IN THE SUPREME COURT OF MISSISSIPPI

THORNTON "SHUG" PETERSON, Jr. — APPELLANT

VS. — No. 2004-KA-00642

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

STEPHEN NICK, Attorney for
the appellant

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies taht the following listed persons have an interest in the outcome of this Appeal. These representations are submitted that the Judges of the Court may evaluate possible disqualifications or recusal.

Thornton Peterson, appellant

Dewayne Richardson, District Attorney

Hallie Gail Bridges, Assistant District Attorney

Stan Perkins, Attorney at Law

William M. "Mickey" Mallette, Attorney at Law

Jon A. Green, Attorney at Law

Respectfully submitted, this the 31 day of March, 2009.

Stephen Nick

Stephen Nick, counsel for
the appellant, Thornton Peterson

TABLE OF AUTHORITIES

Grizzard v. State, 149 Miss. 323, 115 So. 555.

Atwood v. State, 146 Miss. 662, 111 So. 865, 51 ALR 836.

Bogard v. State, 624 So. 2d. 1313.

Seely v. State, 451 So. 2d 213.

Davis v. State, 680 So. 2d 848.

STATEMENT OF ISSUES

ISSUE: The trial court committed reversible error when the court denied the appellant's motion to dismiss the charge at the close of the evidence. The appellant correctly observed that the prosecution failed to prove all of the elements of the charge to establish a prima facie case that the defendant was guilty of the charge of possession of cocaine with intent to distribute.

ISSUE: The trial court failed to admit in evidence exhibit C-18 in violation of Rule 901 of the Mississippi Rules of Evidence adopted effective January 1, 1986, consequently, the appellant's conviction for possession of cocaine with intent pursuant to 41-29-139 (a)(1) should be reversed.

ISSUE: The trial court failed to properly instruct the jury wherein he refused defendant's instruction D-4.

ISSUE: The trial court failed to properly instruct the jury wherein he refused defendant's instruction, D-6.

ISSUE: The trial court failed to properly instruct the jury on the meaning of the terms and or elements of the crime as charged in the indictment, consequently, the appellant's conviction for possession of cocaine with intent should be reversed.

ISSUE: The trial court was in error when he admitted the search warrant in evidence as exhibit, S-1.

ISSUE: The trial court was in error when he admitted the substance identified by Robert Moore as cocaine in evidence as exhibit, S-3.

ISSUE: The Circuit Judge who conducted the suppression hearing was in error when she denied the Motion to Suppress the evidence filed herein by the defendent.

ISSUE: The trial court improperly sentenced the defendant pursuant to 99-19-81 of the Mississippi Code of 1972 as amended, further, said sentence violates the defendant's constitutional right to due process of law, Article 3 section 14 of the Constitution of the State of Mississippi.

STATEMENT OF THE CASE

Thornton "Shug" Peterson, Jr. was indicted on December 28, 2001 on a charge of possession of cocaine with intent, 41-29-139 (a) (1), subsequent offender 41-29-147; habitual, 99-19-81.

The charge was the result of a search warrant secured by Robert Moore, Indianola, Mississippi from Justice Court Judge John Burrell of Sunflower County. The indictment claims that 19.0 grams of cocaine were found on the premises of 407 Clay St., Indianola, Mississippi. He was convicted on February 19, 2004 and sentenced on February 20, 2004 to serve a term of sixty (60) years and a fine in the amount of $2,000,000.00. Prior to his conviction the defendant was tried three (3) times each resulted in a mistrial declared by the Court.

The Circuit Judge Margaret Carey-McCray held a hearing on the Motion to Supress the evidence on May 21, 2002. She denied the motion. The first trial was declared a mistrial on October 17, 2002. Judge Carey-McCray recused herself on November 12, 2002. Judge Ashley Hines was assigned to hear the matter on Hovember 25, 2002. Judge Hines entered an Order for Mistrial on February 13, 2003. Judge Hines entered an Order for Mistrial on July 22, 2003. The defendant was convicted on February 19, 2004 and sentenced on February 20, 2004.

