IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PERRY ARMSTEAD — APPELLANT

VS. — NO. 2007-KA-0238

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PERRY ARMSTEAD — APPELLANT

vs. — CAUSE No. 2007-KA-00238-SCT

THE STATE OF MISSISSIPPI — APPELLEE

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Oktibbeha County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **SALE OF COCAINE** and **POSSESSION OF COCAINE.**

STATEMENT OF FACTS

The Appellant does not challenge the sufficiency of the evidence of his guilty for his felonies, nor does he assert that the verdicts against him are contrary to the great weight of the evidence. It will therefore be unnecessary to set out the facts demonstrating his guilty in any more than in a summary way. This was a routine "controlled buy" case in which the Appellant sold a quantity of cocaine to a person working as a confidential informant for law enforcement. The sale occurred at the Appellant's residence in Oktibbeha County on 16 March 2006.

After the sale was completed, law enforcement executed a search warrant issued for the

Appellant's residence. In the course of the search the federal reserve notes given to the confidential informant for the purchase of the cocaine were recovered. The officers also found more cocaine. The Appellant admitted that the contraband belonged to him.

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN FINDING THAT THE APPELLANT KNOWINGLY AND VOLUNTARILY WAIVED HIS PRIVILEGE AGAINST SELF - INCRIMINATION"

2. DID THE TRIAL COURT ERR IN REFUSING TO DISMISS COUNT 1 OF THE INDICTMENT?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN FINDING THAT THE APPELLANT KNOWINGLY AND VOLUNTARILY WAIVED HIS PRIVILEGE AGAINST SELF - INCRIMINATION

2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN FINDING THAT THE APPELLANT KNOWINGLY AND VOLUNTARILY WAIVED HIS PRIVILEGE AGAINST SELF - INCRIMINATION

In the First Assignment of Error, the Appellant asserts that the trial court erred in refusing to suppress his admission to law enforcement officers that the drugs and money found in his residence during the course of an execution of a search warrant belonged to him. It is claimed that law enforcement did not advise the Appellant of his *Miranda* rights at the time of his arrest. It is also said that the Appellant did not waive his privilege against self - incrimination.

The Appellant further alleges that the trial court erred in failing to make a specific finding on the issue. In considering the Appellant's First Assignment of Error, we bear in mind the standard of review relevant to it. *Dobbs v. State*, 726 So.2d 1267 (Miss. Ct. App. 1998).

Mississippi Bureau of Narcotics Agent Eddie Hawkins testified that he assisted in the execution of a search warrant for the Appellant's residence. In the course of executing the warrant, Hawkins gave the Appellant his *Miranda* rights. The Appellant was seated in the carport when this occurred. Hawkins also asked the Appellant if he understood his rights and asked him if he had any questions about his rights. The Appellant indicated that he had no questions and that he did understand his rights. Hawkins further testified that it was his practice to inform arrested persons of their rights immediately upon arrest. Another law enforcement officer, one Maurice Johnson, then came out of the house and into the carport.

Johnson told the Appellant that marijuana and cocaine had been found in the house. The Appellant made the statement that everything in the house belonged to him and that the others in the house had nothing to do with it. There were no threats made to the Appellant. The Appellant was not asked a question by Johnson. The Appellant spontaneously made his statement in response to Johnson's statement. (R. Vol. 3, pp. 190 - 207).

Maurice Johnson testified. He stated that he heard Hawkins read the *Miranda* rights to the Appellant. Not long afterwards, after drugs had been found in the house, Johnson went into the carport, stated that drugs had been found in the house, and sat down beside the Appellant. He testified that he asked the Appellant whether his wife knew anything about the drugs found in the house. The Appellant stated that everything in the house belonged to him. Johnson stated that he did not threaten the Appellant. He testified that he never threatened to arrest the Appellant's wife if the Appellant did not admit that the drugs belonged to him. (R. Vol. 3, pp. 211 - 220).

Highway patrolman Clay Moore then testified. He stated that, at the time of the search of the Appellant's residence, he was employed by the Starkville police department. His part in executing the search warrant was to secure the rear of the house. He saw the Appellant in the

carport but could not recall hearing anyone reading the Appellant his rights. However, Moore also testified that he was in and out of the house during the search. At one point, though, he overheard Johnson ask the Appellant to whom the drugs belonged. The Appellant initially denied knowing to whom the drugs belonged, but then he later admitted that they belonged to him, that he had been a user for several years. The conversation between Johnson and the Appellant was casual. Moore heard no threats, and the Appellant was calm and unafraid. As for the Appellant's wife, the witness said that Johnson told the Appellant that she could be charged with possession of the drugs, but this comment was not made in the form of a threat. It was a statement, and the Appellant's response was that the drugs belonged to him, that he had been a user for years. (R. Vol. 3, pp. 221 - 231).

Tretis Anderson was another law enforcement officer involved in the search of the Appellant's residence. He stated that he did not overheard any conversation Johnson might have had with the Appellant. (R. Vol. 3, pp. 231 - 234).

The trial court made a specific finding of fact. It found that any statement made to the Appellant about his wife was not a threat. It further found that any questions or statements made to the Appellant were not in the context of a custodial interrogation but, rather, a part of an on-the - scene investigation. It further found that the Appellant had been advised of his rights. (R. Vol. 3, pp. 236 - 237).

The jury returned to the courtroom. It was then put into evidence that the Appellant stated that the drugs belonged to him and that the other occupants of the house had nothing to do with them. (R. Vol. 3, pp. 241 - 242).

There was no testimony by the Appellant, at the suppression hearing or elsewhere, to contradict the testimony of the law enforcement officers.

