

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

**REGINALD D. CLAY**

**APPELLANT**

**VS.**

**NO. 2008-KA-0691**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE ISSUES**

- I. THE APPELLANT WAS PROPERLY SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE PURSUANT TO MISSISSIPPI CODE ANNOTATED §99-19-83.
- II. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

**STATEMENT OF THE FACTS**

Deputy Ruston Russell of the Lauderdale County Sheriff's Department and Agent Jerome Moore of the East Mississippi Drug Task Force were patrolling when they noticed a car run a stop sign. (Transcript p. 70). Deputy Russell turned on his lights and siren in an attempt to stop the car. (Transcript p. 71). As they followed the car before it stopped, both officers noticed the rear passenger acting suspiciously. (Transcript p. 71 and 98). The passenger ducked down and back up and moved around. (Transcript p. 71 and 98).

After speaking with the driver of the vehicle and noticing the smell of alcohol and marijuana, Deputy Russell called a DUI officer. (Transcript p. 72). He then spoke with the rear passenger, the Appellant, Reginald Clay, who initially gave the officer a false name. (Transcript p. 72). After noticing Clay's nervous behavior, Deputy Russell performed a pat down for weapons and noticed something in Clay's front pocket. (Transcript p. 73). Deputy Russell reached into Clay's front pocket and a glass crack pipe fell to the ground and shattered. (Transcript p. 73). He also found a small rock of cocaine in Clay's pocket. (Transcript p. 74).

Both officers searched the vehicle and found a bag of crack cocaine in the rear passenger area of the vehicle. (Transcript p. 74). It was later determined that the contents of the bag were "cocaine in a base form with a weight of 2.37 grams." (Transcript p. 143). Clay was arrested, tried, and convicted of possession of cocaine. He was sentenced under Mississippi Code Annotated §99-19-83 as a habitual offender to serve life in the custody of the Mississippi Department of Corrections with no possibility of parole.

### **SUMMARY OF THE ARGUMENT**

Clay was properly sentenced pursuant to Mississippi Code Annotated §99-19-83. He was previously convicted of two separate felonies, one of which was a crime of violence, arising from separate incidents and served at least one year for each. Thus, his sentence was within the statutory guidelines.

The verdict was not against the overwhelming weight of the evidence as there was ample evidence that Clay was in constructive possession of the cocaine.

## ARGUMENT

### I. THE APPELLANT WAS PROPERLY SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE PURSUANT TO MISSISSIPPI CODE ANNOTATED §99-19-83.

“Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute.” *Gibson v. State*, 731 So.2d 1087, 1097 (Miss. 1998) (citing *Hoops v. State*, 681 So.2d 521, 537 (Miss.1996)). Further, it has been held that “as general rule, a sentence will not disturbed on appeal so long as it does not exceed the maximum term allowed by statute.” *Stromas v. State*, 618 So.2d 116, 122 -124 (Miss.1993) (*citations omitted*). Moreover, “[d]eclaring a sentence violative of the Eighth Amendment to the U.S. Constitution carries a heavy burden and only in rare cases should this Court make such a finding.” *Id*, at 123. (*Emphasis added*).

Clay argues that his “life sentence without parole for possessing essentially a small amount of cocaine is unconstitutionally too severe and clearly disproportionate to the offense.” (Appellant’s Brief p. 5). However, Clay’s sentence is within the statutory guidelines. He was sentenced according to Mississippi Code Annotated §99-19-83 which states as follows:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

(*Emphasis added*). As established at his sentencing hearing, Clay meets the requirements for sentencing under this statute. The following prior convictions were established:

- Lauderdale County Cause No. 148-92 / Robbery / Sentenced on February 23, 1993 to 15 years with 4 to serve and 11 suspended with 5 years probation. (Actually

served one year and three months then paroled, parole revoked and actually served an additional two years and nine months then paroled again. Probation later revoked and served 4 years and 3 ½ months then released for earned release supervision. Violated earned release supervision and served one year and one month).