Counsel was appointed by the Circuit Judge pursuant to an Order from the Mississippi Supreme Court after his appeal was reinstated same having been previously dismissed. Counsel cites a number of issues for consideration by the Court. Further, counsel would submit that the appellant's conviction and sentence should be reversed and the matter remanded to Sunflower County.

SUMMARY OF ARGUMENT

The appellant asserts that the search warrant was void and that any and all evidence obtained through said warrant should be excluded. The search warrant violates the defendant's right to be free from an unreasonable search predicated on a void warrant. The trial was flawed inasmuch as evidence of the alleged cocaine was not properly admitted in evidence, thus, the charge should be dismissed. The principle witness, Carolyn Webb destoyed her credibility and her competence as a witness when she testified that during the time of the alleged crime and for a significant period preceding the alleged date of the crime that she was a regular user of illegal drugs and that she was high on said drugs all the time, thus, her credibility as a witness was destroyed by her admissions. The defendant was tried three times prior to his conviction and the trial court refused two instructions that the defendant felt were essential to a proper understanding by the jury of the charge and the defendant's lack of participation, thereby, allowing the jury to give a more balanced deliberation of the facts that would have resulted in a finding of not guilty.

The sentence of the trial court was in violation of the case law that requires the prosecution to prove beyond a reasonable doubt that the defendant not only was convicted of two felonies prior to this conviction and that he served at least one year of each sentence on each preceding conviction The prosectuion offered no proof on the element of the amount of time served on the two prior convictions. The jury was not properly instructed on the elements of the charge possession with intent. The instructions did not properly define the term, intent.

ISSUE: The trial court committed reversible error when the court denied the appellant's motion to dismiss the charge at the close of the evidence. The appellant correctly observed that the prosecution failed to prove all of the elements of the charge to establish a prima facie case that the defendant was guilty of the carge of possession of cocaine with the intent to distribute.

Unfortunately, the prosecution offered the testimony of Carolyn Webb to establish that the defendant, Thornton Peterson, operated a criminal enterprise wherein he engaged in a drug operation that he unlawfully, willfully, knowingly, and feloniously possessed cocaine with the intent to sell, barter, transfer or deliver same to another on August 10, 2001.

Obviously, Caroly Webb was an uncopperative witness for the prosecution as a direct result of years of drug abuse. (see testimony, pages 341-400) Thornton Peterson was tried four times on this charge. Each of the three trials prior to this matter ended in a mistrial.

On October 17, 2002, the trial judge declared a mistrial. It appears that Caroly Webb refused to testify and invoked her right not to incriminate herself in the so-called enterprise.

On February 13, 2003, the trial judge delcared a mistrial when the jury failed to reach a unanimous verdict.

On July 22, 2003, the trial judge declared a mistrial when the jury failed to reach a unanimous verdict.

Caroly Webb testified that while she lived at 407 Clay Street, Indianola, Mississippi she was continuously under the influence of illegal drugs. Consequently, her testimony is without question tainted by the influence of drugs. Further, her obivious admission that she committed numerous crimes wherein she was granted immunity from prosecution destroys her competency.

and credibilty to prove beyond a reasonable doubt each and every element of the charge.

Black's Law Dictionary, Revised Fourth Edition, dfines the following terms as: see pages, 440 and 355.

> Credibility. Worthiness of belief; that quality in a witness which renders her evidence worthy of belief. After the competence of a witness is allowed, the consideration of her credibility arises and not before.
>
> Competency: In the law of evidence. The presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice; applied, in the same sense, to documewnts or other written evidence.

Defendant could not be convicted of possessing concaine with felonious intent to distribute in the absence of any evidence to prove that he intended to distribute cocaine. See, Stringfield v. State, 478 So.2d 266.

