IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LORENZO TARVER — APPELLANT

VS. — NO. 2006-KA-1260-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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STATEMENT OF THE CASE

The grand jury of LeFlore County County indicted defendant, Lorenzo Tarver for for the crimes of Possession Marihuana with intent as a felon in possessin of a firearm and enhanced as to location all in violation of Miss. Code Ann. §§ 41-29-139(a)(1), 41-29-142 & 97-37-5. After a trial by jury, Judge W. Ashley Hines, presiding, the jury found defendant guilty. (C.p.98). Defendant was convicted of Possession with intent. Sentencing was enhanced and defendant was ordered to serve 60 years in the custody of the Mississippi Department of Corrections, plus a $100,000 fine, court costs and a bond fee. (Sentence order, cp. 312).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

Based on investigation a search warrant was obtained for the home of defendant. Upon execution of the warrant over nine pounds of marijuana was found in defendant's possession. Defendant was arrested and tried by jury.

SUMMARY OF THE ARGUMENT

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THE CLOSING ARGUMENT BY THE PROSECUTOR DID NOT DEPRIVE DEFENDANT OF A FUNDAMENTALLY FAIR TRIAL.

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THERE WAS NO OBJECTION TO THE SEATING OF THE JURY ON THE GROUND NO PRESENTED – THIS ISSUE IS PROCEDURALLY BARRED.

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IT WOULD APPEAR THE MOTION TO SEVER WAS DENIED BY THE TRIAL COURT WITH EXTENSIVE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

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Issue XIII.

DEFENDANT RECEIVED A FUNDAMENTALLY FAIR TRIAL.

ARGUMENT

I.

THE CLOSING ARGUMENT BY THE PROSECUTOR DID NOT DEPRIVE DEFENDANT OF A FUNDAMENTALLY FAIR TRIAL.

In this initial allegation of error defendant claims prosecutorial misconduct during closing argument.

Looking to the record, and the complete closing arguments by all parties coupled with the rulings of the trial court and the instructions given to the jury – defendant was not deprived of a fair trial.

> ¶ 5. The standard of review we apply to lawyer misconduct during closing statements is "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." Sheppard v. State, 777 So.2d 659, 661(¶ 7) (Miss.2000). During closing argument, a lawyer is "entitled to argue his case, drawing all rational inferences that come from the evidence presented in the courtroom." Caston v. State, 823 So.2d 473, 495-96(¶ 72) (Miss.2002) (citation omitted). "Attorneys are allowed wide latitude in arguing cases to the jury. However, prosecutors are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." Sheppard, 777 So.2d at 661(¶ 7).
>
> Davis v. State, 2008 WL 640228 (Miss.App. 2008).

Any objections to which where sustained are not error. Further, looking at the overall tone and tenor of the argument and the actual facts of the case there was no denial of a fair trial. In fact it would appear the jury considered everything and showed some leniency during deliberations.

Succinctly, defendant was not denied a fundamentally fair trial by the closing argument of the prosecutor.

Issue II.
THERE WAS NO OBJECTION TO THE SEATING OF THE JURY ON THE GROUND NO PRESENTED – THIS ISSUE IS PROCEDURALLY BARRED.

Within this next issue appellate counsel raises many issues – including ineffective assistance of trial counsel – as to the selection of the jury.

Again, looking to the record, the jury selection process was well within acceptable parameters and covered a wide range of issues, – none of which were improper, illegal or deprived defendant of his right to a trial by jury.

Further, the prosecutor, defense counsel and the judge all kept notes and were very attentive as to each juror. As selection drew to a close there was no objection – and defense counsel was often asked if he had an objection.

It would appear trial counsel was satisfied with the jury he helped choose.

