

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CURTIS HOGAN

APPELLANT

V.

NO. 2009-KA-2012-SCT

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.

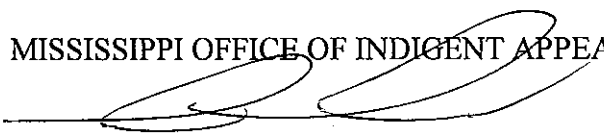
1. State of Mississippi
2. Curtis Hogan, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Kenneth L. Thomas, Circuit Court Judge

This the 15th day of April, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

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

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Bolivar County, Mississippi, and a judgment of conviction for sale of cocaine entered against Curtis Aster Hogan. (Tr. 65, C.P. 26, 28-34, R.E. **). The trial court sentenced Hogan to twelve (12) years in the custody of the Mississippi Department of Corrections with six (6) years suspended. (Tr. 73, C.P. 28-34, R.E. **). The trial court denied Hogan's motion for JNOV or, in the alternative, motion for a new trial. (C.P. 35-36, 40, R.E. **). Hogan is presently incarcerated and now appeals to this Honorable Court for relief.

STATEMENT OF THE FACTS

On April 22, 2009, Officer Joe Smith, a narcotics investigator with the Bolivar County Sheriff's Office, met with confidential informant Michael Cox in order to attempt a controlled drug buy from a man known as "Apple." (Tr. 18, 22, 38-39). At the time, Cox was working with police in connection with a pending drug charge against him. (Tr. 53-54). Officer Smith testified that he searched Cox's person and vehicle; however, he did not testify as to the details/extent of the search. (Tr. 18-19, 39). Cox was wired with audio/video surveillance equipment and given \$100 before leaving on his motorcycle to attempt the purchase in Alligator, Mississippi, a few miles away. (Tr. 18-22, 39). While at the pre-buy location, Cox received a phone call, allegedly from Hogan. (Tr. 19-20, 39-40). Cox told the caller that he wanted \$100 worth of "hard"—more commonly known as crack cocaine. (Tr. 40-41).

Officer Smith did not follow Cox; he stayed at the pre-buy location and waited for Cox to return. (Tr. 21). To this end, Officer Smith admitted that he could not tell what Cox was doing, and he could only conclude that Cox made a purchase by reviewing the video tape when Cox returned and trusting that Cox's statement was true. (Tr. 21, 27). Curiously, the video tape shows Cox make two detours on the way to meet the seller. (Ex. S-1). First, he pulled into a service station and rode around the parking lot slowly, passing by several parked cars and bystanders before returning to course. (Ex. S-1 at 09:30). Shortly thereafter, Cox pulled into a housing complex, drove slowly by a parked car with a man in the driver's seat and a another man standing outside the car, and told the men "I'll be right back" as he drove away. (Ex. S-1 at 11.50). At trial, Cox offered no explanation as to the reason for these detours or the identity of the persons he spoke to.

After leaving the housing complex, Cox pulled over to the shoulder of the road and made a phone call, presumably to the seller, who, according to Cox "was not where he said he would be."

(Tr. 41). Cox testified that the seller told him to meet him nearby. (Tr. 43). Cox then pulled into a gravel parking area outside a mobile home, where a man was sitting in the driver's seat of a gray four-door car, and another man was seated in the passenger seat. (Tr. 43, Ex. S-1 at 14:00). Cox testified that he rode his motorcycle right beside the door of the car, and he exchanged the \$100 for the substance without getting off of his bike. (Tr. 43-44). However, the video shows Cox park his motorcycle, get off of it, and walk over to the car. (Ex. S-1 at 14:09).

The video shows Cox hand what appears to be money to the man in the passenger seat. (Ex. S-1 at 14:30). Significantly, however, the video shows no drugs (or anything appearing to be drugs) being exchanged. (Ex. S-1 at 14:30).

Cox then drove back to the pre-buy/post-buy location and handed Officer Smith a substance that appeared to be crack cocaine. (Tr. 22, 44, 47). Officer Smith did not field test the substance, and he did not seal the bag in which he placed the substance until he returned to the police department. (Tr. 34). At this post-buy meeting, Officer Smith searched Cox's person and motorcycle, and Cox returned the audio-video equipment; Cox also gave a statement describing the seller as a black male, approximately thirty-five (35) years old, weighing approximately two hundred (200) pounds, with "cornrows" in his hair. (Tr. 22, 31, 44-46). Cox testified that he told Officer Smith that the man who sold him the substance was called "Apple," and he admitted at trial that he did not know Apple's real name at the time of the alleged buy. (Tr. 45). Hogan was arrested the following day; at the police station he weighed in at two hundred thirty-five (235) pounds and police learned that he was only twenty-eight (28) years old. (Tr. 32).