State must prove intent beyond reasonable doubt for evidence to be sufficient to establish possession of controlled substance with intent to sell or distribute; mere suspicion of intent cannot support conviction. See, Holland v. State (Miss. 1995) 656 So. 2d 1192.

When seeking to prove intent to sell, transfer or deliver, state must establish more than a mere suspicion of intent. Girley v. State (Miss. 1992) 602 So. 2d 844.

Mere suspicion of intent to distribute drugs cannot support conviction; State must prove intent beyond reasonable doubt. Esparaza v. State, (Miss. 1992) 595 So. 2d 418.

The competency of Caroly Webb as a direct result of her drug abuse cannot be restored with a showing that she has undergone drug treatment. Her credibility will forever be compromised and undermined as the principal witness against thronton Peterson. She cannot be rehabilitated to give credible testimony of events that transpired when she was admittedly under the influence of drugs all the time as she acknowledged was her condition of her mind and body.

ISSUE: The trial court failed to admit in evidence exhibit C-18 in violation of Rule 901 of the Mississippi Rules of Evidence adopted effective January 1, 1986, consequently, the appellant's conviction for possession of cocaine with intent pursuant to 41-29-139 (a)(1) should be reversed.

During a prior trial that ended in a mistrial, Tara Milam, a forensic scientist with the Mississippi Crime lab identified the alleged substance containing cocaine, a schedule II controlled substance. The substance was received in evidence as exhibit S-7. Pages 97-101 of witness testimony; February 12 and 13, 2003.

During a prior trial that ended in a mistrial, the substance was received in evidence as exhibit no. S-9, page 14 of witness testimony; the 1st and 2nd days of July, 2003.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. Requirement of Authentication or Identification

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satified by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Black's Law Dictionary, Revised 4th Edition, page 366.

> A "condition precedent" is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or performance of some act after the terms of the contract have been agreed on, before the contract shall be binding on the parties.

Rogers v. Malone, 850 Or. 61, 165 P. 357, 358; Mercer-Lincoln Pine Knob Oil Co. v. Pruitt, 191 Ky. 207, 229 S.W. 374.

During the last trial (fourth), the parties agreed to stipulate the substance (evidence) was cocaine. However, the agreement did not waive the requirement that the stipulation being representative of the substance must be admitted in evidence as was done in the prior trials.

Obviously once the document was marked for identification, the condition precedent for its admissibility was present, thus, the trial judge must direct that the document be marked as evidence and received. This event did not happen, thus, the document as representative of the substance was never received in evidence.

ARTICLE X. CONTENTS OF WRTINGS, RECORDINGS AND PHOTOGRAPHS

Rule 1002. Requirement of Original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by law.

Comment

This rule is a statement of the so-called best evidence rule. The best evidence rule only applies to writings, recordings, or photgraphs, as defined in Rule 1001, when a party seeks to prove their contents.

Black's Law Dictionary, Revised 4th Edition, page 203.

Best evidence. Primary evidence, as distinguished from seconary; original, as distinguished from substitutionary; the best and highest evidence of which the nature of the case is susceptible, not the highest or strongest evidence which the nature of the thing to be proved admits of.

A written instrument is itself always regarded as the primary or best possible evidence of its existence and contents; a copy or the recollection of a witness, would be secondary evidence. Manhattan Malting Co. v. Sweteland, 14 Mont. 269, 36 P. 84.

Therefor, the appellant submits the conviction cannot be supported and the appellant's conviction and sentence should be reversed and remanded to Sunflower County for further proceedings.

ISSUE: The trial court failed to properly instruct the jury wherein he refused defendant's instruction D-4.

This instruction should be considered with as background the consideration that Thornton Peterson was tried four times on this charge. The first 3 trials ended in a mistrial when the jury could not reach a verdict.

