IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COREY BARLOW — APPELLANT



VS. — NO. 2005-KA-1179

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## THE STATE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES

## STATE CASES

**STATE STATUTES**



**STATE RULES**

and conspiracy to distribute cocaine. Barlow was sentenced to fifty years for possession of at least three, but less than four kilograms of cocaine with the intent to distribute, enhanced by possession of a firearm, and ten years for conspiracy to distribute cocaine, to run consecutive. Barlow was ordered to serve the first forty-seven years with the last thirteen years to be served on post release supervision.. (Clerk's Papers at 232.) Barlow was fined ten thousand dollars and ordered to pay court costs, and four hundred and five dollars in restitution to the Lincoln County Sheriff's Office and State Crime Lab. *Id.*

## STATEMENT OF FACTS

Corey Barlow was a parolee living in Lincoln County, Mississippi; his supervisor, Tanya Thompson, was a probation officer from Copiah County. Another Department of Corrections field officer, John Purser, received two calls from anonymous sources, both stating that Barlow was in possession of a large quantity of narcotics. The corroborating information included: the location, color of the car, and time of day that Barlow would be on Beard Road.

In cooperation with the Lincoln County Sheriff's Department, Officer Purser set up a driver's license checkpoint at the two locations which led to the alleged address of Barlow. Once stopped at the checkpoint, Barlow was asked for his driver's license, which he did not have in his possession. Barlow and his passenger were then asked to get out of the car. As the passenger, Thomas McWilliams, got out of the car, drugs fell from under his shirt.

After being arrested and given their *Miranda* warnings, Barlow told officers that the drugs in the car were his, that there were more drugs in the car, and that there were more drugs at his residence at Beard Road. The police drove Barlow to the Beard Road residence where Barlow gave consent for officers to enter the residence. Barlow proceeded to show the officers where the drugs were located in the house. While in the house, Barlow also told the officers that there was a gun in

the house.

## SUMMARY OF THE ARGUMENT

The trial court did not err in denying Barlow's motion to suppress the fruits of the search and seizure. The search and seizure were proper.

The trial court did not err in denying Barlow's motion to suppress statements. The record shows that the statements were knowingly and voluntarily given.

The trial court did not err by denying Barlow's motions regarding the handgun. The evidence that Barlow was in possession of the handgun was required for the proof of the crime charged. Moreover, the handgun was admissible in any event.

The trial court did not err in allowing the admission of Barlow's prior conviction. The conviction was admissible to prove Barlow's intent in possession the drugs.

The trial court did not err regarding jury instructions. The jury was properly instructed.

The trial court did not err in denying Barlow's dispositive motions. The evidence was sufficient to support the verdicts.

The trial court did not abuse its discretion in sentencing Barlow. The sentences were within legal limits.

The trial court did not err in rejecting Barlow's cumulative-error allegation.

## ARGUMENT

### I. The Trial court did not err in denying Barlow's Motion to Suppress Fruits of the Search and Seizure.

### A. The Sheriff's Department had reasonable suspicion and/or probable cause to stop and detain Barlow.

The sheriff's department conducted a reasonable search within the meaning of the Fourth Amendment when looking at the "totality of the circumstances" in combination with Barlow's status

as a parolee. To determine reasonable suspicion or probable cause, the courts should look to "the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). In *Ornelas*, the Court held that as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. *Id* at 699. However, the Court also stated that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.*

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects, against *unreasonable* searches and seizures. . . ."U.S. Const. Amend. IV (emphasis added). Whether a search is reasonable "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-119 (2001). In Mississippi it is possible, that inmates or persons on probation or parole may be subjected to searches absent the usual constitutional safeguards against illegal search and seizure. *Robinson v. State*, 312 So. 2d 15 (Miss. 1975). In the present case, the sheriff's department conducted a reasonable search based on the lower expectation of privacy for parolees and the state's interest in supervising parolees. In addition, when looking at the 'totality of the circumstances," the officers had enough idicia of reliability to establish reasonable suspicion.

Barlow was on parole and, therefore, had a lower expectation of privacy than members of law-abiding society. *Knights,* 534 U.S. at 119. Parolees have fewer expectations of privacy than

even probationers, because parole is more akin to imprisonment than probation is to imprisonment. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence." *Id.* In addition to the lessor expectation of privacy, Mississippi has an overwhelming interest in supervising parolees.

The Supreme Court has acknowledged that a State has an "overwhelming interest" in supervising parolees because parolees are more likely to commit future criminal acts. *Pennsylvania Bd. of Probation and Parole*, 524 U.S. 357, 365 (1998). Similarly, the Court has acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987). Therefore, the officers' investigative stop of Barlow was reasonable. In addition, the officers had sufficient reasonable suspicion because Barlow was a parole.

Barlow argues that officers did not have sufficient cause to stop him; however, the cases that he relies on do not take into account his status as a parolee. Looking at the "totality of the circumstances" the officers did not violate Barlow's Fourth Amendment rights due to his lower expectation of privacy. In addition, the officers had sufficient corroboration of the information received by them in order to establish reasonable suspicion.

