IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NOLAN WILLIAMS — APPELLANT

VS. — NO. 2009-KA-0092-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF OF APPELLEE

PROCEDURAL HISTORY:

On November 21, 2008, Nolan Williams, Jr., "Williams" was tried for possession of cocaine with intent to distribute before a Pike County Circuit Court jury, the Honorable David H. Strong, Jr. presiding. R. 1. Williams was found guilty and given a thirty five year sentence with twelve years suspended as an habitual offender in the custody of the Mississippi Department of Corrections. R. 115; 117; C.P. 37. From that conviction, Williams filed notice of appeal to the Mississippi Supreme Court. C. P. 47.

ISSUE ON APPEAL

I.

WAS THE VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

STATEMENT OF FACTS

On December 12, 2007, Williams was indicted by a Pike County Grand jury for possession of cocaine with intent to distribute on August 24, 2007. C.P. 3-4; 13.

On November 21, 2008, Nolan Williams, Jr. was tried for possession of cocaine with intent to distribute before a Pike County Circuit Court jury, the Honorable David H. Strong, Jr. presiding. R. 1. Williams was represented by Mr. Robert Lenoir, and Mr. Paul Luckett. R. 1.

Sergeant Lyle Tadlock with the McComb police department testified that on August 24, 2007 he was working on patrol. Tadlock was contacted by Officer Deska Varnado. Varnado had a car under surveillance. When Tadlock followed and approached the vehicle, he discovered the driver did not have on his seat belt. R. 68. The passenger in the car was Williams. R. 68.

Tadlock identified Williams as the person who he encountered that day. R. 68. An open container of Budweiser beer was seen on the front seat between Williams and the driver, Mr. Isaac. R. 69. Issac was Williams' brother in law. R. 104.

When Tadlock was patted down, Williams testified to feeling an object not consistent with clothing. It was an object between his underwear and his pants. It was a small plastic bag. R. 69. Inside the bag were a smaller bag with a label on it. R. 70. This was introduced into evidence as State's exhibit 1. R. 71.

Officer Deska Varnado with the McComb police department testified that he bought cocaine from Williams. R. 76. This was four days before the incident at issue. At the time Varnado did not know the name of the salesman. This was at the Economy Inn in McComb. An informant knew him as "Nolan." After the sale, Varnado had him under surveillance for other possible sales of cocaine.

When the suspect left the motel with another suspect in the visitor's car, Varnado contacted Tadlock for assistance and "back up."

When the car was stopped for traffic violations, Varnado saw a 12 ounce can of Budweiser on the car seat. R. 78. This was between the driver and Williams.

When the driver was asked to step out of the car, what appeared to be crack cocaine could be seen on the floor board. This was on his side of the front seat. R. 79. The driver's name was Mr. Eddie Isaac. R. 79. Sergeant Tadlock told Varnado that he found what appeared to be crack cocaine inside Williams underwear.

When Williams was taken into custody, he informed Varnado that he had the crack but it was just for his own use. He was going to smoke it. R. 80. The driver of the vehicle, Mr. Eddie Isaac ,said the cocaine found near him was for sale. R. 80. The controlled substance found with Williams was removed , packaged, labeled and submitted to the Crime lab for testing and identification by chemical composition.

Williams also had $830 in his pockets. R. 83. He admitted in his testimony that he was not working at the time of the find. R. 100.

Varnado did not know the name of the person who sold him cocaine. The undercover agent only knew him as "Nolan." R. 84.

On cross examination, Varnado was questioned about why he did not test Williams for drug use. Varnado testified that he knew that Williams was not using drugs. He had determined as part of his investigation that Williams was out on probation and had not failed any drug tests. R. 84.

Ms. Allison Conville testified that she was a forensic scientist with the Mississippi Crime Laboratory. Conville had education and training in drug identification. R. 88-89. She was accepted as an expert in drug analysis. R. 89.