The trial court granted defendant's instruction D-7. This instruction was a "twotheory" instruction regarding consideration of the circumstantial evidence present in this case. Further, the trial court gave instruction, CR-2, which presumes every person charged with a crime to be innocent at the outset of the trial. The defendant requested instruction D-4 which completed CR-2 insofar as "you must view the testimony in the light of that presumption which stays with the defendant throughout the trial of the case unless or until the evidence convinces you that the defendant is guilty beyond a reasonable doubt."

Carolyn Webb in her drug tainted testimony never provided any specifics associated with the elements of this charge. The intent portion of this charge requires the prosecution prove the elements such as sell, barter, transfer or delivery of a controlled substance.

In the case, Edwards v. State (Miss. 1994) 630 So. 2d 343.

The Court advised that a cautionary instruction regarding testimony of an accomplice was mandatory in a drug sale prosecution based on the accomplice's testimony. I would argue this instruction was in the nature of a cautionary instruction inasmuch as Carolyn Webb's testimony was riddled with doubt as to accuracy. An instruction to the jury to be vigilent regarding the presumption was not inappropriate in light of the testimony.

ISSUE: The trial court failed to properly instruct the jury wherein he refused defendant's instruction, D-6.

The defendant was charged with possession of cocaine with the intent to sell, barter, transfer or deliver on August 10, 2001. The defendant was not charged with conspiracy. A conspiracy requires the cooperation of two or more persons. On page 409 of the trial record wherein D-6 was debated. The prosecution acknowledges that Carolyn Webb's testimony is the entire case regarding intent.

As previously noted, Carolyn Webb acknowledged she lived at 407 Clay Street in Indianola, Mississippi where she was continuously under the influence of illegal drugs. Ms. Webb acknowledged that she knew Thornton Peterson all his life. Presumably, she was aware of his prior drug convictions. Consequently, her testimony about prior drug transactions should be viewed with suspicion. (pages 341-359) Ms. Webb acknowledges that she has been granted immunity from prosecution for her participation in the alleged conspiracy. (pages 376-395) Carolyn Webb continues her testimony, but, she acknowledges that she was in a stupor during the time she lived at 407 Clay Street, but, she can separate her guilty conduct from that of Mr. Peterson.

> Trial court should have given limiting instruction as to narrow purpose for which it was receiving other crimes evidence regarding drug-trafficking defendant's prior sales of controlled substances i.e., that evidence was admitted solely for purposes of demonstrating defendant's intent as regards the drugs in his possession at the time of his arrest. See, Smith v. State (Miss. 1995) 656 So. 2d 95.

Argubly, Carolyn Webb's testimony regarding intent is seriously tainted and should be discarded as it relates to the defendant's conduct on August 10, 2001. Therefore, the appellant submits the conviction cannot be supported and the appellant's conviction and sentence should be reversed and remanded.

ISSUE: The trial court failed to properly instruct the jury on the meaning of the terms and or elements of the crime as charged in the indictment, consequently, the appellant's conviction for possession of cocaine with intent should be reversed.

The appellant was found guilty that he did:

> unlawfully, willfully, knowingly, and feloniously have and possess 19 grams of cocaine, a scheduled 2 controlled substance, with the intent to sell, barter, transfer or deliver the same to another.

> "The Court instructs the jury that in order for the State to meet its burden of proving the Defendant, Thornton Peterson, Jr., guilty beyond a reasonable doubt, the State must prove each and every essential element of the offense charged, and if they have failed to prove any one or more of these elements beyond a reasonable doubt, then you must find the Defendant, Thornton Peterson, Jr., not guilty."

Section 41-29-139. Prohibited acts and penalities; indictments for trafficking.

(a) Excpt as authorized by this article, it is unlawful for any person knowingly or intentionally;
(1) To sell, barter, transfer, manufacture, distribute or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance; or

The trial court on page 418 of the record instructed the jury extensively regarding the term of possession. However, the trial court said nothing regarding the meaning of other terms used by the Court wherein the jury was instructed to consider the evidence presented in this matter.

Several terms appear in the instructions that have consequences to the defendant. Yet the jury was left to define the terms for themselves without guidence from the trial court.

