IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ATIBA PARKER — APPELLANT

V. — NO.2007-KA-00490-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Atiba Parker
3. Honorable Forrest Allgood and the Lowndes County District Attorneys Office
4. Honorable James T. Kitchens, Jr.

THIS 17th day of December 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Atiba Parker, Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgment of conviction for the crimes of Count One, Sale of Cocaine and Count Two, Sale of Cocaine, against the appellant, Atiba Parker[1]. After a sentencing hearing, the trial judge sentenced Parker to twenty (20) years on Count I, with a fine of five thousand dollars ($5,000.00), and fourteen (14) years on Count II, also with a five thousand dollar ($5,000.00) fine. Count II was to be served consecutive to Count I for a total of thirty-four (34) years to serve. C.P. 95-98, Tr. 322, R.E. 41. This sentence followed a jury trial which began on November 15, 2006 and ended with a verdict on November 17, 2006, Honorable James T.

[1] Count III was severed prior to trial. Tr. 12, R.E. 29.

Kitchens, Jr., Circuit Judge, presiding. Atiba Parker is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the trial testimony, Amanda Knapp had a relative die of a drug overdose. She wanted to help get drugs off the street, so she contacted Columbus Police Department. She told them that she could set up some people she knew. They made arrangements to set up cameras in the room she was living in at the Plaza Motel. Tr. 121. Knapp knew the appellant, Atiba Parker, sometimes stayed at the same hotel. She stated she knew him "from the streets," but later explained that she had known Parker since 2002, when she dated a friend of Parker's girlfriend. Tr. 122, 150-51.

Knapp admitted to being paid one hundred dollars ($100.00) for each good buy she made. Tr. 122, 157. A "good buy" was one that was had a good video of the transaction. Tr. 157, 161, 164. On July 13, 2005, Agent Eric Lewis with the Columbus Police Department's Community Action Team or "CAT," came to Knapp's room to set up video equipment. Tr. 123, 164. Knapp testified she had previously called Parker and arranged to met with him later that afternoon. Tr. 123. However, none of that conversation was recorded.

Knapp testified that Agent Lewis searched her room and her person for contraband when he arrived. Tr. 123. Also living in the room with Knapp at the time was her aunt, Regina Kirkbaum. Tr. 125. Lewis could only perform a pat down search on the two women, as he could not do a strip search since no female officer was present. Tr. 176. Lewis gave

Knapp two twenty dollar ($20.00) bills and an evidence bag. Tr. 124. The conversations on the video are difficult to hear, but Knapp testified she called Parker and told him to come to her room and "serve" her. Tr. 125.

Knapp identified Exhibit 2 as the videotape of the transaction. Tr. 128. The tape was played for the jury. Tr. 130. Knapp describes Parker entering the room and taking cocaine out of his socks. Knapp stated she handed Parker the money and he gave her two rocks of cocaine. Tr. 133. Knapp stated she then put the rocks into the evidence bag, but that occurred off camera. Tr. 155. After Parker left the room, Agent Lewis returned and retrieved the evidence from her. Knapp and Lewis both identified Exhibit 1 as the bag containing the cocaine. Tr. 127, 169.

Agent Lewis asked Knapp to set up a second buy from Parker the following day. Tr. 136. Lewis testified that the police liked to set up multiple buys on one suspect to show a pattern and prove the sale was not a one time occurrence. Tr. 172. On July 14, 2005, Lewis again went to Knapp's room. Tr. 136-37, 172. He again searched the room and both Knapp and Kirkbaum, and set up the video and audio equipment. Tr. 137, 173. Knapp testified she called Parker after Lewis left the room. He arrived about thirty minutes later. Tr. 137. She gave him the money and he again pulled the cocaine out of his sock and laid it on the bed. Tr. 137-38. She then placed the drugs in the evidence bag provided by Lewis. Tr. 138. Knapp and Lewis both identified the bag as Exhibit 3. Tr. 139, 174-75.