The Supreme Court of the United States concluded that whether an informant's information creates probable cause for a search or arrest is to be determined by the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213 (1983). An investigative stop of a suspect may be made so long as officers have "reasonable suspicion, grounded in specific and articulable facts, that

a person they encounter was involved in or is wanted in connection with a felony...." *McCray v. State*, 486 So.2d 1247, 1249 (Miss.1998). Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors – quantity and quality – are considered in the "totality of the circumstances – the whole picture." *United States v. Cortez*, 449 U.S. 411, 417 (1981). Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. *Alabama v. White*, 496 U.S. 325 (1990). In this case, looking at the "totality of the circumstances," reasonable suspicion was established by the facts of the case. These factors included: Barlow was a parolee, Officer Purser called the Department of Corrections Office and learned that Barlow had tested positive for drugs on two prior occasions, Officer Purser received information that Barlow was a "known drug dealer," and the officers had received information from two anonymous tips which included: information that Barlow was in possession of drugs, what type and color the car he would be using, the fact that he was residing on Beard Road, and that he would be in the specific car at a certain time. The anonymous tips had sufficient idicia of reliability to establish reasonable suspicion when coupled with the fact that Barlow had a lower expectation of privacy based on his status as a parolee.

**B. Mississippi Department of Corrections Officer John Purser had reasonable grounds and the legal authority to stop and detain Barlow.**

Barlow argues that Mississippi Department of Corrections (MDOC) Officer Purser did not have the authority or reasonable grounds to stop Barlow since Barlow was assigned to MDOC Officer Tanya Thompson for supervision during his parole. Barlow cites Section 47-7-27 of the Mississippi Code for this justification. Section 47-7-27, states in part:

> Any **field supervisor** may arrest an offender without a warrant or may deputize any other person with power of arrest to do so by giving him a written statement setting forth that the offender has, in the judgment of that field supervisor, violated the conditions of his parole or earned-release supervision. Such written statement delivered with the offender by the arresting officer to the official in charge of the department facility from which the offender was released or other place of detention designated by the department shall be sufficient warrant for the detention of the offender.

(Emphasis added.)

First, Barlow states that Officer Purser is not a field supervisor as required under Section 47-7-27. However, in Section 47-7-9(2)(c), the Mississippi Code of 1972 states:

> It is the intention of the Legislature that insofar as practicable the case load of each division personnel supervising offenders in the community (hereinafter **field supervisor**) shall not exceed the number of cases that may be adequately handled.

It is evident that for purposes of convenience, the Code uses the term "field supervisor" as reference to any division personnel supervising offenders in the community.

Officer Purser is an MDOC field officer assigned to supervise parolees and, therefore, would be included in the all-encompassing term "field supervisor." Since Officer Purser is, in fact, a field supervisor, Officer Purser had the legal authority to detain and/or arrest Barlow without a warrant and had the authority to delegate that power to the sheriff's department.

Next Barlow argues that Officer Purser did not provide the written statement referenced in Section 47-7-27 to the Lincoln County Sheriff's Office, in order to delegate his power to detain and/or arrest Barlow. However, the Lincoln County Sheriff's Officers did not need to have Officer Purser provide the written statement delegating his power to them because Officer Purser was at the scene. Officer Purser had the authority to detain Barlow and only sought assistance by the law

enforcement officers. Although Officer Purser was initially at the second checkpoint and not at the checkpoint where Barlow was initially detained, he was immediately notified and taken to the checkpoint where Barlow was located. Officer Purser was less than a mile away and was present at the location where Barlow was detained. Officer Purser did not need to delegate his authority when he was actually present at the location.

**C. The officers acted within permissible bounds in arresting Barlow without a warrant.**

Barlow argues that the officers exceeded their permissible bounds when they arrested him without a warrant because he was arrested before there was sufficient probable cause to arrest him. However, Barlow was not compliant with state licensing requirements and the officers arrested Barlow after finding narcotics in plain view.

"Probable cause to arrest depends upon whether, at the moment the arrest was made . . . the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). To stop and temporarily detain is not an arrest. Given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest. *Singletary v. State*, 318 So. 2d 873, 876 (Miss. 1975).

The officers had reasonable suspicion to stop Barlow as stated in Issue 1 subsection A. After the stop, the officers did not arrest Barlow until after narcotics were found. Barlow was detained for a small period of time and the officers only requested McWilliams and Barlow to get out of the car. Barlow argues that Officer Purser testified at the suppression hearing that he reached into Barlow's car, turned off the car, and removed the keys. On review of the transcript, Officer Purser did not

testify that he removed the keys nor did he testify that he turned off the car. Officer Purser only asked Barlow to get out of the vehicle. (R. at 26.) The police may order the driver to step out of the car. See *Pennsylvania v. Mims*, 434 U.S. 106, 111 (1977). Thomas McWilliams (McWilliams) voluntarily got out of the car after Officer Pitts asked if he wouldn't mind. (R. at 343.) As one of the officers asked him to put his hands on the car, narcotics fell out of his shirt. Immediately after that, both McWilliams and Barlow were given their *Miranda* warnings and arrested. Barlow cites *Floyd v. State*, 500 So. 2d 98, as precedent. However, the case differs because the defendant in Floyd was arrested before the discovery of the drugs. In the present case, Barlow was not arrested until after discovery of the narcotics.