She identified state's exhibit 1 was .2 grams of crack cocaine. R. 91. This was after examination and scientific analysis "called gas chromatograph /mass spectrometry." R. 91. The laboratory report identifying the cocaine was identified in evidence as Exhibit 5. R. 92.

At the conclusion of the prosecution's case in chief, the trial court denied a motion for a directed verdict. R. 93-94.

Mr. Williams testified in his own behalf. R. 96-105. Williams admitted to having cocaine in "his underwear." R. 100. However, he denied having it available for sale. R. 100. He believed that the cocaine in the bag was worth only some $20.00. R. 101. He admitted that he had been staying at the Economy Inn in McComb but denied having sold anyone any cocaine. R. 102-103.

Williams admitted that he was seen on a video made of the alleged drug purchase at the Economy Inn, but still denied having sold anyone any drugs. He admitted to having pled guilty to possession of cocaine with intent on a previous occasion. R. 102. He admitted to just being out of incarceration and reporting to a parole officer. R. 105.

Williams admitted that he was not working at the time of the stop. R. 100. Williams testified that the $830.00 in his pocket was a loan from his family for repairing his car and house. R. 103. His brother in law, with him in the car leaving the Economy Inn, had some $700.00 in his pocket.

Williams was found guilty and given a thirty five year sentence with twelve years suspended as an habitual offender in the custody of the Mississippi Department of Corrections. C.P. 37.

Williams through counsel filed a motion for a new trial. C.P. 42 . After a hearing, the trial court denied relief. C.P. 46.

From his conviction, Williams filed notice of appeal to the Mississippi Supreme Court. C.P. 47.

SUMMARY OF THE ARGUMENT

I.
THERE WAS CREDIBLE SUBSTANTIAL EVIDENCE IN SUPPORT OF THE VERDICT.

When the evidence presented by the prosecution was taken as true with reasonable inferences, there was more than sufficient, credible partially corroborated evidence in support of Williams' conviction. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993). While Williams admitted to possession and testified accordingly, there was, nevertheless, corroborated evidence from which it could be inferred that he not only possessed what was determined to be crack cocaine but that he possessed it with an intent to sale to others.

The cocaine found on his person was packaged and labeled. R. 70. Williams admitted that he had the said cocaine in his shorts. While he claimed possession for his personal use, he had not failed any drug tests while reporting to his parole officer. R. 84. Williams also admitted that he had plead guilty to possession with intent on a prior occasion. R. 100;102. He admitted he was at the Economy Inn where Officer Varando testified that he had sold him cocaine. R. 103. Williams admitted that he was seen on the video of the alleged drug sale at the Economy Inn. R. 103. He admitted to having the $830.00 on his person but was not working. R. 100.

The appellee would submit that Williams' testimony about personal use merely created a factual issue for the jury to resolve. **Groseclose v. State**, 440 So. 2d 297, 300 (Miss. 1983).

ARGUMENT

PROPOSITION

THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY CORROBORATED EVIDENCE IN SUPPORT OF THE VERDICT.

Williams argues that the trial court erred in denying his motion for a new trial. The Court erred because there was alleged insufficient evidence in support of his conviction for possession with intent. Williams believes there was only evidence in support of a conviction for possession of a small amount of cocaine. Williams denied having any intent to deliver and there were no witnesses to his transferring when he was apprehended. There was insufficient evidence in his opinion for any inference that he intended to transfer the cocaine found on his person. Appellant's brief page 1-7.

The record reflects that what was determined to be packaged crack cocaine was found concealed in Williams' underwear. R. 69-70. He was arrested when the car in which he was traveling was stopped for traffic violations. R. 69-70. Williams admitted to having the cocaine in his underwear. R. 100.

> Q. So let me get this straight. You're saying that the cocaine that they found in your waistband was yours, right?
>
> A. They didn't find it in my waistband.
>
> Q. Okay. But you had a piece of cocaine on you that day?
>
> A. I know I had a piece in my underwear, uh-huh. R. 100.