Knapp also identified Exhibit 4 as the video of the second transaction on July 14th. Tr. 140. Again, the phone calls made to Parker setting up the deal were not recorded. There

is no conversation on the video between Parker and Knapp referencing cocaine or any other drugs. Tr. 156. Knapp admitted on the stand that she was currently incarcerated pending three felony charges that she picked up after these videos were made. Tr. 120, 163-64. Knapp was living with her aunt and had no job. Tr. 149-50. Making these buys was her only source of income at the time. Tr. 156. Knapp claimed she did not spend time with Parker, and that he had never been in her room before. Tr. 160. Oddly enough, however, she testified he had a habit of leaving the door open when he came to her hotel room. Tr. 142-43.

Keith McMahon, a forensic scientist with the Crime Lab, testified Exhibit 1 contained a smokeable form of cocaine. Tr. 195, 198. (No weight was given). Jamie Johnson, also a forensic scientist with the Crime Lab, testified Exhibit 3 was analyzed and determined to contain 0.07 gram of crack cocaine. Tr. 188, 192.

Parker testified in his own defense. He told the jury that he would collect gas money form Knapp after giving her aunt rides to work. Tr. 208. He admitted he was the individual in videos played to the jury. Tr. 210. He stated that Knapp had requested an aspirin when he came up to get his gas money. He explained that he kept all his medications in his socks. Tr. 210. On the second video, he explained he was only collecting gas money and did not give Knapp anything. Tr. 213. Parker informed the jury he currently takes the prescription drugs Seroquel and Depakote. Tr. 204.

Dr. Raymond Overstreet was the psychiatrist treating Parker. He testified that Parker has Schizo-affective Disorder. Tr. 231. This is a kind of a mood as well as a thought disorder. It is characterized by mood changes, periods of depression, and at times, periods

of more manic type behavior. "It can affect his judgment and can sometimes cause unusual abnormal type behaviors." He prescribed Depakote to try and stabilize the mood disorder, and the Seroquel for his psychotic symptoms. Tr. 232.

Parker also had several character witnesses testify to his reputation for truth and veracity in the community. All the witness stated that his reputation was good. Tr. 237-60. The record indicates that after these incidents in July of 2005, Parker successfully completed treatment as an inpatient drug rehabilitation program at The Pines/Cady Hill Chemical Dependency Program, and subsequently secured gainful part-time employment at Fred's in Columbus. C.P. 58, Tr. 238, 316-17. Eight months later he was arrested in a "round-up" of suspected drug dealers based on the transactions the previous July. Tr. 184.

SUMMARY OF THE ARGUMENT

The trial judge abused his discretion in not granting trial counsel's request for a continuance prior to trial. Counsel stated that she had spent the previous day on the trial of another defendant, and had just completed an election campaign which ended the week before, which took up approximately two months of her time. She explained she did not have adequate time to prepare for appellant's case. The trial judge also erred in not severing all three counts in appellant's indictment. Although it could be argued that Count I and Count II arose out of the same facts and circumstances, this was only the case because the State set it up to be so. The State controlled the dates and times of the controlled buys. Trying Count I and II together clearly prejudiced the defense.

The trial judge also abused his discretion in not allowing the defense a peremptory challenge on a military veteran in response to a reverse-*Batson* objection by the State. Upon objection, the defense counsel gave a race neutral reason for striking Juror No. 32. He was a 79 year old white male who was retired from the Navy. He had also recently served on a civil jury. The trial judge disallowed the strike, ruling that since counsel did not seek to strike him on a previous case tried the same week, she had to keep him on this case. This was clearly an abuse of discretion, as counsel gave a sufficient race neutral reason for the strike.

There was also reversible error when State improperly referred to all the pending charges against Parker when cross-examining a defense character witness. Upon prompt objection by defense counsel, the jury was sent home for the night, allowing that last inappropriate comment to linger until the following morning. The next day, without referencing the question, the Court asked the jury if they could disregard the comment. When all the jurors indicated that they could, the defense request for a mistrial was overruled. This was error. The instruction to disregard did not cure the obvious prejudice to Parker.