In addition, Barlow argues that he was compliant with state licensing requirements, but when stopped he was asked for his driver's license and stated that he did not have it. (R. 357.) Section 63-1-41 of the Mississippi Code Annotated (1972) states in relevant part: "[e]very licensee shall have the required license in his immediate possession at all times when operating a motor vehicle." Barlow was not operating his vehicle legally under Mississippi law as he stated; he was actually in violation of this statute.

Officers had reasonable suspicion to stop Barlow due to his status as a parolee and the anonymous tips Officer Purser received. After the stop, the officers had Barlow and McWilliams get out of the vehicle. At this time, probable cause existed for Barlow's arrest, although he was not technically arrested until after the discovery of possession of narcotics. The officers had probable cause to arrest Barlow.

**D. Barlow did not have a reasonable expectation of privacy while operating his vehicle on the road.**

Barlow argues that he had a reasonable expectation of privacy while operating his vehicle because the terms of his parole did not expressly state that authorities could search his vehicle. A parolee's expectation of privacy is only slightly greater than that of the prison inmate. *Hudson v. Palmer*, 468 U.S. 517, 530 (1984). Barlow was on parole and, therefore had a lower expectation of privacy.

As a parolee, he was subject to being stopped and searched in his vehicle and at his residence by an officer of the MDOC. When Barlow was stopped, he was asked for his license, which he stated that he did not have, in violation of Section 63-1-41 of the Mississippi Code Annotated (1972). When asked to get out of the car, McWilliams dropped narcotics that were hidden under his shirt. Once the drugs were obtained by police, Barlow was asked questions which he was required to answer under the terms of his parole. Paragraph eleven of the Certificate of Parole states: "I will promptly and truthfully answer questions from my Field Officer, the Parole Board and its authorized representatives and carry out all instructions from them." He admitted to owning the narcotics and proceeded to take the officers to his residence where more narcotics were located. (R. 323-324). Paragraph six of the Certificate of Parole, in relevant part, states: "I will not possess or use any illegal drugs, narcotics...." It was only after the drugs were found that Barlow was arrested and his car and residence searched. Barlow argues that the terms written in the Certificate of Parole do not provide the authority for the police to search his vehicle. In 2006, the United States Supreme Court held in *Samson v. California*, 126 S. Ct. 2193 (2006), "that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." In *Robinson v. State*, 312 So. 2d 15, 18 (Miss. 1975), the Mississippi Supreme Court stated that "courts generally hold that

although an inmate is released on parole, the parole authorities may subject him, his home *and his effects*, to inspection and search as may seem advisable to them." (Emphasis added.) The Court cited *People v. Hernanadez*, 229 Cal. App.2d 143 (Cal. 1964), which held that a parolee was subject to have his person, home and effects searched by the parole officer without a warrant. Barlow's vehicle was not searched until after his arrest and he admitted to having narcotics in his car. The officers did not violate Barlow's due process rights by the search and seizure in this case since Barlow had a lesser expectation of privacy.

**E. The Lincoln County Sheriff's Department did need to secure an arrest or search warrant.**

Barlow argues that the evidence at his residence should be suppressed because the Lincoln County Sheriff's Office did not secure an arrest and/or search warrant prior to detaining Barlow. The Mississippi Supreme Court has held that "[t]he standard of review regarding admission [or exclusion] of evidence is abuse of discretion." *Thompson Mach. Commerce Corp. v. Wallace*, 687 So. 2d 149, 152 (Miss.1997). Where error involves the admission or exclusion of evidence, the court "will not reverse unless the error adversely affects a substantial right of a party." *In re Estate of Mask*, 703 So. 2d 852, 859 (Miss. 1997).

Both the Mississippi Supreme Court and the United States Supreme Court have recognized several exceptions to the Fourth Amendment's general proscription against warrantless searches. Consent to search is recognized as an exception to the requirements of a warrant and probable cause. *United States v. Matlock*, 415 U.S. 164, (1974); *Hudson v. State*, 475 So.2d 156, 158-59 (Miss.1985). A search warrant is not necessary if the search is made with the consent to the search of the accused or by someone having equal right to use or occupy the premises. *Loper v. State*, 330 So. 2d 265 (Miss. 1976). The trial court did not err by allowing the evidence found at Barlow's

residence. Paragraph four of the Certificate of Parole states that: "I will allow my field supervisor to visit my residence." Barlow agreed to allow the officers into the residence where he claimed he lived. (R. at 325.) Barlow and McWilliams both gave consent to search the house. McWilliams gave written consent (R. at 326.) and Barlow gave oral consent (R. 326-327.). Since the officers had consent from two parties living at the Beard Road address, a search warrant was not necessary.

**II. The Trial court did not err in denying Barlow's Motion to Suppress Statements.**

Barlow made several incriminating statements to law enforcement officers. He argues that the trial court erred in denying his motion to suppress those statements. "Determining whether a confession is admissible is a finding of fact which is not disturbed unless the trial judge applied an incorrect legal standard, committed manifest error, or the decision was contrary to the overwhelming weight of the evidence." *Hunt v. State*, 687 So. 2d 1154, 1158 (Miss. 1996).