This Court in Davis v. Wal-Mart Stores, Inc. 724. So. 2d 907, 909 citing Boone v. Wal-Mart, 680 So. 2d 844, (Miss. 1996) stated the following:

"We have held that if jury instructions fail to set out the applicable law the case must be reversed and remanded."

Black's Law Dictionary, Revised Fourth Edition, defines the following terms as:

A number of the terms and or elements of the crime constitute an economic transaction between persons. While these terms may have a understanding in the general community at large; the instruction to the jury fails to define the terms and or elements as understood in law. I contrast this omission with the trial court's carefully worded instruction on the term, possession.

Barter.	A contract by which parties exchange goods or commodities for other goods. It differs from sale, in this; that in the latter transaction goods or property are always exchanged for money.
Sell.	To dispose of by sale.
Transfer.	To convey or remove from one place, person, etc. to another; pass or hand over from one to another; to make over the possession or control of; sell or give.
Delivery.	The act by which the res or substance thereof is place within the actual or constructive possession or control of another.
Intend.	To design, resolve, purpose.

After concluding the possession question, the jury was instructed to further decide if the defendant intended to sell, barter, transfer or deliver the cocaine. The trial court carefully instructed the jury regarding the elements of possession, then, the trial court bifurcated the charge regarding intent without any guidance to the jury regarding intent, which is formed if the prosecution proves beyond a reasonable doubt any of the elements of economic transaction such as sell, barter, transfer or delivery. Carolyn Webb never provided any testimony regarding these elements of the charge. Thus, the appellant submits the conviction cannot be supported and should be reversed and remanded to Sunflower County for further proceedings.

ISSUE: The trial court was in error when he admitted the search warrant in evidence as exhibit, S-1.

ISSUE: The trial court was in error when he admitted the substance identified by Robert Moore as cocaine in evidence as exhibit, S-3.

The appellant submits the search warrant designated as exhibit, S-1, is invalid and is therefore void and all evidence collected in the execution of the search warrant should be excluded as well as the search warrant.

Black's Law Dictionary, 4th Edition, page 1518 defines search-warrant as follows:

> SEARCH-WARRANT. An order in writing, issued by a justice or other magistrate, in the name of the state, directed to a sheriif, constable, or other officer, commanding him to search a specified house, shop, or other premises, for personal property alleged to have been stolen, or for unlawful goods, and to bring the same, when found, before the magistrate, and usually also the body of the person occuping the premises, to be dealt with according to law. People v. Lavendowsky, 329 Ill. 223, 160 N. 582,585.

The search warrant was issued by Justice Court Judge John Burwell of Sunflower County, Mississippi, page 181 of the trial record, to RobertMoore, an Indianola, Mississippi police officer. Consequently, Robert Moore should be classified as an officerof justice. (Moore's trial testimony, Pages 180-237).

Black's Law Dictionary, 4th Edition, page 1236 defines officer of justice as follows:

> OFFICER OF JUSTICE. A general name applicable to all persons connected with the adminstration of the judicial department of government, but commonly used on of the class of officers whose duty is to serve the process of the courts, such as sheriffs, constables, baliffs, marshals, sequestrators, etc.

Robert Moore's ministerial duty was to serve Thornton Peterson with the search-warrant, collect and inventory any evidence seized pursuant to the warrant. Further, he was required to make a proper return of his activities to the proper judicial officer and secure any and all evidence seized pursuant to the warrant. A perusal of the search-warrant reveals a document without any legal significance whatsoever as same relates to the matter before this court.

The search-warrant, S-1, is a document consisting of three pages, the part of the document designated as the Return is void of any signature of Robert Moore of verification that same was in fact executed by Robert Moore. It is void of any authentication of Robert Moore's absent signature that would render the document legally admissible as evidence in the matter before this court.

Black's Law Dictionary, 4th Edition, page 168 and 1732 defines verification and authentication as follows.