> ¶ 81. When the jury was finally selected, Thorson made no objection to the seating of the jury on this basis, or for any other reason. Thorson also did not object to the jury panel when they were sworn in at the beginning of the trial. This Court has continuously held that "a party who fails to object to the jury's composition before it is empaneled waives any right to complain thereafter." Bell v. State, 725 So.2d 836, 844 (Miss.1998) (citing Hunter v. State, 684 So.2d 625, 631 (Miss.1996); Myers v. State, 565 So.2d 554, 557 (Miss.1990); Pickett v. State, 443 So.2d 796, 799 (Miss.1983)). Since no objection was made, this issue is not properly preserved for review before this Court. See Cannaday v. State, 455 So.2d 713, 719 (Miss.1984); Ratliff v. State, 313 So.2d 386 (Miss.1975); Pittman v. State, 297 So.2d 888 (Miss.1974); Myers v. State, 268 So.2d 353 (Miss.1972).

Thorson v. State 895 So.2d 85, 118 (Miss.,2004)

Accordingly, the State will rely upon the rulings of the trial court as clearly enunciated in the record. There was no error in jury selection or in the questioning of jurors. No relief should be granted on this allegation of error.

Issue III.

IT WOULD APPEAR THE MOTION TO SEVER WAS DENIED BY THE TRIAL COURT WITH EXTENSIVE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Continuing his challenges to the conviction defendant avers the trial court erred in denying the motion to sever.

The ruling of the trial court in denying the motion to sever is found in the record excerpts at pages 201-203.

In the order denying the motion to suppress the trial court clearly cited appropriate, the correct legal standard, and the appropriate remedy (jury instruction). Citing, Wright v. State, 797 So.2d 1028 (¶8)(Miss. Ct. App. 2001).

Such was the correct analysis and application of the law to the facts of this case.

There being no error or abuse of discretion no relief should be granted on this allegation of error.

Issue IV.
TRIAL COUNSEL ANNOUNCED READY FOR TRIAL WHEN ASKED.

Again, in this allegation of error a look to the record shows that when it came time for trial counsel for defendant announced ready. Transcript page 304.

As the reviewing courts of this State have oft noted:

> ¶ 16. The decision to grant or deny a continuance is left to the sound discretion of the trial court. Lambert v. State, 654 So.2d 17, 22 (Miss.1995). This Court does not reverse a denial of a continuance unless there is a showing of manifest injustice. Atterberry v. State, 667 So.2d 622, 631 (Miss.1995). In the present case, the judge denied the continuance because McFadden's attorney was hired in January and attended McFadden's habeas corpus hearing in March. McFadden's attorney stated that he had worked on the case every day since he received the State's discovery materials. On the day of the trial, the circuit court asked McFadden's attorney whether he was ready for trial, and the attorney announced that he was ready. The court did not abuse its discretion in denying a continuance.

McFadden v. State, 929 So.2d 365369 (Miss.App. 2006)(emphasis added).

The State would adopt the same rationale and request that no relief be granted on this allegation of error.

Issue V.

THE RULING OF THE TRIAL COURT APPLIED THE CORRECT LAW TO THE FACTS OF THE CASE ALLOWING OF ADMISSION OF A PRIOR CONVICTION.

In looking to the comprehensive rulings filed by the trial court it is clear the trial judge applied the correct legal analysis.

The trial Court was aware of the prior conviction of defendant, that some would be required to be admitted as an element of the offense and that there was discretion in the admission of prior convictions. White v. State, 842 So.2d 565 (Miss. 2003). (Ruling of trial court C.p. 199-200.)

The ruling was made prior to trial and trial counsel was aware and could prepare a defense appropriate to the ruling of the trial court. The ruling was limited in scope and correct in application of the law to the facts of this defendant and the charges before the court.

Accordingly, there is no merit to this allegation of error and no relief should be given.

Issue VI.

THE CHANGE IN THE INDICTMENT WAS ONE OF FORM AND NOT SUBSTANCE.

The trial court, in amending the indictment (well before trial) noted it was a scrivener's error and allowed by rule. (Order amending indictment, c.p 205). It should be mentioned the sentencing order referred to "park". (c.p.312).

