

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

ATIBA PARKER

FILED

APPELLANT

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SUPREME COURT
COURT OF APPEALS**

VS.

NO. 2007-KA-0490

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

- I. The trial court correctly denied Parker's motion to sever counts I and II of the indictment.
- II. The Trial Court was within its discretion to deny Parker's Motion for a Continuance.
- III. The Trial Court did not err in refusing Parker's peremptory challenge of a white juror where Parker's counsel had not stricken that juror from a previous panel earlier in the week.
- IV. The Trial Judge correctly denied Parker's Motion for Mistrial after the prosecutor asked character witness who testified that Parker had a good reputation for truth and honesty if she was aware that Parker had been charged with three counts of selling cocaine and two counts of possession.
- V. Parker's sentence was well within statutory limits and was therefore not unduly harsh.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Parker's motion to sever counts I and II of the indictment where the two counts for sale of cocaine were separated by only one day and involved the same witnesses and were linked by a common scheme or plan. The Trial Court was within its discretion to deny Parker's Motion for a Continuance where the case was already six months old and was not complicated or unusual. The Trial Court did not err in refusing Parker's peremptory challenge of a white juror where Parker's counsel had not stricken that juror from a previous panel earlier in the week. The Trial Court clearly found the reason given for the strike was pretextual. On appellate review, the trial court's determinations under *Batson* are accorded great deference because they are based, in a large part, on credibility.

The Trial Judge correctly denied Parker's Motion for Mistrial after the prosecutor asked character witness who testified that Parker had a good reputation for truth and honesty if she was aware that Parker had been charged with three counts of selling cocaine and two counts of possession. The trial judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared," and if no "serious and irreparable damage" has resulted, the trial judge should admonish the jury at that time to "disregard the impropriety," which the judge did in this instance.

Parker's sentence was well within statutory limits and was therefore not unduly harsh. It is well settled that sentencing is within the sole discretion of the trial court, and the Mississippi Supreme Court has held that it will not reverse a sentence where it is within the limits prescribed by statute.

ARGUMENT

I. The trial court correctly denied Parker's motion to sever counts I and II of the indictment.

A trial court's denial of a motion to sever multiple counts in a single indictment is reviewed for abuse of discretion. *Rushing v. State*, 911 So.2d 526, 532 (Miss.2005). Mississippi Code Section 99-7-2 (Rev.2000) provides:

Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

Parker was charged in a three count indictment with three sales of cocaine, one alleged to have occurred on the 14th day of July, another on the 13th day of July, and the third count on the 20th day of July. (Tr. 12).

At the pretrial hearing on his motion to sever the three counts, Parker argued primarily that Count III, which occurred several days after the original Count II, should be severed. (C.P. 45, Tr. 9). Parker also argued that Count I should be severed as well, and all counts should be tried separately. (Tr. 9.10). The record reflects that Counts I and II occurred on April 14th and 13th respectively, and involved the same defendants, informants, agents and location. Further, testimony revealed that a phone call made on the evening of the 13th enlisted the deal on the 14th. The State confessed Parker's Motion as to Count III because of the remoteness in time.

The Trial Court granted Parker's motion as to Count III, but held that Counts I and II could be tried together pursuant to the multi-count indictment statute. (Tr. 10, 11) The Trial Court relied on *State, vs. Rushing*, 911 So.2d 526, 532 (Miss.2005), in which the Mississippi Supreme Court established the following three factors for lower courts to consider when

determining whether a multi-count indictment is proper: (1) whether the time period between the occurrences is insignificant, (2) whether the evidence proving each count would be admissible to prove each of the other counts, and (3) whether the crimes are interwoven. *Rushing*, 911 So.2d at 533 (citing *Corley v. State*, 584 So.2d 769, 772 (Miss. 1991)).

The *Rushing* court stated the time factor must be considered together with the totality of events, and that there is no bright line test for determining whether the amount of time is significant or insignificant. *Id.* at 536. The court went on to find that four counts of prescription forgery which occurred at two separate pharmacies over a five month period were properly charged under a single indictment. *Id.* at 537.

In the case sub judice, the Trial Court noted that Counts I and II were only one day apart, that the crimes are the same and the witnesses are the same. The Trial Court therefore correctly held that Counts I and II should not be severed. This issue is without merit and the trial court's decision should be affirmed.

II. The Trial Court was within its discretion to deny Parker's Motion for a Continuance.

"The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court and will not be reversed unless the decision results in manifest injustice." *Ross v. State*, 954 So.2d 968, 1007 (Miss. 2007) (citation omitted).

