

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHRISTOPHER T. LEWIS

APPELLANT

V.

NO. 2008-KA-1119-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. Christopher T. Lewis, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Lisa P. Dodson, Circuit Court Judge

This the 29 day of September, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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STATEMENT OF THE ISSUES

THE TRIAL COURT ERRED IN DENYING LEWIS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT THE EVIDENCE, AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT LEWIS' CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Harrison County, wherein Christopher Thomas Lewis was convicted for the crime of possession of a controlled substance in violation of Mississippi Code Annotated section 41-29-139(c)(1) (Rev. 2005). (Tr. 121, C.P. 47). The trial court sentenced him to serve a term of four (4) years without the possibility of parole. (Tr. 135, C.P. 50-51). Lewis is presently incarcerated in the custody of the Mississippi Department of Corrections and now appeals to this Court for relief.

STATEMENT OF THE FACTS

On April 20, 2006, Officer Samuel Jewell conducted a traffic stop of a car in which Lewis was riding as a passenger. (Tr. 67). As Officer Jewell approached the vehicle, he noticed the driver "passing something over in a hand movement" to Lewis. (Tr. 68). Approximately two minutes later, Officer Jason Goudin, who had just arrived as "backup," walked up to the passenger side window and had a short conversation with Lewis, during which he noticed an "off-white rock-like substance" in Lewis' left hand that Officer Goudin believed to be cocaine. (Tr. 69, 81). He then grabbed Lewis' left hand and the substance fell on the floorboard where it was seized. (Tr. 82). Lewis explained to Officer Goudin that the driver took the cocaine out of his mouth and handed it to him. (Tr. 84). Lewis was then arrested. (Tr. 83). The substance was transported to the Mississippi Crime Lab, where test results confirmed that the substance was in fact 2.3 grams of cocaine. (Tr. 65).

After presentation of the evidence, defense counsel moved for a directed verdict. (Tr. 89).

The court heard arguments from counsel and denied the motion. (Tr. 89-97). The jury then found Lewis guilty of possession of a controlled substance. (Tr. 121, C.P. 47). The trial court determined Lewis to be a habitual offender under Mississippi Code Annotated section 99-19-81 and, after considering the matter pursuant to *Clowers v. State*, 522 So. 2d 762 (Miss. 1998) and *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989), sentenced him to serve a term of four (4) years without the possibility of parole. (Tr. 135, C.P. 50-51).

SUMMARY OF THE ARGUMENT

The evidence was insufficient to support Lewis' conviction for possession of a controlled substance. The evidence showed that the driver of the vehicle handed the cocaine to Lewis, who only momentarily handled it until it was seized. Under *Berry v. State*, 652 So. 2d 745, 749-50 (Miss. 1995), a momentary handling such as this is insufficient to establish possession. Although *Berry* was a "constructive possession" case, the reasoning of its holding should apply equally to the instant case, as the main distinction between *Berry* and the instant case is only that the passenger in *Berry* took drugs from the driver and hid them in the glove compartment, whereas, Lewis took the drugs from the driver and hid them in his hand. Accordingly, this Court should hold that Lewis' momentary handling of the cocaine is insufficient to support his conviction for possession of a controlled substance.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING LEWIS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT LEWIS' CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE.

A motion for judgment notwithstanding the verdict tests the sufficiency of the evidence. *Reed v. State*, 987 So. 2d 1054, 1057 (¶10) (Miss. Ct. App. 2008). In reviewing a challenge to the

legal sufficiency of the evidence, the evidence is viewed in the light most favorable to the prosecution, who is given the benefit of all reasonable favorable inferences that may be drawn from the evidence. *Seeling v. State*, 844 So. 2d 439, 443 (¶8) (Miss. 2003). This Court may reverse where, “with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.” *Gleaton v. State*, 716 So. 2d 1083, 1087 (¶14) (Miss. 1998) (quoting *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987)).

In order to prove possession:

[T]here 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 possession. Constructive possession may be shown by establishing that the drug involved was subject to his dominion and control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.

Hamm v. State, 735 So. 2d 1025, 1028 (Miss.1999) (quoting *Curry v. State*, 249 So. 2d 414, 416 (Miss. 1971)).

In *Berry v. State*, 652 So. 2d 745 (Miss. 1995), Berry, a passenger, was convicted for possession of cocaine based on evidence that the driver of the vehicle in which Berry was riding handed him cocaine wrapped in a napkin, which Berry placed in the glove compartment at the driver’s direction as police pulled the vehicle over. 652, So. 2d 745, 746-47. On appeal, the Mississippi Supreme Court reversed Berry’s conviction, finding the evidence insufficient to support a finding that he exercised dominion and control over the substance. *Id.* at 749-750. Specifically, the court determined that Berry’s momentarily handling of the drugs and his act of placing them in the glove compartment at the driver’s request was insufficient to establish that Berry had dominion or control over the drugs. *Id.* at 751 (“[Berry] simply place[d] them in the glove compartment at [the

driver's] request, in [the driver's] car, and in [the driver's] presence. There was no evidence that [Berry] owned the drugs, paid for them, or controlled them in any manner.”).

Although, *Berry* was a “constructive possession” case, its reasoning should apply to the situation presented in the instant case. Constructive possession requires evidence that the defendant exercised dominion and control over the drugs; similarly, actual possession requires evidence that the defendant intentionally and consciously possessed the drugs. *Hamm*, 735 So. 2d at 1028. Under *Berry*, a momentary handling is insufficient to establish that drugs are subject to a defendant's dominion and control. The only material factor that distinguishes the instant case from *Berry* is that the defendant in *Berry* disposed of the drugs that he was given, whereas, Lewis kept the drugs concealed in his hand as police approached.

The facts of the present case establish no more in the way of conscious and intentional possession than did the facts in *Berry* establish dominion or control. Lewis and his companion were pulled over by the police. In that moment of panic, the driver handed Lewis a rock of cocaine. **What was he to do?** Had Lewis been aware of the *Berry* case, he would have simply placed the cocaine in the glove compartment or dropped it. Consequently, Lewis would not be guilty of possession. However, Lewis, who was placed in a very compromising situation, hid the drugs in his hand for a minute or two as police investigated. Lewis essentially had no choice; he did not *intentionally* possess the cocaine. Similar to the facts in *Berry*, Lewis simply took the cocaine from the driver, in the driver's car, and in the driver's presence. There was no evidence that Lewis owned the drugs, paid for them, or (intentionally) controlled them in any manner. It is human nature for one to take something that is handed to them. By the time that Lewis received the cocaine from the driver, the police were in close quarters, where they remained until the cocaine was seized. The simple fact that Lewis held the cocaine instead of disposing of it should be considered

inconsequential under the facts of this case.

Because there was no evidence that Lewis owned the drugs, and the evidence established that Lewis had the cocaine in his hand only because the driver handed it to him, his momentary handling of the cocaine should not be deemed intentional. Accordingly, this Court should find that the evidence was insufficient to support Lewis' conviction for possession of a controlled substance, and enter a judgment of acquittal.

CONCLUSION

For the foregoing reasons, Lewis is entitled to have his conviction for possession of a controlled substance reversed and rendered.

CERTIFICATE OF SERVICE

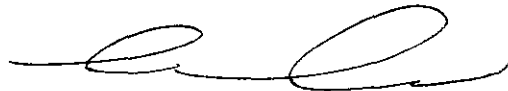
I, Hunter N. Aikens, Counsel for Christopher T. Lewis, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 29 day of September, 2008.



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