In addition, Williams admitted to be staying at the Economy Inn where a cocaine sale allegedly took place. R. 103. He admitted that he was the person seen on a video of the alleged sale. R. 103. Williams admitted to having $830 in his pocket and was not working at the time. R. 100. He also admitted that he had pled guilty to possession with intent on a previous date. R. 102.

Sergeant Lyle Tadlock testified that in response to a call from Officer Varnado, he followed a car leaving the Economy Inn. The driver did not have on his seat belt. R. 68. When the car was stopped, an open container of beer was on the seat. R. 69. When Williams exited the car, Tadlock patted him down for safety. Tadlock felt an object inside Williams' clothes. He determined it was a plastic bag. Inside the plastic bag were a smaller bag of what appeared to be cocaine. The smaller bag had a tag on it for labeling. R. 69-70.

> Q. At the time that you got the vehicle stopped, what happened at that point, after you got him stopped?
>
> A...I couldn't tell exactly what it was. **At that time I pulled it out of his–it was between his pants that he had on and his underwear. Pulled it out. Looked like a small plastic baggie that had some, what appeared to be crack cocaine.** R. 68-69. (Emphasis by appellee).

Officer Deska Varnado testified that four days prior to finding Williams with what appeared to be cocaine , he had bought crack cocaine from him. R. 75-83. At that the time of the sale, he did not know his name. An informant knew him only as "Nolan."

"Nolan" was under surveillance at an Economy Inn in McComb, Mississippi. Varnado continued surveillance on the suspect after a previous sale. He was stopped after he left the motel in Eddie Isaac's car. Isaac was Williams' brother in law. "A bag of cocaine" was found on the floor board near Issac , the driver, when the car was stopped. R. 79. Issac told officers he was going to sell this cocaine. R. 80.

> Q. Can you tell us about that investigation?
>
> A. **Okay. Four days prior to this incident here, I bought crack cocaine from the subject at the hotel in which he was staying.** I didn't know who he was. I had a audio and video of the transaction, but the confidential source did not know his name. R. 76. (Emphasis by appellee).

Varnado also testified that his investigation determined that Williams was on probation. He was reporting to a parole officer. Varnado determined that Williams had not failed any drug tests. This testimony occurred on cross examination.

> Q. **You said you knew that Mr. Williams didn't use drugs but sold it. Did you drug test him?**
>
> A. **No, I didn't.**
>
> Q. Okay.
>
> A. **He was on probation with Mississippi Department of Corrections at that time, and if he had failed a drug test, he would have violated his probation. And he was reporting and everything, so he had no–**
>
> Q. Okay.
>
> A. **—no failed drug tests. So he wasn't a drug user.** R. 84. (Emphasis by appellee).

In **Swington v. State** , 742 So.2d 1106, 1111 (¶13) (Miss. 1999), the Supreme Court found testimony about a previous drug sale was admissible as relevant for showing intent to distribute.

> ¶ 13. Evidence of prior involvement in the drug trade is admissible to prove intent to distribute. **Holland v. State**, 656 So.2d 1192, 1196 (Miss.1995). In **Smith v. State**, 656 So.2d 95 (Miss.1995), the defendant was convicted of possession of cocaine with intent to distribute in violation of Miss. Code Ann. § 41-29-139 (1993). This Court determined that "given the difficulty of proving subjective intent, we see no reason to categorically exclude evidence of prior sales." **Smith v. State**, 656 So.2d at 99. Swington argues that due to the fact that the testimony regarding the prior sale came from a self-proclaimed drug addict, the testimony was not admissible. However, the fact that the testimony was elicited from the mouth of a cocaine addict is a matter affecting the credibility of the witness which is an issue to be determined by the jury.

Mr. Williams testified in his own behalf. R. 96-105. He admitted to having cocaine but testified it was for his own personal use. R. 99-100. The money in his pocket was allegedly a loan to repair a house and his car. He admitted that he had been staying at the Economy Inn. He also

admitted that the he was seen on a video tape of an alleged drug purchase but denied that he had sold anyone any drugs. R. 102-103.

