

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00047 COA**

KHRISTOFFER HEARRON

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	01/05/96
TRIAL JUDGE:	HON. FRANK G. VOLLOR
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CEOLA JAMES
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN
DISTRICT ATTORNEY:	G. GILMORE MARTIN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE: SENTENCED TO SERVE A TERM OF THIRTY YEARS IN THE CUSTODY OF THE MDOC, AS A HABITUAL OFFENDER, WITHOUT ELIGIBILITY FOR PAROLE
DISPOSITION:	AFFIRMED 2/10/98
MOTION FOR REHEARING FILED:	2/25/98
CERTIORARI FILED:	04/21/1998
MANDATE ISSUED:	

BEFORE BRIDGES, C.J., PAYNE AND SOUTHWICK, JJ.

BRIDGES, C.J., FOR THE COURT:

Khristoffer Hearron was convicted of the crime of possession of cocaine with intent to distribute and sentenced as a habitual offender to thirty years with the Mississippi Department of Corrections, without eligibility for parole. From that conviction and sentence, Hearron now appeals, assigning four errors. Having considered Hearron's assignments of error, we find them to be meritless and affirm the lower court's decision.

On the evening of August 4, 1995, Officer Glen Truesdale, an accident investigator in the traffic division of the Vicksburg Police Department, was traveling south on Drummond Street at Belmont Street when the radar unit in his marked patrol car showed a vehicle was traveling north at 46 mph in a 30 mph zone. The officer visually identified the vehicle as an older model green Chevrolet automobile. It was the only vehicle going north on Drummond Street at that time. As the speeding car passed Officer Truesdale, Officer Truesdale recognized its driver and sole occupant as Khristoffer Hearron. Officer Truesdale immediately made a U-turn, turned on his blue lights, and proceeded north behind Hearron's car. Officer Truesdale testified that in an attempt to flee, Hearron accelerated causing smoke to exit the exhaust pipe.

As Hearron approached the traffic light at the intersection of Belmont and Drummond Street, Hearron slowed only enough to negotiate the right turn onto Belmont without colliding with any other vehicles. Officer Truesdale testified that the traffic light for approaching traffic on Drummond Street was red. At the traffic light at the intersection of Belmont and Cherry Streets, Hearron, traveling north towards Clay Street, did not stop at the red light and negotiated a left-hand turn causing a southbound driver to slam on his brakes to keep from colliding with Hearron's vehicle.

With the patrol car's blue lights flashing and siren activated, Officer Truesdale continued behind Hearron as he approached the intersection of Harrison and Cherry Street. A vehicle was stopped at an angle at this intersection waiting for the traffic light to turn green before making a right-hand turn from Cherry Street onto Harrison Street. As Hearron cut across the sidewalk beside the First Baptist Church to go around the stopped vehicle to enter Harrison Street, the stopped vehicle began negotiating its planned right-hand turn onto Harrison Street and the cars collided causing minor damage. Officer Truesdale positioned his patrol car in front of Hearron's car to prevent Hearron from fleeing the accident scene. Officer Truesdale testified that as Hearron's car crossed the sidewalk area, he saw something shiny fly out of the right passenger's window of the vehicle. Officer Truesdale noted where the shiny object fell.

Officer Truesdale placed Hearron under arrest for reckless driving. Searching Hearron incident to his arrest, Truesdale found \$421 wadded up in Hearron's two front pockets. One of the officers who had responded to Truesdale's call for assistance, Officer Ricky Anderson, was directed to the area on the church lawn where Truesdale saw the shiny object land after being thrown from Hearron's vehicle. Officer Anderson walked directly to what was later identified as a cellophane baggy containing rock cocaine. The baggy was shown to Officer Truesdale and then turned over to Officer Bob Donahue of the narcotics division along with the cash seized from Hearron. Officer Wesley Whitaker transported Hearron to the Vicksburg Police Department. Hearron was subsequently charged with possession of a controlled substance with intent to distribute in violation of Miss. Code Ann. § 41-29-139(a)(1) (Rev. 1993).

ISSUE I

DID THE OFFICER HAVE PROBABLE CAUSE TO INITIATE PURSUIT OF HEARRON FOR SPEEDING?

Hearron argues that Officer Truesdale had no probable cause to pursue Hearron for a traffic violation. "[T]he existence of 'probable cause' . . . justifying an arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not

legal technicians act." *Blue v. State*, 674 So. 2d 1184, 1202-03 (Miss. 1996). In determining whether probable cause exists, the standard is whether "the facts and circumstances within an officer's knowledge . . . are sufficient to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it." *Moore v. State*, 493 So. 2d 1295, 1298 (Miss. 1986).