Be that as it may, such an amendment has been described in case law when the prosecution changed 'church' to 'park' in a similar drug indictment. The reviewing court specifically held:

> ¶ 10. Kendrick was in a better position under the second indictment than the first. An indictment benefitting Kendrick could hardly be considered "prosecutorial misconduct." The supreme court has previously held that the prosecution has the right to correct clerical errors or mistakes in an indictment, as long as the defendant has ample and sufficient notice of the offense with which he was charged. Dendy v. State, 224 Miss. 208, 213, 79 So.2d 827, 829 (1955). Based on the record before us, the State simply corrected a previous mistake in the indictment. We find no evidence to suggest otherwise. Therefore, we affirm the decision of the lower court.

Kendrick v. State 876 So.2d 420, 422 (Miss.App.,2004)(emphasis added).

The ruling of the trial court was in November 2005. Defendant went to trial in June of 2006 a full six months after the change in the indictment.

Accordingly, it is the position of the State the amendment was allowed by rule and defendant had ample and sufficient notice of the change. No relief should be granted based on this allegation of error.

Issue VII.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

While counsel for defendant list numerous supposed errors of trial counsel, he does not produce and cogent argument as to the prejudice. Oh, to be sure, he uses the words 'prejudice' and' prejudicial' but not in the sense of arising from a deficiency of counsel.

> ¶ 37. The second prong of the Strickland test requires the defendant to show that, absent counsel's errors, "there is a reasonable probability that he would have received a different result in the trial court." Rankin v. State, 636 So.2d at 656. Williams has failed to meet his burden on this prong of the test. There was no shortage of credible evidence against Williams on the manufacture-of-marijuana charge, as discussed previously. Even if defense counsel had successfully moved to have the charges severed, given the strength of the State's case against Williams, he could not reasonably have expected a different result on the manufacture-of-marijuana charge. We find that Williams fails to meet the second prong of the Strickland test.
>
> Williams v. State, 971 So.2d 581, 592 (Miss. 2007).

Defendant was ably represented. Counsel at trial conducted extensive voir dire, was prepared with question, objections and trial strategies. In fact it would appear the strategy worked in that the jury, found defendant 'not guilty' on the second of the two counts submitted to the jury for decision.

It is the concise argument of the State defendant had effective counsel and no relief should be granted on this allegation of error.

Issue VIII.

DEFENDANT IS NOT ENTITLED TO A NEW TRIAL BECAUSE OF LOST EVIDENCE.

During the course of the trial the evidence (and lack thereof) was repeatedly brought to the attention of the jury and used, effectively, to develop lines of questioning for defense.

Now defendant complains he could not test the marijuana.

Well, looking to the record the large bricks of marijuana were carried to the crime lab and samples taken. Those samples were then tested. Those 'core samples' are mentioned repeated in the transcript and would have been available for defense to test.

> ¶ 16. A defendant is entitled to a new trial because of lost or destroyed evidence only if the evidence "would have played a significant role in the defendant's case" and the defendant had "no way of obtaining comparable evidence by other means." Russell v. State, 849 So.2d 95, 114(¶ 58) (Miss.2003) (quoting Northup v. State, 793 So.2d 618, 623-24(¶ 17) (Miss.2001)). "To play a significant role, the exculpatory nature and value of the evidence must have been apparent before the evidence was lost." Id. (quoting Northup, 793 So.2d at 623-24(¶ 17)). Intentional destruction of evidence raises an inference that material was exculpatory only when "the spoliation or destruction was intentional and indicate[d] fraud and a desire to suppress the truth." Murray v. State, 849 So.2d 1281, 1286(¶ 19) (Miss.2003) (quoting Tolbert v. State, 511 So.2d 1368, 1372 (Miss.1987)).

Cridiso v. State, 956 So.2d 281, 287 (Miss.App. 2006).

Defendant is not entitled to a new trial and could have had the sample remaining tested if they wanted. No relief should be granted on this claim of error.

Issue IX.
DEFENDANT WAS NOT DENIED HIS RIGHT TO A SPEEDY TRIAL.

The trial court heard testimony and made extensive findings of fact and conclusions of law regarding defendant's right to a speedy trial. That ruling is to be found in the record within the clerk's papers at pages 50-53. Then a year later, just days before the trial additional testimony and evidence was heard (June 12th) and trial commenced just a few days later.