Briefly restated, the testimony was that the Appellant and the others in the house at the time of the search were detained while the search proceeded. The Appellant and the others were orally given the *Miranda* rights. There were no written and signed forms concerning those rights. After the drugs were found, one officer came out to the carport and stated the fact that drugs were found. At that point, it appears that the Appellant was asked whether his wife knew anything about the drugs, to which the Appellant responded that the drugs belonged to him.

To be sure, there is something of a contradiction in the testimony of the officers. One did indeed state that the Appellant made this comment spontaneously, while the one who announced the discovery of the drugs stated that the comment was made after he asked the question about the wife. However, we think that under the facts of the case the apparent discrepancy is of no consequence.

It clear and uncontradicted that the Appellant was in fact given the *Miranda* warnings. It is likewise clear that, while a question may have been asked about his wife's knowledge of the presence of the drugs, any such question was not asked in a threatening way or for the purpose of threatening the Appellant. If the question was asked, it was one asked as a part of the on - the - scene investigation. It is a question one would expect to be asked in a circumstance in which contraband had been found in a place with a number of occupants.

The Appellant did not testify that he was threatened into making the statement, or that he felt threatened. The evidence, without contradiction, was that the Appellant was advised of his rights and freely responded to Johnson. There is not one word in the testimony to suggest that the Appellant's statement was anything other than a voluntary one, made after he had been informed of his rights. He indicated that he knew and understood his rights. That there was not a written, signed waiver of rights does not affect this conclusion. *Moore v. State*, 493 So.2d 1301

(Miss. 1986). There is no evidence at all that the Appellant invoked one or more of his rights or that he intended to. He did not testify to such.

The Appellant relies principally upon *McCarty v. State*, 554 So.2d 909 (Miss. 1998). It is the Appellant's idea, apparently, that, notwithstanding the fact that the Appellant had been advised of his rights by Hawkins, Johnson was also required to advise the Appellant of his rights.

In *McCarty*, the facts were that the appellant there was subjected to three separate custodial interrogations. He was given his rights in the first two interrogations, but not in the third. Relying on Rule 1.03, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979), the Court found that the trial court erred in admitting the statement made at the third interrogation.

The facts of the case at bar are not similar to those of *McCarty*. Here, there was but one encounter with law enforcement. *McCarty* does not stand for the proposition that where an officer different from the one who gave the *Miranda* rights says something to the one in custody, he too must give the suspect his rights. In *McCarty*, there were three wholly separate interrogations with law enforcement, and the rule at the time required a new advice of his rights for each one.[1] Neither the rule cited by *McCarty* nor *McCarty* itself required a new advice of rights in the event some officer other than the one who gave the rights spoke to the one in custody. The key difference is that here that was but one interview with the Appellant. In *McCarty* there were three.

As for the claim that the trial court erred by failing to make a specific finding, the record

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[1] We have not found Rule 1.03, nor a set of rules known as the Mississippi Uniform Criminal Rules of Circuit Court Practice in current law. We have not found the text quoted by the Court in *McCarty* in some other rule. Since it appears that Rule 1.03 died somewhere between 1989 and the present, and since the Court in *McCarty* relied on that rule for its holding, we submit that *McCarty* does not provide a rule of law here. This in addition to the fact that, as a factual matter, *McCarty* simply does not apply.

belies this claim. Beyond that, there is no requirement that a trial court make such a finding. *Greenlee v. State*, 725 So.2d 816, 825 (Miss. 1998).

The First Assignment of Error is without merit.

2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT

In the Second Assignment of Error, the Appellant alleges that the trial court should have dismissed the sale of cocaine count of the indictment because (1) the Appellant's statement was inadmissible and (2) the statement was irrelevant with respect to the sale count.

First, we do not find, and the Appellant does not allege, that this objection was raised in the trial court. It may not be raised here. *Dixon v. State*, 953 So.2d 1108 (Miss. 2007). It is certainly true that the Appellant moved to sever counts of the indictment, but the grounds alleged for such relief did not include the one raised here.

Secondly, as we have demonstrated above, the statement was admissible.

Thirdly, while the Appellant claims that the statement concerning the amount of residue found in the home would not have been admissible on the sale count, he does not trouble himself to demonstrate that it would have been irrelevant. The Appellant assumes that it would have been irrelevant, but he makes no attempt to demonstrate why it would have been irrelevant. We see no purpose to be served in attempting to guess at why the Appellant supposes the statement would have been inadmissible, for any purpose, in the sale count. We will note, though, that the statement had considerable probative value in establishing the fact that the Appellant was involved in the earlier sale of cocaine.

The Appellant, amusingly, cites *Bennett v. State*, 451 So.2d 727 (Miss. 1984). That decision, however, concerned the validity of a multi - count indictment. At the time of the decision, multi-count indictments were said by the Court to be "inherently defective". *Bennett*, at

728. The Court then went on to affirm one of the convictions arising out of the multi - count indictment, observing that all of the evidence as to the other counts would have been admissible as to remaining count.

Bennett predated Miss. Code Ann. Section 99-7-2 (Rev. 2007) and was effectively set aside by that statute. Under Section 99-7-2, there is no rule that evidence as to one charge of a multi - count indictment may only be admitted if it is also admissible as to the other count. Indeed, as observed by the Court of Appeals, it would be difficult to imagine a trial of multiple charges where some element of proof as to one charge would not be subject to a M.R.E 404(b) challenge in the context of another charge. *Wright v. State*, 797 So.2d 1028, 1030 (Miss. Ct. App. 2001). *Bennett* simply does not state the law now; nothing in it is relevant to the case at bar.

The Second Assignment of Error is without merit.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, 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:

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