Finally, the trial judge also abused his discretion in giving the appellant a thirty-four year sentence for these two offenses without conducting any sort of inquiry into how his mental illness affected his actions. The buys were set up by a paid confidential informant who admitted this was her only source of income. Parker was a first time offender. All the prior offenses referred to by the court occurred in the same week period in July of 2005. The trial court inappropriately considered a prior juvenile arrest which occurred at least 12 years

prior to this trial and an arrest with no disposition in Michigan. At the very least, this Court should remand this case for a new sentencing hearing.

ARGUMENT

ISSUE NO. 1 THE TRIAL COURT ERRED IN REFUSING TO SEVER COUNT I AND COUNT II OF THE INDICTMENT.

On the day prior to trial, defense counsel filed a motion requesting that all three counts in Parker's indictment be severed. C.P. 45-46, R.E. 22-23. A hearing was held on the motion prior to jury selection. Tr. 9-12, R.E. 26-29. The court agreed that Count III was remote enough in time to sever from the other counts, but refused to sever Count I and II.

> [BY THE COURT:]... The fact that these are similar cases, similar identical crimes, I think does militate in favor of keeping these two together. You've got the same witnesses and those kind of things. It's not like one day he's charged with sale of cocaine and the other day he's charged with a rape that's totally unrelated. That would militate in favor of severance.
>
> So, I find that the Count Number 1 and Count Number 2 can be tried together under the statutes and the under the case law. And I will allow that to be tried.

Tr. 12-13, R.E. 29-30.

The appellant would assert that the trial court erred in not severing these counts. The facts are similar and close in time, but the State, not the appellant, manufactured the time and circumstance of the buys. The State deliberately tried to get as many sales on the appellant as possible to make him look like a drug dealer and not just a user. Agent Lewis admitted this during his testimony.

> Q. Why did you want to go ahead and have another deal with this particular defendant? Explain that to these ladies and gentlemen of the jury.

> A. The reason we do is, to try to have – we try to get multiple deals on a subject. And the reason for that is, because we want to maybe show this is – show that this is not a one time occurrence. We try to show a pattern of this going on over and over again. So, we can, you know, help us to know that his is a person that is, you know, actually a problem in our society who is selling this cocaine.

Tr. 172.

Miss. Code Ann. § 99-7-2(1) (1986), states in part that two or more offenses may be charged in a single indictment 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." Subsection (2) allows both offenses to be tried together at a single proceeding. However, the statute does not address the circumstance where law enforcement dictates that timing of the transactions.

This Court has held that repeated sales of narcotics in a short span of time can constitute part of a common scheme or plan. *Watkins v. State*, 874 So.2d 486 (¶19) (Miss.App. 2004), citing *Ott v. State*, 722 So.2d 576 (¶ 23) (Miss.1998). However, the facts in *Watkins* are distinguishable from the case at bar. The undercover officer in *Watkins* was not targeting one individual. The officer was cruising in a high crime neighborhood looking to buy drugs. *Watkins* at ¶3. The officer purchased cocaine from Watkins and went out again looking for more sellers three days later. She was not intentionally looking to buy from Watkins, but he approached her and sold her more cocaine. *Id* at ¶6. The officers were not attempting to sell to Watkins for a second time in three days. This Court held there was no basis for a severance under those circumstances. *Id.* at ¶21.

In *Ott*, officers set up a controlled buy with the defendant using a confidential informant. After the buy, the CI informed officers that Ott had more marijuana. Based on that information, officers got another confidential informant to page Ott and try and set up another deal. *Ott*, 722 So.2d at ¶ 2-6. There is no indication in the opinion on whether or not the officers attempted to control the date or time for the second transaction.