*Miranda* instructs generally that an uncounseled statement made by a defendant during custodial interrogation should be suppressed from use by the government in its case-in-chief unless the prosecution proves that the suspect voluntarily waived his right to counsel and privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). To determine whether a confession is voluntary the court must take into consideration the totality of the circumstances and determine whether the statement is a "product of the accused's free and rational choice." *Porter v. State*, 616 So. 2d 899, 907-08 (Miss. 1993). The prosecution has the burden of proving beyond a reasonable doubt that the confession was voluntary. *Haymer v. State,* 613 So. 2d 837, 839 (Miss. 1993). This "burden is met and a prima facie case made out by testimony of an officer, or other persons having knowledge of the facts, that the confession was voluntarily made without threats, coercion, or offer of reward." *Chase v. State*, 645 So. 2d 829, 838 (Miss. 1994). "Once the trial

judge has determined at a preliminary hearing, that a confession is admissible, the appellant has a heavy burden in attempting to reverse that decision on appeal." *Hunt v. State*, 687 So. 2d 1154, 1160 (Miss. 1996).

In this case, Barlow was given his *Miranda* warnings and proceeded to confess to officers. The record reflects that Barlow made incriminating statements after his arrest and after he was given his *Miranda* warnings. Barlow stated that he understood his rights (R. at 344.) MDOC Officer Purser (Suppression Hearing R. at 7), Officer Barefield (R. at 274) and Officer Pitts (R. at 344) all testified that Barlow was given his *Miranda* warnings before confessing to the ownership of the narcotics. Barlow admitted to the officers that he had been living on Beard Road for three weeks (R. at 9-10), that the drugs in the car were his (R. at 276), that there were more drugs in the car (R. at 278). Barlow made statements to Officer Barefield about the amount he had paid for the cocaine and that he intended to make $300,000 for the sale of the cocaine. (R. at 292.) In addition, during the time that Barlow was being transported to his Beard Road residence, Barlow admitted to Officer Pitts that there were a lot more drugs at the residence. (R. at 345.) Barlow denies these statements. Barlow also denies that he was read his *Miranda* rights. (R. at 280.) Even after Barlow was transported to the police station, he was given a written form with his *Miranda* rights. Barlow signed the form where it states that he had been given his *Miranda* rights. (R. at 332.) In addition, at the suppression hearing, Officer Purser testified that the confession was voluntarily made without threats, coercion, or offer of reward. (R. at 15.)

Barlow argues that the trial judge at the motion hearing used the wrong legal standard because he stated that the statements "explain several different elements of what happened." However, the judge stated that he was going to agree with the original judge's opinion and allow the

statements. He did not state that the only reason he was allowing the statements was to explain the elements of what happened. The judge did not use the wrong legal standard.

Barlow was given his *Miranda* warnings, three officers testified that they had personal knowledge that he was given his *Miranda* warnings, and Barlow was given and signed the written *Miranda* warnings when taken to the police station. The prosecution proved beyond a reasonable doubt that the confessions were made voluntarily.

**III. The Trial court did not err by denying Barlow's motions regarding the handgun.**

**A. The Trial court did not err by denying Barlow's motion to strike portions of the indictment.**

Barlow argues that the trial court erred in denying Barlow's motions regarding the handgun found at the Beard Road residence. Barlow contends that the gun was irrelevant and inadmissible; however, the gun is admissible whether or not it was included in the indictment.

"'Relevant Evidence' is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. In *Wilkins v. State*, 264 So.2d 411, 413 (Miss.1972), the Court stated:

> articles such as tools or weapons found near the place or scene of the crime have been admitted in evidence ... even where it is not claimed or proved that they were used in the commission of the alleged crime in cases where the evidence has probative weight, or where they constitute a part of the surrounding scene or picture, or are a part of the circumstances of the arrest.

The police discovered the .32 caliber handgun in the vicinity of the cocaine found at the Beard residence. The gun is relevant and admissible as part of the "surrounding scene or picture" of

the crime. The Third Circuit Court of Appeals stated, in *United States v. Picklesimer*, 585 F.2d 1199 (1978) that: "where a defendant is charged with narcotics conspiracy, evidence that weapons were found in his possession may be relevant and admissible." Barlow was charged with narcotics conspiracy and with possession of a firearm; therefore, the gun was relevant and admissible. In addition, the indictment charged Barlow with possession of cocaine with intent to distribute while in possession of a firearm, and conspiracy. (R. at 2.) The prosecution never amended the indictment to drop the gun charge and; therefore, the prosecution had the right to prove its case by presenting evidence. (R. at 89.)

B. The Trial court did not err regarding the prosecutor's closing argument.

Barlow argues that he was not in physical possession of cocaine when he was arrested and that the prosecution had to prove constructive possession because he was not in exclusive possession of the premises where the drugs were found. In order to convict a defendant of possession of a controlled substance, the state need not prove actual physical possession. *Nance v. State*, 948 So. 2d 459 (Miss. Ct. App. 2007). To establish constructive possession of a controlled substance, there must be evidence, in addition to physical proximity, showing the defendant consciously exercised control over the substance. *Dixon v. State*, 953 So. 2d 1108 (Miss. 2007). Barlow confessed that the drugs in the car and at the Beard Road residence were his. (R. at 276.) The prosecution proved that Barlow was in constructive possession of the narcotics by the fact that Barlow admitted to owning the drugs (R. at 291-292) and admitting that the Beard Road house was where he had been residing for three weeks. (suppression hearing, R. at 35.) In addition, Barlow stated to police that the room where the drugs and gun were found was his room. (R. at 283.)

