

**IN THE COURT OF APPEALS 05/07/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-KA-00306 COA**

**DERRITT SWEARINGTON A/K/A DERRITT RAMON SWEARINGTON**

**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. L. BRELAND HILBURN, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT (1ST DIST)

ATTORNEY FOR APPELLANT:

J. DEWAYNE THOMAS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: ED PETERS

NATURE OF THE CASE: CRIMINAL: POSSESSION OF COCAINE

TRIAL COURT DISPOSITION: GUILTY VERDICT: SENTENCED TO THREE YRS IN  
PRISON.

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

SOUTHWICK, J., FOR THE COURT:

Derritt Swearington was convicted of possessing cocaine and was sentenced to three years in prison. He appeals his conviction, contending that the guilty verdict was contrary to the overwhelming weight of the evidence and that he should have been granted a directed verdict. We conclude that the charge and the verdict were well-supported by the evidence and affirm.

#### FACTS

On April 3, 1992, Swearington was arrested when police raided a house. A police officer saw Swearington throw a container behind a refrigerator. When the police saw Swearington throw the container, an officer located what Swearington had thrown and secured it as evidence. The container was transmitted to the State Crime Lab for analysis and was determined to contain cocaine. This evidence was part of the State's case against the owner of the house who pled guilty to possession of cocaine, under the theory of constructive possession. Nevertheless, the evidence was also central to the prosecution of Swearington to prove his possession of cocaine.

#### DISCUSSION

Objections to the denial of a directed verdict challenge the sufficiency of the evidence. Our standard for reviewing challenges to convictions based on sufficiency of the evidence is well-established. As to each element of the offense, we consider all of the evidence in the light most favorable to the verdict. We reverse when, with respect to an element of the offense charged, the evidence is such that reasonable and fair-minded jurors could only find the accused not guilty. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987). As to whether the verdict is contrary to the overwhelming weight of the evidence, a similar standard is employed. We view the evidence in the light most favorable to the verdict. The trial court is given discretion to order a new trial to prevent an unconscionable injustice in the face of overwhelming evidence contrary to the jury's verdict. *McClain*, 625 So. 2d at 781 (citation omitted).

Swearington was charged with possession of cocaine with intent to sell under section 41-29-139 of the Mississippi Code of 1972. That section provides that "it is unlawful for any person knowingly or intentionally . . . [t]o . . . possess with intent to sell . . . a controlled substance . . ." Miss. Code Ann. § 41-29-139(a)(1) (Supp. 1995). Swearington challenges the prosecution's proof concerning whether he possessed cocaine. He does not contend that the proof of intent to sell was lacking.

Swearington denied that he possessed cocaine and provided proof that the residence in which he was arrested was owned by another individual who had pled guilty to possession of cocaine. Swearington's possession of the cocaine is established by testimony that Swearington was observed throwing a container behind a refrigerator. A search behind the refrigerator found the container which held the substance that was later identified as cocaine. The proof demonstrated that Swearington was not a mere bystander who was present on property where drugs were found. *See Windom v. United States*, 19 F.3d 1190, 1200 (7th Cir.), *cert. denied*, 115 S. Ct. 174 (1994). There was direct evidence that Swearington possessed a container that contained cocaine. Presented with this evidence, the jury was justified in concluding that Smith possessed cocaine.

The fact that another individual pled guilty to possession of the same cocaine that formed the basis of the charge against Swearington does not alter our conclusion. More than one person can possess contraband and thereby be subject to prosecution for and conviction of that possession. Our only concern now is whether there was sufficient evidence to prove Swearington's guilt. There was. We affirm.

**THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY OF CONVICTION OF POSSESSION OF COCAINE AND SENTENCE OF THREE (3) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.**

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