> VERIFICATION. Confirmation of correctness, truth, or authority by affidavit, oath, or depostion. McNamara v. Powell, Sup., 52 N.Y. S. 2d 515, 527.

> AUTHENTIFICANTION. In the law of evidence. The act or mode of giving authority or legal authenticity to a statute, record, or other written instrument, or a certified copy thereof, so as to render it legally admissible in evidence. Voloshin v. Ridenour, C.C.A.Canal Zone, 299 F. 134. Verifications of judgments. Collete v. Hanson, 174 A. 466, 467, 133 Me. 146.
>
> An attestation made by a proper officer by which he certifies that a record is in due form of law, and that the person who certifies it is the officer appointed so to do. Acts done with a view of causing an instrument to be known and identified.

On page 3 of the document the folowing language appears:

THE FOLLOWING IS AN INVENTORY OF THE THINGS TAKEN PURSUANT TO THE WARRANT.

> The alleged cocaine does not appear in the inventory, further, the list of items is written with two pens, one blue and black.

Consequently, the exhibit, S-3, cannot be accepted in evidence as having been found in the search. Further, though the warrant indicates on page two that a copy of the warrant was left with Thornton Peterson. Obviously, without verfication and authentication present on the warrant, a court of review could not accept that the appellant was ever served with the warrant at the time of the search and the evidence was collected by the Indianola Police Department.

Robert Moore testified during trial that he was provided extensive training in narcotics work including search warrants. (Pages 196-197) Further, he has no knowledge of what became of the statement of the underlying facts attached to the searh warrant to support same being issued by the Justice Court Judge. Obviously, the assertion the narcotics were found during the search is not supported by a notation in the list of items found during the search. The list of the inventory of the items does not include the narcotics. (pages 217, 230)

In Brewer v. State (Miss. 1926) 142 Miss. 100, 107 So. 376.

> Evidence obtained on search of one's premises on a void search warrant is incompetent on prosecution of her.

Roebert Moore testified he was in charge of collecting the illegal narcotics. Without Moore's verfication of the search warrant with his signature, a court reveiwing the warrant has no independent verification of who actually wrote the information on the search warrant. I would argue that the search warrant is a void document on its face and should have never been admitted in evidence.

In Stubbs v. State, 811 So. 2d 384.

> The standard of review regarding the admission of evidence is abuse of discretion.
>
> Where error involves the admission or exclusion of evidence, this Court will not reverse unlsess the error adversely affects a substantial right of a party.

Section 23, Article 3 of the Mississippi Constitution provides:

The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

In Boyd v. State, (Miss. 1949) 206 Miss. 573, 40 So. 2d 303.

> Where sheriff signed printed form of affidavit for search warrant at his office at Raleigh, which instrument was taken by a deputy sheriff to to a justice at Taylorsville, and on basis of such form affidavit justice issued a search warrant, warrant was invalid because not supported by oath or affirmation before the justice.

In Grizzard v. State, (Miss. 1928) 149 Miss. 323, 115 So. 555.

> Warrant wherein defendant's name was inserted after affiant stated officers had misunderstood him about name held void for absence of oath.

In Atwood v. State (Miss. 1927) 146 Miss. 662, 111 So. 865, 51 A.L.R. 836.

> "Oath" is appeal to God by affiant to witness truth of what he swears.

Interlude

The defendant represented by Stan Perkins filed a Motion to Suppress the evidence found during an illegal search. A hearing was held on May 21, 2002 before Judge Margaret Carey-McCray. The court denied the motion by Order filed on June 5, 2002.