Barlow also argues that the trial court erred regarding the prosecutor's closing argument. The

test for determining whether argument is so improper as to warrant sustaining objection is whether the natural and probable effect of the argument is to create an unjust prejudice against the defendant. *Harvey v. State*, 666 So. 2d 798, 801 (Miss. 1995). Absent impermissible factors such as commenting on the defendant not testifying, a prosecuting attorney is entitled to great latitude in framing the closing argument. *Dunaway v. State*, 551 So. 2d 162, 163 (Miss. 1989).

In his closing argument, the District Attorney stated that: "he's walking around with his girlfriend's pistol and bullets and he's got $1,800 that he's claiming and you can see the $90.00 that..." (R. at 491.) The defense objected after the conclusion of the closing statements, stating that there was no testimony that the gun was his girlfriend's; however, the objection was untimely. (R. at 495.) Barlow did not object until after the jury had been sent to deliberate. *Id.* A contemporaneous objection should have been made in order to preserve this issue for appeal.

Even if the objection had been timely, Officer Barefield testified that Barlow made a statement that there was a gun in the bedroom and Barlow told him the name of the owner. (R. at 340.) Officer Barefield testified that there was a gun in the Beard Road house and testified that the gun was located in the room Barlow claimed was his. (R. at 283.) In addition, Barlow was not prejudiced by the prosecutor's comment because the trial court gave a jury instruction stating: "Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark." (Jury Instruction 1; Clerk's Papers at 155.) Even if the Court determines that the comment was improper, the comment did not create unjust prejudice against Barlow which would result in a verdict influenced by prejudice especially when the jury was instructed that the statements of counsel were not in fact evidence and

that any such statements which had no basis in the evidence should be disregarded.

**IV. The Trial court did not err regarding Barlow's prior conviction.**

**A. The Trial court did not err in admitting Barlow's prior conviction and Barlow's parolee status.**

Barlow argues that the trial court erred in finding his prior conviction and his parolee status admissible, and argues that the admission of this evidence was unfairly prejudicial. Therefore, Barlow argues the admission constitutes reversible error. However, Mississippi Rule of Evidence 404(b) allows Barlow's prior bad acts to prove intent to distribute. Because this was one of the elements that the prosecution must prove under the indictment, the evidence was not unfairly prejudicial to Barlow. The standard of review is whether the trial court abused its discretion in weighing the factors and admitting or excluding the evidence. *Baldwin v. State*, 784 So. 2d 148, 156 (Miss. 2001).

The trial court did not abuse its discretion by allowing Barlow's prior bad acts. Barlow's prior conviction is allowed under Mississippi Rule of Evidence 404(b), which states that "evidence of other crimes, wrongs or acts...may...be admissible for other purposes such as proof of motive, opportunity, *intent*...." (Emphasis added.) (See *Carter v. State*, 450 So. 2d 67 (Miss. 1984)). In addition, Barlow's prior bad acts do pass the Mississippi Rule of Evidence 403 balancing test because intent to distribute was a necessary element of the prosecution's proof. The prior bad act that was admitted was, in fact, a distribution charge that was not used to show the character of Barlow, but instead was used to show Barlow's intent to distribute; therefore, the trial court did not err in allowing testimony about Barlow's prior conviction.

**B. The Trial court did not err by allowing Officer Barefield to testify as an expert.**

Barlow argues that the trial court erred in allowing Officer Barefield of the Lincoln County Sheriff's Department to testify as an expert. (R. at 211). The trial court's admission of expert testimony is reviewed under an abuse of discretion standard. *Pucket v. State*, 737 So. 2d 322, 342 (Miss. 1999).

In *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31, the Mississippi Supreme Court adopted the factors described by United States Supreme Court in *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 587 (1993): (1) whether the theory can be, and has been, tested; (2) whether the theory has been published or subjected to peer review; (3) any known rate of error; and (4) the general acceptance that the theory has garnered in the relevant expert community. *Id* at 593-594. In addition, Mississippi Rule of Evidence 702 states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court did not abuse its discretion by permitting Officer Barefield to testify as an expert in the field of narcotics enforcement. In *Triplett v. State*, 814 So. 2d 158, 163 (Miss. App. 2002), this Court concluded that an officer's testimony regarding the intent to distribute is permissible if he is tendered as an expert and had his qualifications tested by voir dire prior to offering those opinions. The officer in that case had experience with drug trafficking and had been a member of narcotics task forces for years. He based his testimony on his experience in his employment. The officer testified

that he had handled approximately 500 narcotics cases since 1990, and he had attended numerous courses regarding drug trafficking.

