

**IN THE COURT OF APPEALS 12/29/95**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-KA-00826 COA**

**HUBERT HERNANDO HOWARD**

**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

TRIAL JUDGE: HON. GEORGE C. CARLSON, JR.

COURT FROM WHICH APPEALED: YALOBUSHA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

LEON JOHNSON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS

DISTRICT ATTORNEY: ROBERT LEE WILLIAMS

NATURE OF THE CASE: CRIMINAL: POSSESSION OF CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: SENTENCED TO THREE (3) YEARS IN MDOC, WITH TWO  
(2) YEARS SUSPENDED, FINE OF \$500.00, CRIME LAB FEE \$100.00, CRIME VICTIMS  
FUNDS \$50.00, AND ALL COURT COSTS

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

BRIDGES, P.J., FOR THE COURT:

Hubert Hernando Howard was convicted of possession of crack cocaine. He now argues that he was convicted against the sufficiency of the evidence. He also maintains that he should have been granted a directed verdict, JNOV. In reviewing this case, we find that neither of Howard's assignments is meritorious and affirm the judgment of the lower court.

#### FACTS OF THE CASE

Hubert Hernando Howard was driving his vehicle on Highway 315 when he collided head on with the Sheriff of Yalobusha County, Lloyd Defer, who was driving in the opposite direction. After the accident, Howard got out of his car and ran down an embankment. Sheriff Defer immediately radioed the police and gave them his position. About one minute later, Howard returned to the accident scene. Shortly thereafter, the Police Chief, Fire Chief, and Officer Lee Sigler arrived at the scene.

A nearby resident, Jim Higdon, saw Howard running from the accident scene and down the embankment to the base of a tree. He also saw Howard reach "in his pocket and put something in the weeds," by the tree before returning to the scene. Both Higdon and Sheriff Defer informed the officers of Howard's actions. Chief Ward and Officer Sigler went down the embankment to the area pointed out by Higdon. They found two plastic vials near the base of the tree. The vials were wrapped in a handkerchief and given to the Police Chief who determined the vials to contain crack cocaine.

Howard was arrested and charged with possession of a controlled substance. At the end of his trial, he moved for a directed verdict arguing that the case for constructive possession of the cocaine had not been made. His motion was denied and he was convicted as charged. He now appeals maintaining that his conviction was against the sufficiency of the evidence and that he should have been granted a directed verdict. Finding that Howard's issues are without merit, we affirm the decision of the lower court.

#### ARGUMENT AND DISCUSSION OF THE LAW

##### I. WHETHER THE PROOF WAS SUFFICIENT TO CONVICT HOWARD FOR KNOWINGLY AND INTENTIONALLY POSSESSING COCAINE.

Howard argues that the State failed to meet its burden of proof that he possessed the crack cocaine because no witnesses actually saw him in possession of the cocaine. However, it is well settled that constructive possession allows the prosecution to establish possession of contraband "when the evidence of actual possession is absent." *Roberson v. State*, 595 So. 2d 1310, 1319 (Miss. 1992). Further, constructive possession "is established by evidence showing that the contraband was under the dominion and control of the defendant." *Id.* Circumstantial evidence is entitled to the same weight

and effect as direct evidence. *See Cardwell v. State*, 461 So. 2d 754, 760 (Miss. 1984). To insure this, the trial court must grant a jury instruction that every reasonable hypothesis other than that of guilt must be excluded in order to convict. Here the trial court instructed the jury accordingly in granting Instruction D-3.

The jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). In *Noe v. State*, 616 So. 2d 298, 302 (Miss. 1993), the Mississippi Supreme Court held:

In judging the sufficiency of the evidence . . . the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn there from, and to disregard evidence favorable to the defendant.

Further, in *Doby v. State*, 532 So. 2d 584, 590 (Miss. 1988), the court held that the testimony of a single witness is sufficient to support a conviction. Here, both the Sheriff and Higdon testified that they saw Howard run down the embankment. Higdon testified that he saw Howard hide something by the tree. Two vials of crack cocaine were found in the exact location that Higdon saw Howard "hide something."

In *Williams v. State*, 427 So. 2d 100, 104 (Miss. 1983), the court held that jurors may accept or refuse testimony of witnesses stating "It is not for this Court to pass upon the credibility of witnesses and where the evidence justifies the verdict, it must be accepted as having been found worthy of belief." Here, the jury weighed the evidence, believed the State's witnesses, and convicted Howard. Howard's argument is without merit.

## II. WHETHER THE TRIAL COURT ERRED BY OVERRULING HOWARD'S MOTION FOR A DIRECTED VERDICT OR JNOV.

Howard next argues that he should have been granted a judgment of acquittal notwithstanding the verdict because the State failed to prove the elements of the charge against him beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. This assignment of error must also be reviewed in a light most favorable to the state. *Williams v. State*, 463 So. 2d 1064, 1068 (Miss. 1984). The evidence which is consistent with the verdict must be accepted as true. *Glass v. State*, 278 So. 2d 384, 386 (Miss. 1984). Considered as such, we cannot say that the trial court was in error by refusing to grant Howard a JNOV or directed verdict.

**THE JUDGMENT OF THE YALOBUSHA COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE AND SENTENCE OF THREE (3) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH TWO (2) YEARS SUSPENDED AND FINE OF \$500.00 IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO YALOBUSHA COUNTY.**

**FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE,  
AND SOUTHWICK, JJ., CONCUR.**