In its ruling at trial, the court cited the case of *Rushing v. State*, 911 So.2d 526 (Miss. 2005). Tr. 12. In *Rushing*, the Mississippi Supreme Court reiterated that severance issues are reviewed for abuse of discretion. *Id.* at ¶12, citing *Brawner v. State*, 872 So.2d 1 (¶15-20) (Miss. 2004). Rushing was a prescription fraud case, where the defendant was indicted on four counts spread across a five month period. The State elected to proceed to trial on three of the counts. *Rushing*, 922 So.2d 526 at ¶6. The Supreme Court found no abuse of discretion in refusing to sever the counts. *Id.* at ¶21.

As referenced in *Rushing*, the Mississippi Supreme Court laid out three cornerstone considerations a trial court must weigh when deciding severance issues. These considerations are set forth in *Corley v. State*, 584 So.2d 769, 772 (Miss. 1991). "The trial court should pay particular attention to whether the time period between the occurrences is insignificant, whether the evidence proving each count would be admissible to prove each of the other counts, and whether the crimes are interwoven." *Id.*

The appellant submits this is not a crime spree of the appellant's own choosing. The confidential informant called him and asked him to come to her room in the same hotel where he frequently stayed two days in a row. While the record does not provide us with an exact

transcript of what Knapp said to Parker prior to each buy, the record does show the Agent Lewis asked Knapp to try and set up another buy for the next day. Tr. 172. There is nothing to suggest this was Parker's idea. The State should not be allowed to claim the two transactions were close in time when the State actually set up the times of the buys. As Agent Lewis stated, this was a direct attempt to manufacture a pattern to show he was a problem. *Id.*

As the Court will note, the second transaction on July 14th, Exhibit 3, does not show Parker handing Knapp anything. Trying these two cases together unduly prejudiced the defendant. Parker is entitled to a new trial on both counts.

ISSUE NO. 2 THE TRIAL COURT ERRED IN REFUSING TO GRANT TRIAL COUNSEL A CONTINUANCE.

On the morning before trial, counsel requested that the court grant her motion for a continuance. C.P. 42-43, R.E. 19-20. Counsel informed the court that she had just been involved in an extensive political campaign which took up approximately two months of her time. This election was only concluded the week before. Counsel was also involved in a trial the day before in that very court. Although the defendant eventually pled, she was involved in that case for the entire day. Tr. 8, R.E. 25. Although Parker was served with his indictment only six months prior, the court, nevertheless, denied the motion. Tr. 11, 13-14, R.E. 28, 30-31.

The decision on whether or not to grant a request for a continuance is made at the trial court's discretion. It is also the defendant's burden to prove a manifest injustice if the

continuance is not granted. *Stack v. State*, 860 So.2d 687 (¶7) (Miss. 2003). The appellant submits that counsel stated that she was tired and had not had time to adequately prepare for this trial. Tr. 8. This was evinced by counsel's questioning of defense character witnesses. Counsel asked if they knew Parker's reputation for truth and honesty in the community. Tr. 239. As argued in Issue 4, *supra*, the prosecution then improperly asked the witness if her opinion would be the same if she knew Parker was accused of several other drug charges[2]. Tr. 239. After the jury was instructed to disregard, counsel attempted to clarify how she should ask the reputation question.

> BY MS. JOURDAN: Your Honor, while the jury is still out and I know the Court has been very patient with us this morning, I would like to clarify my understanding so, I don't further misstep or we don't have a further misstep in this trial.
>
> If I'm understanding the Court's ruling and Mr. Allgood's argument, it was the use of the word, "honesty". So, if I'm understanding the Court and also the Porter case, if we limit the inquiry to truth and veracity –
>
> BY THE COURT: Then you don't open that door to that kind of thing unless it's a crime of dishonesty.
>
> BY MS. JOURDAN: Correct. So, if we – and I'll be candid with the Court, we have additional – *yesterday I was tired*. And Mr. Allgood is correct, I did use the word "honesty". But if we use the words "truth" and "veracity", then Mr. Allgood cannot bring up those incidences. Is that correct?
>
> BY THE COURT: That's my understanding.
>
> BY MR. ALLGOOD: That would be my understanding also of Brent and Porter, Your Honor.
>
> BY MS. JOURDAN: I don't repeat this. I want to be careful. We'll be very brief, Your Honor, and then we'll rest.