Officer Barefield's opinion was relevant in helping the jury determine whether or not the drugs found were packaged with the intent to distribute. Officer Barefield's opinion was based on his experience. He had been through the Mississippi Bureau of Narcotics training academy, United States Customs Blue Light agent, gone through in-service classes with Drug Enforcement Agency, Alcohol, Tobacco and Firearms, Federal Bureau of Investigation, and he is a basic instructor in basic narcotics in Lincoln County Law Enforcement Training Academy, and Rankin County training academy. (R. at 214.) In addition, he is also director of training. He has investigated several thousand narcotic-related investigations during his ten years of service. *Id.* Officer Barefield was tendered as an expert and his qualifications were tested by voir dire prior to offering his opinions; the trial court did not err by allowing his expert testimony.

**V. The Trial court did not err regarding jury instructions.**

Barlow argues that the trial court erred regarding jury instructions. The lower court enjoys considerable discretion regarding the form and substance of jury instructions. *Rester v. Lott*, 566 So. 2d 1266, 1269 (Miss. 1990). The dispositive question is whether the jury was fully and correctly instructed on the principles of law involved. If the instructions given provide correct statements of the law and are supported by the evidence, there is no prejudice to the defendant. *Johnson v. State*, 792 So. 2d 253, 258 (Miss. 2001). If the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. *Fielder v. Magnolia Beverage Co.,* 757 So. 2d 925, 929 (Miss. 1999). Barlow argues that Instruction 31 and Instruction D-7 were improperly denied, and that S-3, S-12A, and S-4 should have been denied.

Barlow states that Instruction 31 should have been given to the jury because the premise that the defense relied on was that Thomas McWilliams was the true owner of the drugs. Instruction 31 states:

> The Court instructs the Jury that if you believe from the evidence that there may have been some other person who committed the crime with which Corey Barlow is charged, and that the name of that person has not been disclosed by the evidence, it is not required of Corey Barlow to prove the identity of the other person. In other words, if you believe from the evidence that someone other than Corey Barlow possessed the narcotics with or without intent to distribute them, you must acquit Corey Barlow, without requiring Corey Barlow to solve the case. Likewise, if you believe that someone else committed the crime for which Corey Barlow is charged and the identity of that person has been disclosed but the evidence, you must acquit Corey Barlow.

(Clerk's Papers at 185.)

This is an incorrect statement of law because more than one person can be in possession of the narcotics. (R. at 435.) In addition, the refusal of a proper instruction is not grounds for reversal if the Court can determine that it would not have affected the outcome of the case. *Lewis v. Hiatt*, 683 So. 2d 937 (Miss. 1996). In Jury Instruction 4, the jury was instructed that "to constitute a possession there must be sufficient facts to warrant a finding that the defendant was aware of the presence of the particular substance and was intentionally and consciously in possession of it." (Clerk's Papers at 158.) Looking at the jury instructions as a whole, the jury was sufficiently instructed that they were required to determine whether Barlow committed the crimes beyond a reasonable doubt. Barlow was not prejudiced by the exclusion of this instruction; there was no reversible error.

As to the instruction D-7, the trial judge denied the instruction because he determined that

this was not a circumstantial case. (R. at 422.) Even if the case were found to be partially circumstantial, "[w]here the evidence is mixed and consists of both direct and circumstantial evidence, a circumstantial evidence instruction is not required." *Terry v. State*, 944 So.2d 91, 916 (Miss. App. 2006). Proof of felonious intent will always be by circumstantial evidence except where the accused has confessed. *Hollingsworth v. State,* 392 So. 2d 515, 517-18 (Miss. 1981). "A circumstantial evidence instruction must be given unless there is some type of direct evidence such as eyewitness testimony, dying declaration, or confession or admission of the accused." *Deal v. State*, 589 So.2d 1257, 1260 (Miss.1991) (citing *Mack v. State*, 481 So.2d 793, 795 (Miss.1985)).

Barlow confessed to possession of the drugs found in the car (R. At 276.) and in the house (R. at 279). Barlow also confessed to planning on selling the drugs to make $3000,000 so that he and his girlfriend could move to Florida. (R. at 292-293.) The trial court did not abuse its discretion by denying the instruction.

As to S-3, S-12A, and S-4 instructions, Barlow argues that these instructions were merely a recitation of the elements of criminal law and that the instructions were therefore abstract statements of the law. If the instructions given adequately instruct the jury as to the applicable law, the refused instruction may not be a source of complaint. *Good v. Indreland*, 910 So. 2d 688 (Miss. App. 2005). An appellate court will not reverse on a jury instruction issue if the instructions fairly announce the law of the case and create no injustice when read as a whole. *Kindred v. Columbus Country Club, Inc.*, 918 So. 2d 719 (Miss. App. 2004), cert. granted, 896 So. 2d 373 (Miss. 2005) and judgment aff'd, 918 So. 2d 1281 (Miss. 2005). In addition, "[t]he granting of an abstract instruction is not ordinarily considered to be a reversible error unless it tends to confuse and mislead the jury. *Freeze v. Taylor*, 257 So.2d 509, 511 (Miss.1972). In the present case, these instructions were given to the jury to help them understand the concepts involved in the case. The instructions

did not confuse or mislead the jury. When read as a whole, the jury instructions adequately instructed the jury as to the applicable law and, therefore did not prejudice Barlow.