-Lauderdale County Cause No. 313-93 / Cocaine Possession / Sentenced on September 30, 1993 to serve 1 year to run concurrently with the robbery sentence. (Actually served 7 months).

-Lauderdale County Cause No. 841-00 / Attempted Uttering a Forgery / Sentenced on May 31, 2001 to serve 7 years with 1 day to serve and 6 years, 364 days suspended with 5 years probation. (Actually served one day).

-Lauderdale County Cause No. 240-02 / Felony DUI / Sentenced on October 2, 2002 to serve one year to run consecutive to revocation on Cause NO. 841- 00. (Actually served one year).

(Transcript p. 217 - 220). Thus, Clay was convicted of two separate felonies arising from separate incidents (i.e., robbery and felony DUI) and served at least one year for each. Furthermore, his robbery conviction is considered a crime of violence. *See Magee v. State*, 542 So.2d 228 (Miss. 1989). As such, Clay was properly sentenced within the statutory guidelines established by the legislature.

Nonetheless, Clay, relying on *Clowers v. State*, 522 So.2d 762 (Miss. 1988), asserts that his sentence was disproportionate to his crime. This Court has previously held that “the holding in *Clowers v. State*, is not the rule, but the exception,” noting that “the Mississippi Supreme Court in *Clowers* clearly stated that it was establishing no litmus test for proportionality and noted that ‘outside the context of capital punishment, successful challenges to the proportionality of a particular sentence will be exceedingly rare.’” *Bell v. State*, 769 So.2d 247, 249 (Miss. Ct. App. 2006) (quoting *Clowers*, 522 So.2d at 765). Moreover, this Court in *Everett v. State*, held that “the ruling in *Clowers* is limited to its ‘own distinctive facts and procedural posture.’” 835 So.2d 118, 124 (Miss. Ct. App. 2003) (quoting *Barnwell v. State*, 567 So.2d 215, 221 (Miss. 1990)).

Additionally, Clay’s sentence was not grossly disproportionate to his crime and did not indicate that the trial judge failed to consider the gravity of the offense with the harness of the

sentence as Clay contends. *See Oby v. State*, 827 So.2d 731, 734 (Miss. Ct. App. 2002) (court upheld a life sentence without the possibility of parole for possession of .55 grams of cocaine); and *Wall v. State*, 718 So.2d 1107, 1114-15 (Miss. 1998) (court upheld a life sentence without the possibility of parole for possession of a controlled substance conviction).

Accordingly, as Clay's sentence was within the statutory guidelines and was not grossly disproportionate to the crime charged, this issue is without merit.

## **II. THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

Clay next argues that "the trial court erred in denying [his] motion for a new trial because the verdict was against the overwhelming weight of the evidence." (Appellant's Brief p. 8). The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence is as follows:

[This 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. A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice."

*Pierce v. State*, 860 So.2d 855 (Miss. Ct. App. 2003) (quoting *Smith v. State*, 802 So.2d 82, 85-86 (Miss. 2001)). On review, the Court must accept as true all evidence favorable to the State. *McClain v. State*, 625 So.2d 774, 781 (Miss.1993).

In support of this argument, Clay argues that "the prosecution presented no evidence that the cocaine that was found in the back seat of the vehicle belonged to Clay." (Appellant's Brief p. 10). He also argues that the cocaine was "not connected to Clay in any way by the evidence at trial besides mere presence in the vehicle." (Appellant's Brief p. 11). However, "[p]ossession of a controlled substance may be actual or constructive, individual or joint." *Dixon v. State*, 953 So.2d



1108, 1112 (Miss. 2007) (citing *Berry v. State*, 652 So.2d 745 (Miss. 1995)). Constructive possession was explained by the Mississippi Supreme Court as follows:

There must be sufficient facts to warrant a finding that defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. It need not be actual physical possession. 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 incriminating circumstances.

