons. (T. 56). While Deputy Montgomery was taking Lyons's report, a black truck pulled into the yard then backed out and started down the road. (T. 57). Lyons identified the black truck as belonging to the individuals who had earlier tried to sell her cocaine. (T. 57, 67).

Deputy Montgomery then proceeded to follow the vehicle after Lyons had identified it as being a part of his investigation. Deputy Montgomery testified that he preformed a traffic stop after the vehicle had carelessly driven off the road. Deputy Montgomery then walked to the driver's side of the vehicle and asked the driver for their license. Daphne Patterson was driving the vehicle and responded that she did not have a drivers license. Deputy Montgomery noticed two open cans of beer on the floorboard. (T. 57). He decided to order both the driver, Patterson, and the passenger, Frank Smith, out of the vehicle. (T. 57-58).

Deputy Montgomery asked Patterson and Smith for consent to search the vehicle, both of whom responded in the affirmative. Upon searching the vehicle, Deputy Montgomery found a brown paper bag with a pill bottle inside wrapped in electrical tape under the passenger seat. (T. 58). He looked inside and found what appeared to be cocaine. (T. 59). He then placed both Patterson and Smith in custody and eventually turned the evidence over to a drug agent. (T. 60). Deputy Montgomery did not take fingerprints from the pill bottle. (T. 61). He testified that it was not unusual to fail to take fingerprints off a bottle similar to the one found. (T. 60-61).

Katrina Lyons testified that on September 25, 2006, Patterson and Smith pulled up her driveway in a black truck. According to Lyons, Patterson and Smith tried to sell her cocaine, but she refused. (T. 67). She claimed that Smith pulled out a pill bottle and dumped the cocaine into his hand. She testified that Patterson never had control over the pill bottle. (T. 68). Once Patterson and Smith left her house, she called the police and later told Deputy

Montgomery what happened. (T. 67-68). Lyons admitted having a problem with smoking crack and doing cocaine. (T. 66).

Patterson was called as a witness for the State. Patterson testified that she had used and had a problem with multiple drugs, including crack cocaine, for twenty-one (21) years. (T. 73). According to her testimony, she and her stepfather, Smith, drove to Katrina Lyons's house in order to sell her drugs. (T. 75). She remembered driving the car and remembered Deputy Montgomery finding the pill bottle containing the drugs under Smith's seat. (T. 73). She contended that the pill bottle found in the truck belonged to Smith, and that she had seen it with him several times. (T. 75). During cross-examination, however, Patterson admitted to previously telling a different story on tape the night the incident occurred. (T. 76-77).

Patterson could not remember exactly what she said on tape the night the incident occurred because in her words she, "had been smoking dope." (T. 78). According to what she stated on tape, she and Smith went to Lyons house to collect ten dollars that Katrina owed her. During cross-examination, however, Patterson stated Lyons's mother-in-law was the person who owed her ten dollars. (T. 77). On redirect she reaffirmed her first statement that it was Smith's idea to drive to Lyons's house, however, this time the reason was to collect money that Lyons owed Smith. (T. 79).

Archie Nichols, a forensic scientist employed by the State Crime Laboratory, testified that the evidence he received in relation to this case contained cocaine. (T. 83). He identified the report that included his findings, which was then admitted into evidence. (T. 84). Nichols admitted that, to his knowledge, no fingerprints were taken off of the pill bottle

found under Smith's seat. Nichols testified, however, that his office had the capability to take fingerprints from the evidence. (T. 85).

Smith testified on his own defense that on September 25, 2006, he drove his stepdaughter, Patterson, to the washerette to wash clothes. After leaving the washerette Patterson asked him to take her to Lyons's house to collect money Lyons owed her. (T. 89). Smith agreed to take Patterson to Lyons's house, but stopped on the side of the road to use the bathroom. Upon returning to the car Smith allowed Patterson to drive. He testified that when they reached Lyons house she told them to leave because the police were casing her house. So Patterson and Smith pulled out of the driveway and started down the road when a police officer pulled into Lyons driveway. (T. 90).