**VI. The trial court did not err in denying Barlow's dispositive motions.**

Barlow argues that the trial court erred in denying his directed verdict and judgment not withstanding the verdict motions. On appeal from an overruled motion for directed verdict and a motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Hammond v. State*, 465 So. 2d 1031, 1035 (Miss. 1985). Matters regarding the weight and credibility of the evidence are to be resolved by the jury. *Neal v. State*, 451 So. 2d 743, 758 (Miss. 1984). The court is authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Fisher v. State*, 481 So. 2d 203, 212 (Miss. 1985).

The prosecution presented sufficient evidence to prove conspiracy. A conspiracy occurs when two or more persons conspire to commit a crime. Miss. Code Ann. § 97-1-1(a) (Rev. 2006). The Mississippi Supreme Court has held:

> For there to be a conspiracy, "there must be recognition on the part of the conspirators that they are entering into a common plan and knowingly intend to further its common purpose." The conspiracy agreement need not be formal or express, but may be inferred from the circumstances, particularly by declarations, acts, and conduct of the alleged conspirators. Furthermore, the existence of a conspiracy, and a defendant's membership in it, may be proved entirely by circumstantial evidence.

*Franklin v. State*, 676 So. 2d 287, 288 (Miss. 1996) (quoting *Nixon v. State*, 533 So. 2d 1078, 1092 (Miss. 1987)).

In this case, Officer Barefield testified that McWilliams was in possession of the drugs, which fell from his shirt when exiting the vehicle. McWilliams was also in possession of over $1870 in cash. (R. at 274.) After being arrested, Barlow claim ownership of the drugs in the car. The conduct between McWilliams and Barlow inferred a conspiracy agreement between Barlow and McWilliams. The implicit conspiracy between McWilliams and Barlow in the car shows a conspiracy agreement between the two in relation with the drugs at the house. In addition, both McWilliams and Barlow lived at the residence where the drugs were found. The prosecution presented sufficient evidence to prove conspiracy.

The prosecution presented evidence sufficient to support a conviction for intent to distribute. Officer Barefield testified that Barlow confessed to purchasing the drugs and planned to sell them and move to Florida with his girlfriend. (R. at 292-293.) Officer Barefield testified as to the packaging and amount of crack cocaine found at the Beard residence. Barlow and McWilliams were in possession of about 3,457 grams of cocaine or about 7.5 pounds, worth about $345,000. (R. at 300-301.) Officer Barefield testified that he did not find any syringes or crack pipes at the Beard Road residence. In addition McWilliams was in possession of over $1,800 cash when he was arrested. There was sufficient evidence for a reasonable juror to find beyond a reasonable doubt that Barlow intended to distribute the cocaine in his possession.

The prosecution presented sufficient evidence to support possession of a firearm. "Generally, the government must provide evidence that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred". *Id.* Constructive possession is established by showing that the contraband was under the dominion and control of the defendant." *Roberson v. State*, 595 So. 2d 1310, 1319 (Miss. 1992). "[T]here must be sufficient facts to warrant a finding that the defendant was aware of the presence and character of the particular

[contraband] and was intentionally and consciously in possession of it." *Curry v. State*, 249 So. 2d 414, 416 (Miss.1971). The Court has held that where contraband is found upon premises not in the exclusive control and possession of the accused, additional incriminating facts must connect the accused with the contraband. *Ginn v. State*, 860 So. 2d 675, 685 (Miss. 2003). Officer Barefield testified that Barlow confessed that there was a gun in his bedroom. (R. at 340.) Barlow was intentionally and consciously aware that the gun was in his bedroom. Both the firearm and the black duffle bag containing four bags of crack cocaine were found in Barlow's room. (R. at 291.)

In viewing the evidence in the light most favorable to the State, there was sufficient additional incriminating evidence for a reasonable juror to find beyond a reasonable doubt that Barlow was in constructive possession of the handgun found in his bedroom. The trial court did not err in denying Barlow's motions for directed verdict and JNOV.

**VII. The Trial court did not abuse its discretion in sentencing Barlow.**

Barlow's seventh issue regards whether the trial court erred in enhancing his sentence pursuant to Section 41-29-147 of the Mississippi Code Annotated (1972); however, Barlow's sentence was enhanced under Section 41-29-152 for possession of a firearm. "The imposition of a sentence is within the discretion of the trial court, and this Court will not review the sentence, if it is within the limits prescribed by statute." *Reynolds v. State*, 585 So. 2d 753, 756 (Miss. 1991). Section 41-29-139 of the Mississippi Code Annotated (1972) states the sentencing guidelines for the amount of cocaine that Barlow had in his possession: "Thirty (30) grams ... or more, by imprisonment for not less than ten (10) years nor more than thirty (30) years and a fine of not more than One Million Dollars ($1,000,000.00)." Section 41-29-152 of the Mississippi Code Annotated (1972) states in relevant part: "Any person who violates ... violates Section 41-29-139 ... and has in his possession any firearm, either at the time of the commission of the offense or at the time any

arrest is made, may be punished ... by a term of imprisonment or confinement up to twice that authorized by Section 41-29-139...."