Parker was indicted on April 21, 2006 and was served with the indictment on May 15, 2006. (Tr. 11) The case was set for trial in the August term of Court, and on motion of the defendant for a continuance due to docket congestion, the trial was continued until November 16, 2006. On November 15th, Parker filed another Motion for Continuance due to the outstanding Motion to Sever, an exhaustive witness list and Parker's counsel's recently completed campaign for public office. (C.P. 42)

The Trial Court denied Parker's request for a continuance, noting the following factors: the case had been indicted since May of 2006, allowing six months for preparation, discovery had already been conducted, subpoenas were issued and the case was a routine sale of drugs case without any unusual features. The Trial Court noted the ample amount of experience Parker's counsel had in defending sale of cocaine cases, and her capability of defending such cases. (Tr. 13) The Trial Court further noted that continuing the case would add to the docket congestion.

"The decision to grant or deny a motion for continuance is within the sound discretion of the trial court and will not be grounds for reversal unless shown to have resulted in manifest injustice." *Smiley v. State*, 815 So.2d 1140, 1143-44 (Miss. 2002) (quoting *Coleman v. State*, 697 So.2d 777, 780 (Miss. 1997)). The Trial Court did not abuse its discretion in denying Parker's motion for continuance and the judgment of the Trial Court should be affirmed.

III. The Trial Court did not err in refusing Parker's peremptory challenge of a white juror where Parker's counsel had not stricken that juror from a previous panel earlier in the week.

Parker's counsel exercised her first four peremptory strikes on white jurors, two females and two males. The State made a Batson challenge, and Parker offered sufficiently race neutral reasons for each of the four. The State then accepted the next four jurors on the panel and they were tendered to Parker. The State accepted Parker's race neutral reason as to J36, who worked for the Sheriff's Department, but challenged her reason for exercising a peremptory strike of J32, a 78 year old white male, since he had not answered any questions during the voir dire.

After a race-neutral explanation has been given, "the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory," i.e., that the reason given was a pretext for discrimination. *McFarland v. State*, 707 So.2d at 171 (Miss. 2007). This Court has recognized five indicia of

pretext that are relevant when analyzing the race-neutral reasons offered by the proponent of a peremptory strike, specifically: (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to voir dire as to the characteristic cited; (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits. *Manning v. State*, 765 So.2d 516, 519 (Miss. 2000) (citations omitted). The burden remains on the opponent of the strike to show that the race-neutral explanation given is merely a pretext for racial discrimination. *Berry*, 802 So.2d at 1042.

While the Trial Court in the case *sub judice* did not use the term “pre-textual” in denying the challenge to Juror 32, the Trial Court was clearly making an on-the-record determination that the challenge was pre-textual. Parker’s counsel gave as her race-neutral reason for striking Juror 23, that he was a retired military person who had recently served on a civil jury and made a return verdict. (Tr. 101) The Trial Court rejected this reason as race-neutral, since Parker’s counsel had not stricken Juror 32 from a previous panel during the week while she still had peremptory challenges. While it is not clear from the record what the case on the previous Tuesday was, the Trial Court clearly found that had her reason been nothing more than his military background and his previous service on a civil jury, that Parker’s counsel would have stricken him in the previous case. The Trial Court’s decision not to allow the strike was based on her inconsistency in regard to this juror and the Trial Court reasonably concluded that this inconsistency revealed that her

stated race-neutral reasons were pre-textual. Parker’s counsel offered no explanation for this inconsistency that would distinguish the juror’s suitability to serve in one case but not the other and thus could not overcome the prosecution’s *Batson* challenge.

Regarding the review of *Batson* determinations, the Mississippi Supreme Court has stated

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that: [a] reversal will only occur if the factual findings of the trial judge appear to be "clearly erroneous or against the overwhelming weight of the evidence." *Tanner [v. State]*, 764 So.2d 385, 393 (Miss. 2000) "On appellate review, the trial court's determinations under *Batson* . . . are accorded great deference because they are based, in a large part, on credibility." *Coleman v. State*, 697 So.2d 777, 785 (Miss. 1997) The term "great deference" has been defined in the *Batson* context as meaning an insulation from appellate reversal any trial findings which are not clearly erroneous. *Lockett v. State*, 517 So.2d [1346,] 1349 (Miss. 1987). This deferential standard of review reflects "confidence that trial judges experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Parker's race-neutral reason for striking Juror 32 was not credible and the Trial Court is entitled to great deference. This issue is without merit and the decision of the Trial Court should be affirmed.

IV. The Trial Judge correctly denied Parker's Motion for Mistrial after the prosecutor asked character witness who testified that Parker had a good reputation for truth and honesty if she was aware that Parker had been charged with three counts of selling cocaine and two counts of possession.