Robert Moore testified at the suppression hearing that his underlying facts and circumstances that were attached to his affidavit were missing. His affidavit or a copy was admitted as an exhibit, D-2. (page 19 of the transcript of the suppression hearing)

At trial in February of 2004, Robert Moore does not mention his affidavit and neither the affidavit and or a oopy was admitted at the time the search warrant was admitted in evidence. (page 218)

During the testimony provided at the suppression hearing, there is no testimony regarding the failure to execute the return of the warrant or provide the Justice Court Judge with a copy of the return. Further, there is no testimony of the fact that the alleged cocaine is not listed in the inventory stated in the search warrant. (page 2-64 pf the suppression hearing)

ISSUE: The Circuit Judge who conducted the suppression hearing was in error when she denied the Motion to Suppress the evidence filed herein by the defendant.

I submit the totality of the circumstances surrounding, not only, the issue of whether probable cause existed to issue the warrant, but, if the officer charged with serving the warrant properly executed the warrant. In this matter, we know the officer that was charged with serving the warrant did not properly sign the return and it appears a copy of the return was never provided and or deliverd to the magistrate. Further, the inventory does not indicate that illegal narcptocs were infact found pursuant to the warrant.

Robert Moore by requesting the search warrant from Judge John Burrell was giving his assurance that he would properly execute the search warrant. He did not properly execute the warrant, thus, same is void and all evidence recovered pursuant to said warrant should be excluded. In addition to properly serving the warrant and looking for evidence, the officer has a duty to the court to properly execute the return, list any and all evidence taken from the premises, properly return a executed copy, under oath, to the magistrate who issued the warrant.

Black's Law Dictionary, 4th Edition, pages 676-678.

Execute. To complete; to make; to perform; to do; to follow out.

> To perform; carry out according to its terms; as to execute a contract.

Executed. Completed; carried into full effect; akready done or performed; taking effect immediately, now in existence or in possession; conveying an immediate right or possession.

Execution. Carrying out some act or course of conduct to its completion. The completion, fulfillment, or perfecting of anything, or carrying it into operation and effect.

Execution of Instrument. Execution includes signing, sealing, and delivering. Completion of instrument.

> Execution of instruments means making thereof, when spoken of deeds. It includes all acts such as signing,sealing, and delivering, which are necessary to give effect thereto.

The document submitted by Robert Moore is entitled; Affidavit for Search embodies the duty Robert Moore was entrusted with that is he will faithfully execute the search warrant to its tenor and make a responsible return to the magistrate who issued same.

Wherefore, the warrant should be declared void and all evidence should be excluded and the charge dismissed upon remand by this Court.

ISSUE: The trial court improperly sentenced the defendant pursuant to 99-19-81 of the Mississippi Code of 1972 as amended, further, said sentence violates the defendant's constitutional right to due process of law, Article 3 section 14 of the Constitution of the State of Mississippi.

The defendant was indicted on the charge of possession of cocaine with intent (41-29-139 (a)(1), subsequent offender (41-29-147); habitual (99-19-81) of the Mississippi Code of 1972 as amended. The indictment was filed on December 28, 2001.

The defendant was tried on October 17, 2002 and a mistrial was declared by the Circuit Judge on October 17, 2002.

The defendant was tried on February 13, 2003 and a mistrial was declared by the Circuit Judge on February 13, 2003.

The defendant was tried on July 1, 2003 and mistrial was declared by the Circuit Judge on July 22, 2003.

The defendant was tried on February 19, 2004 and a jury convicted the defendant on February 19, 2004.

The prosecution filed a Motion to Amend the Habitual Offender Portion of the Indictment on February 20, 2004. The Court granted the motion of February 20, 2004 over the objection of the defendant.

The defendant was tried 4 times and convicted on the fourth trial, wherein the prosecution never attempted to amend the indictment prior to the trial of each cause. The prosecution filed the motion to amend on February 20, 2004 subsequent to the defendant's conviction.

On page 446 of the trial record, the prosecution offers this explanation of her tardiness regarding the motion to amend the indictment.

"I learned this through reading the court file itself."

It appears the Court allows amendments with reasonable notice to the defendant. The indictment was filed on December 28, 2001 and the motion to amend was filed on February 20, 2004. The prosecution sees no prejudice to the defendant. When doesreasonable lattitude to amend an indictment violate the defendant's right to due process of law?