"The power to prescribe penalties to be exacted from those committing acts made unlawful under the criminal laws of this state is vested entirely in our Legislature." *Allen v. State*, 440 So.2d 544, 545 (Miss. 1983)(reversed on different point of law). In *Stromas v. State*, 618 So.2d 116, 123 (Miss. 1993), the Mississippi Supreme Court stated: "Drug offenses are very serious, and the public has expressed grave concern with the drug problem. The legislature has responded in kind with stiff penalties for drug offenders. It is the legislature's prerogative, and not this Court's, to set the length of sentences." The sixty-year sentence that Barlow received fit within the limits as prescribed by statute. Barlow was given thirty years for the possession of more than thirty grams of cocaine and the sentence was enhanced because he was in possession of a firearm. (R. at 548.) In addition, Barlow was a repeat offender and subject to a double enhancement sentence provided by Mississippi Code Annotated § 41-19-147, as follows: "Except as otherwise provided in Section 41-29-142, any person convicted of a second or subsequent offense under this article may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both." Barlow's sentence was within the prescribed limits set by statute; therefore, the trial court did not abuse its discretion.

The sentence must still meet the constitutional mandates under *Solem v. Helm*, 463 U.S. 277 (1983). A court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (I) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. The Court limited the application of *Solem*'s three-prong analysis in *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991). *Solem*'s factors are applied

to those cases where a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality. *Hoops v. State*, 681 So. 2d 521, 538 (Miss. 1996). *Rummel v. Estelle*, 445 U.S. 263, 265-66 (1980), serves as a guide in the determination of this threshold comparison. The defendant in *Rummel* was sentenced to life in prison with the possibility of parole under a recidivist statute for a third non-violent felony conviction. Although the total loss from the three crimes was less than $250.00, the United States Supreme Court found Rummel's sentence to be proportionate and not violative of the Eighth Amendment.

In this case, Barlow received sixty years, with forty-seven to serve, and a fine of ten thousand dollars. (R. at 24.) In comparison to the *Rummel* case, Barlow's sentence cannot be considered grossly disproportionate and, therefore the *Solem* factors would not be applied. The trial court did not err in enhancing his sentence pursuant to Section 41-29-152 of the Mississippi Code Annotated (1972).

As to Barlow's claim that the sentence was requested out of vindictiveness because of a plea offer that he declined to accept, the prosecution admitted during the sentencing hearing that the plea offer had been a mistake. Where there is a "reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority," there is a presumption of prosecutorial vindictiveness. *Alabama v. Smith*, 490 U.S. 794, 799 (1989). However, when no such likelihood exists, it is the defendant's burden to prove actual vindictiveness. *Id.* at 799-800. Barlow offered no proof of actual vindictiveness. During the sentencing hearing, the judge was made aware that the prosecution had offered a plea bargain of eight years. (R. at 543.) The prosecutor stated that the prosecutor who recommended that sentence was extremely new to the office. (R. at 545.) Barlow also contends that the prosecution amended the indictment to charge him as a subsequent offender in order to double his sentence if he were convicted; however, Barlow was already indicted on the

possession of a firearm charge that would have doubled his sentence anyway. Barlow's sentence was enhanced by the possession of the firearm and not because of the amendment in the indictment charging Barlow as a subsequent offender. Such enhancement, in any event, would not have been improper. *Meadows v. State*, 828 So.2d 858, 860 (Miss. Ct. App. 2002) ("[I]n the give-and-take of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.").

Barlow did not offer any proof of prosecutorial misconduct, and his sentence is therefore proper.

**VIII. The Trial court did not err in rejecting Barlow's cumulative-error allegation.**

Barlow argues that the "cumulative effect" of the errors in this case denied him a fair trial. The cumulative error doctrine holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. *Byrom v. State*, 863 So. 2d 836, 847 (Miss. 2003). When considering whether individual errors are harmless or prejudicial, relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. *Ross v. State*, 954 So. 2d 968, 1018 (Miss. 2007). Where there is not overwhelming evidence against a defendant, the courts are more inclined to view cumulative errors as prejudicial. *Walker v. State*, 913 So. 2d 198, 216 (Miss. 2005).

In this case, like in the case of *McFee v. State*, 511 So.2d 130, 136 (Miss. 1987), "Athere was no reversible error in any part, so there is no reversible error to the whole." Furthermore, without question, Barlow received a fundamentally fair trial. There was overwhelming evidence against him. He was a parolee, he confessed to the possession of the narcotics in the car and

confessed possession of the drugs in the house, and he even showed the officers where the narcotics were located in the Beard Road residence. In addition to this information, Barlow also proceeded to inform Officer Barefield exactly how much he spent purchasing the cocaine and the profit that he intended to make by selling the narcotics. (R. at 292.) There was overwhelming evidence of Barlow's guilt in this case and no reversible errors, individually or cumulatively.

## CONCLUSION

The State respectfully submit that no reversible error was committed during the trial of this case, and that the verdicts and sentences should accordingly be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Charles W. Maris, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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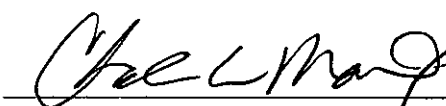
This the 13th day of November, 2007.



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