> ¶ 18. When a speedy trial violation is alleged, an appellate court must determine whether a trial court had good cause for the delay. Flora v. State, 925 So.2d 797, 814(¶ 58) (Miss.2006) (citing DeLoach v. State, 722 So.2d 512, 516(¶ 12) (Miss.1998)). "If substantial credible evidence exists from which a finding of good cause may fairly have been made, we will leave the finding undisturbed." Id. (citing Folk v. State, 576 So.2d 1243, 1247 (Miss.1991)).

Smith v. State, 2008 WL 641179 (Miss.App. 2008).

The trial court heard evidence of the complex nature of multiple charges pending against this defendant. The process of fingerprint analysis, drug analysis and the crime lab. Further there were continuances requested and granted for good cause. It would appear there was a change of counsel.

The State will rely upon the findings in the record of the trial court.

No relief should be granted on this allegation of error.

Issue X.

THE TRIAL COURT WAS CORRECTLY IN DENYING THE MOTION TO RECUSE AS THE REASONS PRESENTED WERE INSUFFICIENT.

Prior to trial counsel filed a motion for recusal of the trial court judge. (C.p. 55-57) The trial court denied the motion by order. (C.p.197). Then defendant got a different lawyer, and it would appear this new lawyer represented defendant at trial. Now, on appeal, the new appellate attorney, is claiming error in the trial court not stepping aside for that original motion for recusal with the first counsel.

> ¶ 11..... "This Court reviews a trial court judge's refusal to recuse themselves under the manifest error standard of review." State v. Culp, 823 So.2d 510, 514 (¶ 11) (Miss.2002) The proper standard is that recusal is required when the evidence produces a reasonable doubt as to the judge's impartiality. Dodson v. Singing River Hospital System, 839 So.2d 530, 533 (¶ 13) (Miss.2003).
>
> Christie v. State, 915 So.2d 1073 (Miss.App. 2005).

Looking to the argument presented the motion to recuse was filed by a different attorney than represented defendant at trial. Plus he is raising issues that happened long after the trial judge denied the motion to recuse.

There is no merit to this allegation of error.

Issue XI.

DEFENDANT'S SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

As counsel conceded defendant's sentence is within the sentencing statute and, technically far less than the maximum he could have received as to the fine.

The reviewing Courts of Mississippi have repeatedly held:

> ¶ 16. Further, the case sub judice is similar to that of Tate v. State 912 So.2d 919, 934(¶ 53) (Miss.2005), where Tate challenged his sentence of sixty years in prison without parole for a drug offense, arguing that the sentence was disproportionate, cruel, and unusual. Tate was given an enhanced sentence in light of his two prior felony convictions for the sale of marijuana. Id. The court found that "[i]t is within the Legislature's prerogative to determine that three crimes such as those committed by Tate can result in a sentence of sixty years without parole or chance of early release." Id.

Baskin v. State, 2008 WL 73639 (Miss.App. 2008).

In this case defendant had a prior drug related conviction (which the judge could consider as a factor in sentencing with discretion), there was enhanced sentencing for public safety considerations as to location. Such are legally acceptable and have been recognized as valid facts for the trial court to impose sentencing or enhance by law.

There is no merit to this allegation of error and no relief should be granted.

Issue XII.

THE TRIAL COURT DID NOT ABUSE DISCRETION IN DENYING THE MOTION TO SUPPRESS THE EVIDENCE FROM THE SEARCH WARRANT.

Counsel for defendant (first counsel) filed pre-trial a motion to suppress a search warrant, claiming the affidavit was based upon false information. (C.p. 16-17). A hearing was held Tr. 19-228. The trial court denied the motion with specific findings of fact and conclusions of law. (C.p 48-49).