Officer Smith took the audio-video equipment back to his office, copied it to a DVD, and reviewed it. (Tr. 25-26, Ex. S-1). He later took the recovered substance to the Mississippi Crime Laboratory where forensic scientist Eric Frazure tested the substance and concluded that it contained

cocaine, although, Frazure could not testify as to whether the substance was powder cocaine (“cocaine salt”) or crack rock cocaine (“free base form cocaine”). (Tr. 7-10, 23).

SUMMARY OF THE ARGUMENT

The verdict in this case was against the overwhelming weight of the evidence, which failed to establish beyond a reasonable doubt that Hogan was guilty of the charge of sale of cocaine. The video showed money exchanged, yet it did not show any drugs exchanged. Additionally, the testimony of the paid informant, who had a previous drug charge himself, was suspect and inconsistent with the video of the alleged buy, which showed Cox make two unexplained detours on the way to the buy, during one of which he drove slowly by, and closely to, a parked car and two men in/around it and told them “I’ll be back.” Furthermore, Cox’s description of the seller was inconsistent with Hogan, and Cox admitted that he did not know the seller’s real name at the time of the buy. Allowing the verdict to stand on this evidence would manifest an extreme injustice.

ARGUMENT

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

Trial counsel's motion for J.N.O.V. or in the alternative motion for new trial specifically argued that the jury’s verdict was against the overwhelming weight of the evidence. (C.P. 35-36, R.E. **). The trial judge denied this motion. (C.P. 40, R.E. **). As explained in detail below, the trial judge erred in failing to grant Hogan’s motion for a new trial.

In reviewing a challenge to the weight of the evidence, the verdict may be disturbed “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, 844 (¶18) (Miss. 2005) (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)) . The evidence is viewed in the light most favorable to

the verdict. *Id.* This Court “sits as a hypothetical thirteenth juror.” *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). “If, in this position, the Court disagrees with the verdict of the jury, ‘the proper remedy is to grant a new trial.’” *Id.*

In the instant case, the video tape of the alleged buy shows money changing hands, however, it does not show drugs (or anything appearing to be drugs) being exchanged. (Ex. S-1 at 14:30). Officer Smith—who remained at the pre-buy location—admitted that he could not tell what Cox was doing from the time he left until he returned. Also, although Officer Smith testified that he searched Cox, the evidence did not establish that Cox’s search was thorough. Because Cox’s testimony was the only evidence that a drug sale actually occurred at the time alleged, his trustworthiness was absolutely essential to the case.

However, the record reflects that Cox’s testimony was highly suspect and inconsistent with the video recording of the alleged buy. For instance, Cox testified that he pulled up to the window of the seller’s car and never got off of his motorcycle during the alleged transaction; however, the video clearly shows Cox get off of his bike and walk over to the car. More curious however, the video shows Cox make two unexplained detours on the way to the attempted buy. He first pulled slowly through the parking lot of a service station; shortly thereafter, he pulled into the parking lot of a housing complex and drove slowly by, and closely to, a parked car and told two men in/around the car that he would be right back. Furthermore, Cox admittedly did not know the real name of the person who allegedly sold him the substance, and Cox’s description of the seller—approximately thirty-five (35) years old, weighing approximately two hundred (200) pounds—was not consistent with Hogan, who was only twenty-eight (28) years old and weighed in at two hundred thirty-five (235) pounds. (Tr. 32, 45-46).

Ordinarily, the jury weighs the credibility of each witness. *Wetz v. State*, 503 So. 2d 803, 812

(Miss. 1987). However, this Court may set aside a jury verdict when, sitting “as the ‘thirteenth juror,’ the court simply disagrees with the jury’s resolution of the conflicting testimony.” *Bush*, 895 So. 2d at 844 (¶18) (citing *McQueen v. State*, 423 So. 2d 800, 803 (Miss.1982)). “This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.” *Id.* (internal citation omitted).

Accordingly, Hogan respectfully submits that the verdict in the instant case was against the overwhelming weight of the evidence, and this Court should reverse his conviction and sentence and remand this case for a new trial.

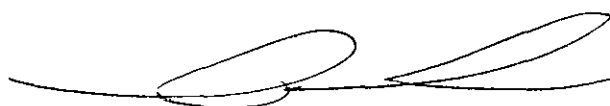
CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Hogan respectfully submits that he is entitled to have this Honorable Court reverse his conviction and sentence for sale of cocaine and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Curtis Aster Hogan, 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 15th day of April, 2010.



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