Hearron contends that Truesdale began following Hearron as a pretext to harassing Hearron because of Hearron's reputation in the community. In support of his argument, Hearron cites *Smith v. State*, 240 Miss. 738, 128 So. 2d 857 (1961), where the supreme court found Smith's arrest was a pretext to search for evidence. There the sheriff, in his personal automobile, began pursuit without any basis for believing a crime had been or was being committed in his presence, and the defendant's subsequent arrest for speeding was declared illegal. "If an officer does not have the authority to make an arrest at the instant he begins his pursuit for the purpose of making the arrest, the fact that the person the officer is pursuing violates the traffic law in making his escape does not thereby authorize the arrest that began unlawfully." *Id.* at 859.

Hearron's theory of pretext is contrary to the evidence. The record in this case reveals that Officer Truesdale, as an officer assigned to the traffic division of the Vicksburg Police Department, was carrying out the duties of his assignment when he was first alerted to a vehicle approaching at an excessive rate of speed by the radar unit in the patrol car. Only after clocking the approaching vehicle going 46 mph in a 30 mph zone, did the officer recognize Hearron as the driver. After personally observing the speeding vehicle, Officer Truesdale negotiated a U-turn to pursue the vehicle. The identity of the officer was clear. He was driving a marked patrol car with its blue lights shining and siren sounding. Had Hearron pulled over when he had first noticed the patrol car following him, Hearron would have been issued a ticket for speeding. But such is not the case.

During the period between Officer Truesdale's initial sighting of Hearron driving the vehicle at an excessive rate of speed and Hearron's collision with another vehicle, the traffic officer testified that he personally observed Hearron driving recklessly, i.e., in a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property. **Miss. Code Ann. § 63-3-1201 (Rev. 1996)**. Speeding in and of itself is not reckless; however, other circumstances may exist which would cause speeding to be considered reckless driving. Having seen Hearron driving at an excessive rate of speed, driving against traffic lights, and ultimately colliding with another vehicle, Officer Truesdale had the right, indeed the duty, to pursue him in an effort to take him into custody. **Miss. Code Ann. § 99-3-7 (Rev. 1994); Kinney v. State**, 336 So. 2d 493, 496 (Miss. 1976).

Officer Truesdale had probable cause to pursue the vehicle being driven by Hearron once the radar calibration indicated the vehicle was traveling at 46 mph in a 30 mph zone. Thus, the evidence obtained during the search of Hearron incident to his arrest for reckless driving is admissible. Accordingly, this assignment of error is without merit.

ISSUE II

DID THE STATE PROVE THE ELEMENTS OF THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE BEYOND A REASONABLE DOUBT?

Because we find there was probable cause to justify arresting Hearron for reckless driving, any

evidence obtained in the search incident to arrest was admissible. Therefore, the money found in Hearron's possession and the discarded baggy containing the controlled substance retrieved from the sidewalk were lawfully seized and admitted into evidence.

Hearron contends that the State failed to prove he had control or dominion of the controlled substance beyond a reasonable doubt. The State was required to establish additional incriminating circumstances in order to prove Hearron constructively possessed the controlled substance which was thrown from the vehicle. *Ferrell v. State*, 649 So. 2d 831, 835 (Miss. 1995).

As the supreme court reiterated in *Townsend v. State*, 681 So. 2d. 497 (Miss. 1996), "there must be sufficient facts to warrant a finding that [the] defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it." *Id.* at 510. The defendant need not have actual physical possession of the controlled substance "if the contraband is in the constructive possession of the accused" or, in other words, the substance is subject to the defendant's dominion or control. *Id.*

Hearron's control or dominion of the rock cocaine was established through Officer Truesdale's testimony that Hearron was the driver and sole occupant of the vehicle from which Officer Truesdale saw a shiny object thrown from the passenger window. A clear cellophane baggy was retrieved from the area noted by Officer Truesdale as where the shiny object landed. The controlled substance, rock cocaine, was in plain view through the clear cellophane, not hidden from sight. The jury could reasonably infer that Hearron, by throwing the baggy out the window of the vehicle before stopping for the traffic violation, knowingly threw the cocaine from the vehicle in an effort to prevent the officers from finding it on his person or in the vehicle.

There was sufficient evidence presented to the jury to enable a finding beyond a reasonable doubt that Hearron was in constructive possession of the rock cocaine. Accordingly, this assignment of error is without merit.

ISSUE III

WAS THE EVIDENCE SUFFICIENT TO SUPPORT HEARRON'S CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE?

Hearron argues that even if there was sufficient evidence of constructive possession of cocaine, the Court should reverse because the State failed to prove, beyond a reasonable doubt, that Hearron knowingly possessed cocaine with intent to distribute as required by Miss. Code Ann. § 41-29-139(a) (Rev. 1993). The State contends that the amount of cocaine, together with the circumstantial evidence (\$421 wadded in Hearron's front pockets, Hearron's attempted flight from the police, and Hearron's attempt to discard the baggy containing the cocaine) are sufficient to provide a reasonable inference that Hearron intended to distribute the cocaine. The jury was instructed regarding possession with intent to distribute and for the lesser charge of simple possession. Based on the evidence, Hearron was convicted of possession of a controlled substance with intent to distribute.