Patterson pulled over to the side of the road when she saw the police officer. (T. 90). When the officer pulled them over and discovered that Patterson did not have a drivers license he asked them to exit the vehicle. Smith testified the officer asked for their consent to search the vehicle, called for backup, and searched the truck. (T. 91). Smith claimed that when backup arrived the officer searched the truck again and found a pill bottle containing cocaine. Smith emphatically denied having any knowledge of the drugs being in the vehicle, let alone under his seat. (T. 92).

During sentencing the State moved to amend the indictment to allege that Smith was a habitual offender under Miss. Code Ann. §99-19-83. (T. 113). After hearing the testimony of several witnesses called by the state, the trial court sentenced Smith to life without the possibility of parole or early release. (C.P. 41-42, R.E. 13-14).



## **SUMMARY OF THE ARGUMENT**

Frank Smith was sentenced to life without the possibility of parole or early release based on a verdict that was against the overwhelming weight of the evidence. The testimony used to convict him was unreliable and incredible. A new trial should have been granted.

## **ARGUMENT**

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

In trial counsel's Motion for a New Trial, counsel argued that the verdict was against the overwhelming weight of the evidence. (C.P. 48-49, R.E.18-19). The trial judge denied the motion. (C.P. 52, R.E. 22). The trial judge erred in refusing to grant this motion.

A motion for a new trial challenges the weight of the evidence; reversal is only warranted if the lower court abused its discretion in denying a motion for a new trial. *Dilworth v. State*, 909 So.2d 731 (¶20-22) (Miss. 2005). "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 (¶18) (Miss. 2005). This Court must accept as true the evidence which supports the verdict and must construe the evidence in the light most favorable to the verdict. *Lee v. State*, 910 So.2d 1123 (¶22) (Miss.App. 2005), citing *Cousar v. State*, 855 So.2d 993 (¶14) (Miss. 2003).

A jury verdict will only be disturbed on appeal in exceedingly rare cases. *Thomas v.*

*State*, 92 So. 225, 226 (1922). Nevertheless, the Mississippi Supreme Court has not hesitated to order a new trial where it considers the determination of guilt to be based on extremely weak or tenuous evidence. *Dilworth*, at 909 So.2d 731 at ¶ 22.

In the case at bar, the Appellant, Frank Smith, was convicted of the crime of unlawful possession of at least one tenth (0.1) but less than two (2) grams of cocaine with intent to distribute. Apparently, the jury even had grave concerns about the sufficiency of the evidence<sup>1</sup>. Smith was convicted based on the theory of constructive possession. The State's theory of constructive possession was based on the testimony of two admitted crack and cocaine users, Daphne Patterson and Katrina Lyons. Without their testimony nothing linked Smith to the cocaine other than him sitting near where it was found. Without their testimony there was nothing to show that Smith had any knowledge of the cocaine or the pill bottle in which the cocaine was found. To allow the testimony of two highly unreliable witnesses to send a man to prison for the rest of his life without the possibility of parole would sanction an unconscionable injustice.

The State's case depended on Smith being in constructive possession of the cocaine found in the truck. Possession requires, "sufficient facts to warrant a finding that the defendant was aware of the particular substance and was intentionally and consciously in

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<sup>1</sup> See Affidavit from Deborah Garfield. C.P. 51, R.E. 21. This Court should note that appellant counsel considered raising a claim of error based on the trial court's refusal to grant a new trial due to juror misconduct. However, after researching the issue, counsel determined the claim to be without merit as an attempt to impeach the jury's verdict. See MRE 606(b), *Gavin v. State*, 767 So.2d 1072 (¶ 6-7) (Miss.App. 2000), and *Payton v. State*, 897 So.2d 921 (¶133-35) (Miss. 2003).

possession of it.” *Hamm v. State*, 735 So. 2d 1025, 1028 (Miss. 1999). “Constructive possession may be shown by establishing that the drug involved was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other circumstances.” *Id.* The State, therefore, was required to prove beyond a reasonable doubt that Smith intentionally and consciously exercised dominion or control over the cocaine.