The defendant objected to the amendment at that late hour. I would submit the defendant should have been sentenced pursuant to section 41-29-147 of the Mississippi Code of 1972 as amended, not section 99-19-81 of the Mississippi Code of 1972 as amended.

The Court held in Bogard v. State (Miss. 1993) 624 So. 2d 1313.

> To sentence defendant as habitual offender, state must prove that defendant has not only been at least twice previoulsy convicted but that he has been sentenced to and has served separate terms of one year or more in any state and/or federal penal institution.

The Court held in Seely v. State (Miss. 1984) 451 So. 2d 213.

> In prosecutions under habitual offender statute, bifurcated trial is mandatory.
>
> Requirement of bifurcated trial in prosecution under habitual offender statute means a full tow-phase trial prior to any finding that defendant is habitual offender and subject to enhanced punishment, rather that perfunctory habitual finding, and a complete record of the second part of the trial must be made.

The Court held in Davis v. State (Miss. 1996) 680 So. 2d 848.

> At bifurcated hearing, as required under recidivist statutes, state msut prove requirements set forth in habitual offender statute beyond reasonable doubt.

I would argue the prosecution failed to prove beyond a reasonable doubt that the defendant was guilty of two prior felony convictions and that he served at least one year of the sentence on each conviction.

Trial record (pages 445-465)

The prosecution offered testimony from Joe Simpson, federal probation officer, that the defendant was convicted of a prior drug charge, exhibit S-19. The witness offered no proof regarding the length of time served. The prosecution offered testimony from Howard Q. Davis, former circuit judge, that the defendant was convicted of a prior drug charge, exhibit S-20. The witness offered no proof regarding the length of time served. Thus, the prosecution failed to prove an essential element of the habitual offender statute.

The defendant, by and through counsel, objected to the amendment to the indictment because same was not in compliance with Rule 11.03 of the Uniform Circuit and County Court Rules. The rule provides that the indictment must with particularity the nature or description of the offense constituting the previous convictions. The elements of the charge of an habitual offender in this matter is not only the prior convictions, but, the essential elements that the defendant actually served at least one year on each offense. This was not pled in the indictment and thus the amendment should not be permitted at such a late hour considering the prosecution never attempted to amend the indictment during the preceding three years, 2001, 2002, and 2003. It was not until 2004 subsequent to conviction did the prosecution attempt to amend the indictment.

Wherefore, the appellant moves the Court to set aside the sentence in this matter and remand the case to the Circuit Court of Sunflower County to resentence the appellant.

CONCLUSION

I, submit that the defendant's constitutional rights, such as the right to be free from an unreasonable search and seizure were violated. Further, the defendant did not receive a fair trial inasmuch as the jury was not properly instructed, the defendant was denied two instructions that were essential to has defense. Evidence was not properly admitted in evidence, thus, his conviction was not supported by admissible evidence, thus, his conviction should be set aside. The sentence was not proper, thus, the matter should be reversed. The search warrant was void and cannever be constitutional, thus, the charge should be rendered in favor the defendant being declared not guilty.

Therefore, the defendnat, by and through counsel, moves the Court to reverse his conviction and remand the matter consistent with the foregoing declarations.

Respectfully submitted, this the 31 day of March, 2009.

Stephen Nick

Stephen Nick

CERTIFICATE

I, Stephen Nick, do hereby certify that I have this day mailed a true and correct copy of teh forgoing, postage prepaid, to the following persons:

Mr. Jim Hood	Judge Ashley Hines	Judge MargaretCarey-McCray
Attorney General	Circuit Court Judge	Circuit Court Judge
Post Office Box 220	Post Office Box 1315	Post Office Box 1775
Jackson, MS.39205	Greenville, MS. 38702 1315	Greenville, MS. 38702-1775

This the 31 day of March, 2009.

Stephen Nick

Stephen Nick