Considering the evidence along with all reasonable inferences therefrom in the light most favorable to the prosecution, this Court will not disturb the jury verdict unless the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable

men could not have found beyond a reasonable doubt that the defendant was guilty. On the other hand, if there is substantial evidence in the record of such quality and weight that having in mind the beyond-a-reasonable-doubt burden-of-proof standard, reasonable fair minded men in the exercise of impartial judgment might reach different conclusions regarding the guilt of the defendant, we have no authority to disturb the jury's verdict.

***Jackson v. State*, 551 So. 2d 132, 136 (Miss. 1989).**

Hearron's intent to distribute or dispense controlled substances may be established by circumstantial evidence, but a mere suspicion of intent to distribute is insufficient to support a conviction. ***Hicks v. State*, 580 So. 2d 1302, 1305 (Miss. 1991).**

Absent direct evidence of intent to distribute, the amount of a controlled substance may be sufficient to establish intent to distribute. "Indeed, a jury may reasonably conclude that a defendant intended to unlawfully distribute a controlled substance if the quantity or nature of the seized substance evidences an intent to distribute--as opposed to an intent to merely possess for personal use." *Id.* However, no clear guidelines have been enunciated as to the issue of what is an amount sufficient to support an intent to distribute, the supreme court preferring a case-by-case evaluation as to whether the quantity is more than a person could reasonably hold for personal use. If the quantity of the controlled substance is not sufficient to establish intent, circumstantial evidence can bolster the inference of intent to distribute. ***Jackson v. State*, 580 So. 2d 1217, 1219 (Miss. 1991).** Finding that forty-seven rocks containing 5.7 grams of cocaine was insufficient standing alone to infer intent to distribute, the supreme court in ***Edwards v. State*, 615 So. 2d 590, 595 (Miss. 1993)**, opined that the cocaine along with the defendant's fleeing from police would have been sufficient circumstantial evidence to support Edward's conviction of possession with intent to distribute even without his confession.

The quantity of cocaine possessed by Hearron, 4.4 grams, alone may not be sufficient to establish intent to distribute. However, when bolstered by the following circumstantial evidence, the jury could reasonably infer Hearron intended to distribute the rock cocaine:

- (1) Hearron's attempted flight from the police;
- (2) Hearron's attempt to discard the baggy containing the cocaine;
- (3) \$421 wadded in Hearron's front pockets found at the time of Hearron's arrest;
- (4) An experienced narcotics officer's testimony that the rock cocaine obtained from Hearron had a street value of \$400 to \$500 and that drug dealers who make street sales usually take the money quickly in the transaction and stick it in their pockets causing the money to be wadded in the same way as the money retrieved from Hearron was wadded; and
- (5) No corroborating testimony that Hearron won the money gambling.

Weighing the evidence presented in the light most favorable to the prosecution, the jury verdict was based upon sufficient evidence that Hearron possessed the controlled substance with intent to distribute. Accordingly, this assignment of error is without merit.

ISSUE IV

DID THE TRIAL COURT ERR IN DENYING HEARRON BAIL?

Hearron contends that the trial court erred in refusing to grant a bond for him while this appeal was pending. **Miss. Code Ann. § 99-35-115(2) (Rev. 1994)** provides:

A person convicted of any felony other than those enumerated in subsection (1) of this section [treason, murder, rape, arson, burglary or robbery] shall be entitled to be released from imprisonment on bail pending an appeal to the Supreme Court, except that the trial judge may deny bail to such person pending his appeal upon making a determination that the release of such person would constitute a special danger to any other person or to the community

The granting of bail pending appeal is discretionary with the trial judge. "It is true that '[b]ail is a fundamental, constitutionally protected right.' Yet 'not every person accused of a crime should be released on . . . bail. That decision still rests in the sound discretion of the judicial officer.'" ***Benson v. State*, 551 So. 2d 188, 194 (Miss. 1989)** (citations omitted). The trial judge's determination will not be disturbed unless there is a showing of manifest error or abuse of discretion. ***Id.* at 195.**

The record supports the trial judge's decision that to release Hearron pending appeal would "constitute a special danger to any other person or the community." Indeed, Hearron had been convicted of at least three felonies prior to his committing the crime which is the subject of the instant appeal. There being no showing of manifest error or abuse of discretion in the record, this Court cannot find that the trial court erred in denying Hearron bail. This assignment of error, therefore, is without merit.

Finding no error by the lower court on any of the issues raised, we now affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY OF CONVICTION OF POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE AS A HABITUAL OFFENDER AND SENTENCE OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. THE COSTS OF APPEAL ARE ASSESSED TO WARREN COUNTY.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.