The State’s entire case rested on the word of two admitted drug users. Without them, the State had no evidence linking Smith to any crime. Daphne Patterson admitted having a serious problem and addiction with drugs, including cocaine, that went on for at least twenty one (21) years. At first she testified that she and Smith went to Lyons’s house because they wanted to sell Lyons drugs. (T. 73). When she was confronted with the fact that she told a completely different story on tape the day the event took place she conveniently began to forget what happened. (T. 76-79). She forgot asking Smith if she could drive. She then testified that she started driving when they left her house for the washateria. Despite forgetting these details she testified that she “basically” remembered why and how she was arrested. (T. 77). She blamed her foggy memory on the fact that she had been, “smoking dope,” the day she and Smith were arrested. (T. 78).

It was Patterson’s testimony that helped put the pill bottle in Smith’s hands. Patterson testified to seeing Smith with the pill bottle that day and several times prior. (T. 75). Her testimony was crucial to establishing Smith’s dominion and control over the pill bottle. The problem is she not only failed to remember significant details and chain of events, she

admitted to being under the influence of drugs the day this happened. She told a story the day it happened and different story when she testified. The admitted drug use and inconsistencies render her testimony incredible. To send a man to prison for life without the possibility of parole based on the incredible testimony of a co-defendant and admitted drug user would sanction an unconscionable injustice.

The other witness linking Smith to the cocaine was Katrina Lyons. Lyons testified that Smith and Patterson came to her house and offered to sell her some cocaine that Smith had in a pill bottle. (T. 67-68). She also testified that she had gotten cocaine from both Smith and Patterson in the past and that she had a drug problem herself. (T. 66, 69). According to Patterson, the two had been friends who smoked drugs together for seven to eight years. (T. 78-79).

Lyons's testimony was crucial to the State's case as well. Her testimony was offered to establish Smith and not Patterson exercised control and dominion over the pill bottle containing the cocaine. Again the State relied on the testimony of an admitted drug user who also happened to be a friend of Smith's co-defendant who was testifying against him. It is clear that Lyons was doing her best to help her friend, Patterson. While Patterson was not offered a deal it seems likely that her testimony was meant to either secure one or throw all suspicion on Smith.

Without the testimony of either Daphne Patterson or Katrina Lyons the State had no evidence linking the Appellant to the cocaine. The evidence was found underneath where Smith was sitting, but proximity alone does not prove constructive possession. *Sumrall v.*

*State*, 758 So.2d 1091 (¶17) (Miss.App. 2000). Both Patterson and Lyons were unreliable and incredible. There were no fingerprints on the pill bottle and no other evidence that could prove constructive possession.

Because the testimony of Patterson and Lyons was unreliable and incredible, this case is more like *Jones v. State*, 693 So. 2d 375 (Miss. 1997). In *Jones* this Court reversed a marijuana conviction based on constructive possession where the defendant was a passenger in a car where drugs were found and there were no other incriminating circumstances linking him to the evidence. *Id* at 377. In the case at bar, Smith was a passenger in a car where drugs were found. The only evidence other than proximity that linked him to the cocaine was incredible. A finding of constructive possession in these circumstances is against the overwhelming weight of the evidence.


Smith denied having any knowledge of the cocaine, did not exercise complete dominion or control over the vehicle, nor did he even own the vehicle. Smith was merely sitting in the wrong place at the wrong time. There was ample time and opportunity for Patterson, an admitted twenty-one year cocaine addict, to place the drugs underneath the passenger seat. The verdict is against the overwhelming weight of the evidence and to allow it to stand would sanction an unconscionable injustice.

## CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed above, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
For Appellant Frank Smith

By:   
\_\_\_\_\_  
Leslie Lee  
Miss. Bar 7765

By:   
\_\_\_\_\_  
Brett Ferguson, Legal Intern

## CERTIFICATE OF SERVICE

I, Leslie S. Lee, Counsel for Frank Smith, 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:

Honorable David Strong  
Circuit Court Judge  
McComb, MS 39649

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So certified, this, the 30<sup>th</sup> day of June, 2008.



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