

**IN THE COURT OF APPEALS 05/07/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 93-KA-01009 COA**

**MYRTLE DENISE HICKS**

**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. ELZY JONATHAN SMITH, JR.

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

AZKI SHAH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL: POSSESSION OF COCAINE

TRIAL COURT DISPOSITION: GUILTY OF BOTH COUNTS: FIVE YEARS IN THE  
CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS FOR EACH COUNT  
AND ORDERED TO PAY A FINE OF FIVE THOUSAND DOLLARS FOR EACH COUNT.

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

## SOUTHWICK, J., FOR THE COURT:

Myrtle Denise Hicks was convicted of two counts of possession of cocaine. She appeals the jury verdict, only arguing that the trial court erred in admitting into evidence cocaine which was removed from her mouth. We affirm.

### FACTS

On February 6, 1993, a search warrant was issued authorizing a search for cocaine at Hicks' residence, in her car, and in any other vehicle on her property. Later that day, a police officer stopped Hicks' car and executed the search warrant. After the car was searched and no contraband was found, another officer at the scene noticed that Hicks was attempting to swallow something. He asked Hicks if she had anything in her mouth and then told her to open her mouth. Hicks refused to comply and continued to try to swallow. The officer testified that Hicks began to swing her arms and that she was "almost choking herself." A struggle ensued for about two minutes.

At this point, several police officers were at the scene. During the struggle, one officer tried to force Hicks' jaws open and testified that one of the other officers might have grabbed her or closed her nose in an effort to make Hicks open her mouth. After approximately two minutes of struggling, a female officer was able to put her hand in Hicks' mouth and remove what looked like paper and powdery rocks and granules. The rocks and granules were later identified by the crime laboratory as crack cocaine. Hicks was then placed under arrest, and her residence was searched pursuant to the search warrant. This search uncovered more crack cocaine.

### DISCUSSION

Hicks argues that the court violated her right to privacy as guaranteed by the Fourth Amendment to the United States Constitution when it allowed into evidence, over her objection and motion to suppress, the cocaine seized from her mouth. "The Fourth Amendment protects 'expectations of privacy,' *Katz v. United States*, [389 U.S. 347] . . . (1967)--the individual's legitimate expectations that in certain times he has 'the right to be let alone--the most comprehensive of rights and the right most valued by civilized men.'" *Winston v. Lee*, 470 U.S. 753, 758 (1985) (citation omitted). However, the Fourth Amendment neither prohibits nor allows all involuntary bodily intrusions by the police. *Id.* at 760. "[R]ather, the Amendment's 'proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.'" *Id.* United States Supreme Court decisions have reviewed police conduct in these situations under a "reasonableness standard." *Id.* at 760-63; *Schmerber v. California*, 384 U.S. 757, 768-73 (1966) (holding that compulsory blood alcohol tests are not per se unreasonable under Fourth Amendment).

In reviewing the reasonableness of the officers' conduct, we consider: (1) whether probable cause existed to conduct the search, (2) the extent to which the procedure would threaten the person's safety or health, and (3) the extent to which the search would damage the individual's interest in personal privacy and bodily integrity. *Winston*, 470 U.S. at 760-62. We must then weigh these individual interests against "the community's interest in fairly and accurately determining guilt or innocence." *Id.* at 762.

Applying these factors to the facts of this case, we conclude that the officers' actions in removing the crack cocaine from Hicks' mouth were reasonable. The officers had probable cause to conduct the search. They had a search warrant to search for cocaine and other drugs at Hicks' residence, in her car, and in any other cars on her residence. Observations by a police officer and information from a reliable confidential informant that Hicks was in possession of, and selling, crack cocaine established the grounds for the warrant. In addition, the officers noticed that Hicks was attempting to swallow something and that she refused to comply with their requests to open her mouth. Under these circumstances, it was reasonable for the officers to conclude that Hicks had drugs in her mouth and to try to remove them.