Parker called his employer Melanie Corbell as a character witness. Ms. Corbell testified that Parker had a good reputation in the community for truthfulness and honesty. (Tr. 238) The State then asked Ms. Corbell on cross examination if she realized it was not honest to sell drugs, to which Ms. Corbell replied, "Yes, Sir." (Tr. 239) The State then asked Ms. Corbell if she was aware of that Parker had been charged with three counts of selling cocaine and two counts of possession in Lowndes County on separate occasions and separate days. Parker's counsel lodged

an objection. The State argued that the door had been opened. (Tr. 239) The Trial Court recessed for the evening and asked counsel to return the next morning with caselaw on the objection. (Tr. 240)

The State argued that the evidence was admissible pursuant to *Porter v. State*, 869 So.2d 414 (Miss. 2004). However, the trial court ruled that there should have been a 403 balancing test before the question on cross was asked. The Trial Court determined that the correct course of action was to ask the jury if they could disregard the last question and there was no answer given. If the jury indicated that it was able to disregard that, then the trial would proceed. The Trial Court denied the Motion for Mistrial. The Trial Court then asked the jury to disregard the last question asked on the previous day and all jurors assented. The Trial Court then instructed the jury not to consider the last question and asked if everyone could follow that instruction. The jurors all indicated that they could follow the instruction. The Trial Court then asked if there was anyone who could not follow the instruction. There was no indication from any juror that they could not follow the instruction. (Tr. 248)

"The judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared," and if no "serious and irreparable damage" has resulted, the trial judge should admonish the jury at that time to "disregard the impropriety," which the judge did in this instance. See *Carpenter v. State*, 910 So.2d 528, 534 (Miss. 2005) (citing *Roundtree v. State*, 568 So.2d 1173, 1177 (Miss. 1990)).

Parker cites *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981) for the proposition that the instruction to disregard is insufficient in this case. However, in *Henderson*, the facts of the case are distinguishable. In *Henderson*, the district attorney, after hearing the court's lengthy admonition to the jury to disregard his improper question with reference to Ricky Scott's

indictment for the burglary of a dwelling, he thereafter, by a question, advised the jury that the appellant's co-indictee and twin brother, Michael Henderson, had been previously convicted for his participation in the same offense for which the defendant was on trial. The Court in

Henderson opined:

We doubt very seriously whether there is a district attorney in the State who does not know that asking such a question is improper. At the same time, we recognize that there are times when the district attorney unwittingly and unintentionally falls into asking such questions. In most of those instances, where the jury is admonished to disregard the district attorney's improper question, we can safely and in good conscience hold that there was no prejudice and the trial court correctly overruled defendant's motion for a mistrial.

The prosecutor in this case believed that the door had been opened and mistakenly asked an improper question. The witness did not answer the question and the Trial Court took proper measures to cure the error. In the absence of anything to show the contrary, the presumption is that the jury in reaching its verdict followed the court's instructions. *Reid v. State*, 266 So.2d 21 (Miss. 1972). Parker's claim is without merit and the trial court's refusal to grant a mistrial based on the Prosecution's question to Ms. Corbell should be affirmed.

V. Parker's sentence was well within statutory limits and was therefore not unduly harsh.

Parker raises his claim that his sentence constitutes cruel and unusual punishment under the Eighth Amendment for the first time on appeal. He acknowledges that his sentence is well within the statutory limits, since Sale of Cocaine under Miss. Code Ann. § 41-29-139 carries a maximum prison sentence of (30) years and Parker was sentenced to consecutive terms of twenty (20) and fourteen (14) years. It is well settled that sentencing is within the sole discretion of the trial court, and the Mississippi Supreme Court has held that it will not reverse a sentence where it is within the limits prescribed by statute. *Gibson v. State*, 731 So. 2D 1087, 1097 (Miss. 1998)

(citing *Hoops v. State*, 681 So.2d 521, 537 (Miss. 1996)).

Parker argues however, that because he is a young African-American charged with Sale of Cocaine, that his sentence should be more closely examined. He argues that since he confessed his drug problem to his family and sought treatment, his sentences should have been more lenient. Parker cites no precedential authority for these arguments. It follows that Parker's argument is procedurally barred for lack of relevant authority. Arguments advanced on appeal must "contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes and parts of the records relied on." M.R.A.P. 28(a)(6). Failure to comply with M.R.A.P. 28(a)(6) renders an argument procedurally barred." *Birraghe v. Ill Cent. R.R.*, 950 So.2d 188, 194 (Miss.Ct.App. 2006).

Parker accuses the Trial Court of using his plea for leniency "as an aggravator because it was not professed prior to trial." However, there is no indication in the record that the Trial Court used Parker's belated candor to enhance his sentence, but rather the Trial Court noted that it lacked credibility as a mitigating factor because it was offered so late in the process and after Parker had given disingenuous explanations for his behavior. This is within the Trial Court's discretion. This issue is without merit and should be dismissed.

CERTIFICATE OF SERVICE

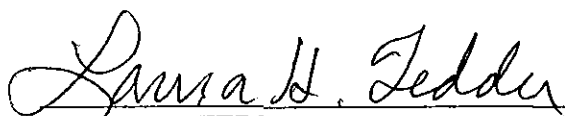
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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