> Q. Isn't that you that's on the video that agent Varnado talked about?
>
> A. **That's me that I seen on that video, but I didn't see no selling or nothing.** R. 103. (Emphasis by appellee).

Williams admitted that he was not employed at the time of his arrest. R. 100.

Williams admitted that he had previously pled guilty to possession with intent. R. 102.

Williams testified that the cocaine in his clothes was allegedly for his personal use. He was going to smoke it, and he was not intending to sell it or distribute to others.

> Q. From the point of being pulled over to the point of being arrested, tell the jury what took place.
>
> A.. ..So the officer pulled me out... So I was telling him, you know, that was for personal use, just like that. That's all I told him. And then he got the rest of my stuff, put it in a bag together. And that was it.
>
> Q. Did you have any intentions of selling that cocaine to anybody?
>
> A. No, sir, I didn't.
>
> Q. And can you explain to the jury why you had $800 in your pocket?
>
> A. Well, I had been released on parole September 25, '06, and I was staying with my parents. And I had my own place. So it just needed a little work did to it from Hurricane Katrina. So they loaned me the money to get my car fixed and to get in my house. R. 99.

Ms. Allison Conville testified that she was a forensic scientist with the Mississippi Crime Laboratory. She had both education and training in drug identification. R. 88-89. She was accepted as an expert in drug analysis. R. 89.

She identified state's exhibit 1 as .2 grams of crack cocaine. R. 91. The laboratory report identifying the cocaine was identified in evidence as Exhibit 5. R. 92.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appeal's court.

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only 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. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the credible, corroborated testimony and evidence summarized above was taken as true with reasonable inferences there was more than sufficient credible corroborated evidence in support of the trial court's denial of all peremptory instructions. There was also sufficient evidence for denying a motion for a new trial. C.P. 46.

Possession of cocaine by Williams was not contested. R. 99-100. The only issue was intent. Officer Varnado testified that his investigation determined that Williams was on probation. He had not recently failed any drug tests which were required for probation. R. 84. From the testimony presented and summarized above it can be inferred from the totality of the circumstances that Williams not only possessed cocaine but he did so with an intent to transfer or sell to others.

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion for a new trial should be denied unless doing so would result in an "unconscionable injustice."

> Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant's motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent "an unconscionable injustice." **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987).We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict." **Jackson v. State** , 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

While Williams denied in his testimony that he intended to transfer or sale cocaine, this merely created a factual issue for the jury to resolve in their deliberations. We have cited corroborated testimony from Sergeant Tadlock and Officer Varnado about the circumstances involved in finding what appeared to be crack cocaine in Williams underwear. Williams admitted to having cocaine in his clothes. R. 99-100. It was determined by scientific test that the substance was crack cocaine. R. 91.

Williams admitted that he had stayed at the Economy Inn at the time of the alleged sale of cocaine, and that he was seen on a video of that previous sale. R. 102-103. He admitted that he had previously pled guilty to possession with intent. R. 102. He admitted to having over eight hundred dollars but yet was not working. R. 100-103. He was stopped as a passenger of a car. The driver of the car, Mr. Eddie Issac, admitted to having cocaine near him in the car when he was detained. He was seen with Williams at the Economy Inn where agent Varnado had him under surveillance. R. 77. He was the brother in law of the appellant. R. 104.

While Williams claimed personal use, there was testimony that he had not failed any drug tests while on probation. R. 84.

In **Groseclose v. State**, 440 So. 2d 297, 300 (Miss. 1983), the court relied upon **Gandy v. State** , 373 So. 2d 1042 (Miss. 1979). It decided that the verdict was not against the weight of the evidence merely because of conflicts in the testimony. In that case, there were conflicts between lay witness testimony and psychiatrists concerning Groseclose's sanity at the time he shot at his ex-wife and killed his father in law, John Mulhern, Sr.

The appellee would submit that we have cited sufficient credible, corroborated evidence for showing that there was no "injustice" involved in the trial court denying Williams' motion for a new trial. C.P. 46.

CONCLUSION

Mr. Nolan Williams' conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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