We next examine the threats to Hicks' health and safety posed by the officers' actions in removing the object from her mouth. There was some testimony that the officers may have grabbed Hicks, pinched her nose, and forced her mouth open during their struggle to remove the packet of crack cocaine. The struggle lasted for about two minutes. After reviewing the record, Hicks' safety and health do not appear to have been significantly threatened. In fact, it seems more likely that her health and safety would have been compromised to a greater extent if the officers did *not* remove the cocaine, either by the very real danger of her choking on the packet or by the consequences of swallowing crack cocaine. "[I]t makes little sense to say that the minimal pressure necessary to prevent swallowing is excessive, particularly when it is considered that if the drugs are swallowed the defendant may be harmed by them and may have to submit to an even more disagreeable procedure for his own protection or for retrieval of the evidence." *People v. Fulkman*, 235 Cal. App. 3d 555, 564 (Cal. Ct. App. 1991) (citation omitted). Although the extent to which these considerations weighed on the officers' minds before conducting the search is difficult to measure, their subjective intent is not the focus here.

The third factor we consider is whether the search of Hicks' mouth damaged her interest in personal privacy and bodily integrity. Without deciding, we assume that this type of search does intrude upon a person's privacy and bodily integrity to some degree. *Contra id.* at 733 (noting that a search of the mouth does not damage interest in personal privacy and security).

Finally, these personal interests must be weighed against the community's interest in fairly and accurately determining Hicks' guilt or innocence. Hicks was convicted of two counts of possession of cocaine. By swallowing the packet of crack cocaine, Hicks would have destroyed the evidence of one of the two counts of her crime. Allowing such destruction would clearly frustrate the State's interest in proving Hicks' guilt.

After weighing all of the factors, we conclude that the search and seizure were reasonable. The relatively minor intrusion on Hicks was offset by the State's need for the evidence. While the parties have not presented to us in their briefs, and we have not found, any Mississippi case law involving search and seizure of objects from a defendant's mouth, our conclusion is consistent with the decisions of courts in other jurisdictions which have addressed the issue. In *Espinoza v. United States*, the Fifth Circuit affirmed a district court's decision which held that a search of the defendant's mouth, and the seizure of the drugs found in his mouth, were lawful. *Espinoza v. United States*, 278 F.2d 802, 804 (5th Cir. 1960). In *Espinoza*, federal officers, in an effort to prevent the destruction of evidence, retrieved drugs from the defendant's mouth as he was trying to swallow them by grabbing the defendant's throat, choking him, and placing pressure on his jaw and nose to pry open his mouth.

*Id.* at 804. The District of Columbia Circuit also addressed the issue when it held that police officers' actions in preventing the defendant from swallowing an envelope of heroin capsules were reasonable, were not undue force or brutality, and were not in violation of the Fourth Amendment. *United States v. Harrison*, 432 F.2d 1328, 1330 (D.C. Cir. 1970); *Fulkman*, 235 Cal. App. 3d at 562 (after application of *Winston* factors, court concluded that in order to prevent the destruction of evidence, police may retrieve evidence from defendant's mouth when he refuses to comply with request to spit out the evidence).

Finding no error, the judgment of the circuit court is affirmed.

**THE JUDGMENT OF CONVICTION OF THE CIRCUIT COURT OF COAHOMA COUNTY OF COUNT I AND COUNT II: POSSESSION OF COCAINE AS A SECOND AND SUBSEQUENT OFFENDER WITH ORDER TO PAY A FINE OF FIVE THOUSAND DOLLARS (\$5,000.00) FOR EACH COUNT AND SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS FOR EACH COUNT WITH SENTENCES TO RUN CONSECUTIVE TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED AND WITH SENTENCE FOR COUNT II TO RUN CONSECUTIVE TO THE SENTENCE IMPOSED IN COUNT I IS AFFIRMED. THE ORDERS PURSUANT TO MISS. CODE ANN. § 63-1-71 ARE AFFIRMED. COSTS ARE ASSESSED TO APPELLANT.**

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