> ¶6. In reviewing a motion to suppress, this Court will only reverse the trial court's findings if they are clearly erroneous or against the overwhelming weight of the evidence. Walker v. State, 913 So.2d 198, 224-25(¶ 87) (Miss.2005) (citing Hunt v. State, 687 So.2d 1154, 1160 (Miss.1996)). In determining whether the issuance of a search warrant was proper, this Court must determine whether the issuing judge had a substantial basis for determining that, based on the officer's affidavit of underlying facts and circumstances, probable cause existed to issue the warrant. Petti v. State, 666 So.2d 754, 757 (Miss.1995) (citing Illinois v. Gates, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). "Probable cause exists when facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient within themselves to justify a man of average caution in the belief that a crime has been committed and that a particular person committed it." Id. Probable cause has been defined as "more than a bare suspicion but less than evidence that would justify condemnation." Foley v. State, 914 So.2d 677, 686(¶ 13) (Miss.2005) (quoting State v. Woods, 866 So.2d 422, 425-26(¶ 11) (Miss.2003)). Whether probable cause exists is based on a totality of the circumstances. Petti, 666 So.2d at 757.
>
> Dimaio v. State, 951 So.2d 581 (Miss.App. 2006).

An extensive hearing over two days was held with several witnesses. The trial court watched the video tape and compared the contents with the testimony elicited at the trial to determine the credibility of the confidential informant. The trial court carefully compared the affidavit to the final evidence collected and the locations authorized.

It is the position of the state the trial court was correct in denying the motion to suppress as there was a substantial basis in the affidavit to support the probable cause determination.

Accordingly, no relief should be granted on this allegation of error.

Issue XIII.
DEFENDANT RECEIVED A FUNDAMENTALLY FAIR TRIAL.

Lastly, it is asserted the cumulative effect of multiple mistakes requires an order of dismissal or a new trial.

> ¶ 31. At the outset, we note that "the Constitution does not guarantee a perfect trial, but it does entitle a defendant in a criminal case to a fair trial." Hammons v. State, 918 So.2d 62, 65(¶ 10) (Miss.2005) (citing Clark v. State, 891 So.2d 136, 140-41(¶ 19) (Miss.2004)). Therefore, Carlisle's trial did not have to be perfect in order to be valid. However, the Mississippi Supreme Court has held that "individual errors, not reversible in themselves, may combine with other errors to make up reversible error." Caston v. State, 823 So.2d 473, 509 (¶ 134) (Miss.2002). The Court further noted that:
>
> > [t]he question that must be asked in these instances is whether the defendant was deprived of a 'fundamentally fair and impartial trial' as a result of the cumulative effect of all errors at trial. If there is 'no reversible error in any part, so there is no reversible error to the whole.'
> >
> > Id. (citations omitted).
>
> Carlisle v. State, 936 So.2d 415 (Miss.App. 2006).

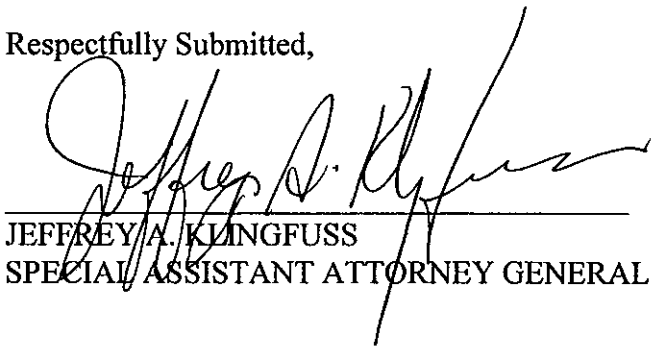
While numerous allegations of error are presented it is the position of the State that singly or collectively they do not rise to a level that defendant was deprived of a fundamentally fair trial.

No relief should be granted on this allegation of cumulative error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully Submitted,



JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special 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:

Honorable W. Ashley Hines
Circuit Court Judge
Post Office Box 1315
Greenville, MS 38702-1315

Honorable W. Dwayne Richardson
District Attorney
Post Office Box 426
Greenville, MS 38702

Imhotep Alkebu-Lan, Esquire
Attorney At Law
Post Office Box 31107
Jackson, MS 39286-1107

This the 17th day of March, 2008.

JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680