*Curry v. State*, 249 So.2d 414, 416 (Miss. 1971). This Court has held, in that regard, that “when the defendant is not the owner of the premises the State must show additional incriminating circumstances to justify a finding of constructive possession.” *Davis v. State*, 817 So.2d 593, 596 (Miss. Ct. App. 2002) (citing *Boches v. State*, 506 So.2d 254, 259 (Miss. 1987)). While, in the case at hand, Clay was not the owner of the vehicle and was not in exclusive control of the vehicle, there were numerous additional incriminating circumstances which justified the jury verdict. First, the cocaine was easily found in the backseat of the vehicle. (Transcript p. 74 and 128). The only passenger in the back seat was Clay. (Transcript p. 72). Second, there is nothing in the record to indicate, at any time after the drugs were found, that Clay denied that the drugs were his or that he was surprised that they were found in the car. Third, a crack pipe and small amount of cocaine were found on Clay’s person. (Transcript p. 73 - 74). Finally, Clay exhibited suspicious behavior before the stop (Transcript p. 71 and 98 - 100) and behaved as if he were nervous during the stop unlike the other people in the vehicle. (Transcript p. 73 and 131 - 132). He also initially gave officers a fake name. (Transcript p. 72). Thus, there is no doubt that the cocaine in question was subject to Clay’s dominion and control.

Clay relies on *Fultz v. State*, 573 So.2d 689 (Miss. 1990) to support his argument. (Appellant’s Brief p. 11). However, *Fultz* is easily distinguishable. First, the defendant in *Fultz*

claimed that he had no knowledge that the drugs were in the car and the drugs were actually found in the trunk of the car. In Clay's case, he never denied knowing that the drugs were in the car and the drugs were found within close proximity to him as opposed to the trunk of the car. Furthermore, the Court notes in *Fultz* that "the only additional incriminating circumstance was that the defendant had a small amount of marijuana on his person at the time of the arrest." *Id.* at 691 (*emphasis added*). In Clay's case there were several additional incriminating factors which are set forth above. The two most incriminating perhaps are the fact that a crack pipe and an actual rock of cocaine were found on Clay's person<sup>1</sup> and his suspicious behavior just before the stop and nervous behavior at the time of the stop. *See Blissett v. State*, 754 So.2d 1242 (Miss. 2000) (noting that the defendant's "nervous demeanor at the time of the stop was inconsistent with a lack of knowledge of the marijuana in the car"). Additionally, one of the officers on the scene testified as follows:

- Q: Was there anything anywhere else in the car to indicate that anybody else was possessing cocaine?  
A: No sir.  
Q: Any instruments you saw used to smoke cocaine in the front seat of the car?  
A: No sir, it wasn't. I looked very thoroughly. I didn't even find residue in the front of the vehicle.  
Q: You said that [the driver] smelled of marijuana, was there any indication on him that he had been smoking cocaine?  
A: No sir.

(Transcript p. 93).

Accordingly, the verdict was not against the overwhelming weight of the evidence and the trial judge did not err in denying Clay's motion for new trial.

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<sup>1</sup> Clay argues that "other than the testimony of the officers, no evidence is present to show that there was in fact a crack pipe or rock like crack cocaine substance on Clay." (Appellant's Brief p. 11). However, it is the jury's duty to determine the credibility of witnesses and they obviously chose to believe that the officers did find both a crack pipe and crack cocaine on Clay's person.

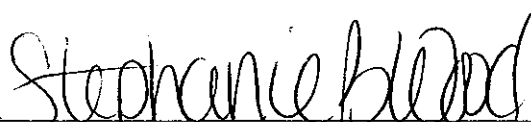
## CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Reginald Clay as the verdict was not against the overwhelming weight of the evidence and as he was properly sentenced.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

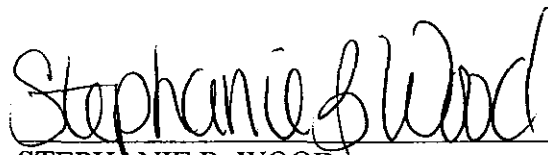
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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