Tr. 246-47 [emphasis added].

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[2] This issue will be discussed more thoroughly in Issue 4, *supra*.

Had counsel been granted the continuance, she would have been more rested for trial and would not have made the mistake of saying "honesty" instead of "veracity." Use of the incorrect word substantially prejudiced Parker, as it allowed the State to believe counsel had opened the door to inform the jurors of his other pending charges. As argued in Issue 4, *supra*, it was impossible to cure this error. Parker is entitled to a new trial.

ISSUE NO. 3 THE TRIAL COURT ERRED IN REFUSING A DEFENSE PEREMPTORY CHALLENGE AFTER COUNSEL GAVE A RACE NEUTRAL FOR THE STRIKE.

During jury selection, defense struck several Caucasian jurors. This prompted the prosecution to request that race-neutral reasons be provided under the authority of *Georgia v. McCollum*, 505 U.S. 42, 59 (1992)[3]. Tr. 96. The defense counsel complied and the court accepted the reasons. After more jurors were tendered, counsel struck Juror No. 32. Again the prosecutor objected, noting Juror No. 32 was a 79 year old white male who did not respond to any questions during voir dire. Tr. 100.

> BY MS. JOURDAN: My race neutral, Your Honor, is that he was a retired military from the Naval. [sic] He, also, recently had – served on a civil jury, where they had – if memory serves me correctly – and again, I was here on Tuesday and I took voluminous notes. He served on civil jury, ruling and made a return verdict, I believe if memory serve me correctly.
>
> BY MR. ALLGOOD: Once again, if Your Honor, please –
>
> BY THE COURT: Hold on. The problem is, he was on the jury that you picked Tuesday. You did not strike him Tuesday.
>
> BY MS. JOURDAN: Well, Your Honor, I ran out of strikes on Tuesday. I'm kidding. I don't now that, Your Honor. I was saying it as a joke.

[3] The prosecutor incorrectly cited the case as *Green v. Georgia*. Tr. 96

BY THE COURT: Yeah. I think you had some left over. I'm going to keep 32 on the panel. Because I think 32 was kept on the panel Tuesday that you picked and I'm going to leave 32 on there.

36, I think he works for the sheriff's department. That's clearly a race neutral reason. I'm going to disallow D- -- Number 32 – Number 36 is allowed. That it is sufficient race neutral.

Tr. 100-101.

In *Georgia v. McCollum, infra*, the U.S. Supreme Court held the case of *Batson v. Kentucky* 476 U.S. 79 (1986), which prohibited racial discrimination in jury selection, applied to defense strikes as well as prosecution strikes. Furthermore, whether or not a *prima facie* case of discrimination was shown, in order to require race neutral reasons, is moot once a party provides reasons into the record. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). In the case at bar, defense counsel provided a sufficient race neutral reason for her strike, and the trial court abused its discretion by disallowing the challenge and allowing Juror No. 32 on the jury. The reasons given for the strike do not need to rise to the level required for challenges for cause. *Batson*, 476 U.S. at 97.

The record clearly indicates the court did not make an on-the-record determination that counsel's reasons were not race neutral. On the contrary, the court simply held that because counsel had accepted the juror earlier that week in a different trial, she was not allowed to challenge the juror in Parker's trial[4]. Tr. 101. The appellant is aware that trial courts are given great deference in their findings on whether or not a reason provided by

[4] Throughout voir dire, it is clear both counsel were relying on notes taken earlier in the week during another case. However, the record does not indicate the race of the defendant in the previous case. The circumstances could have been entirely different in that case to explain why counsel would have wanted Juror 32 on that jury, but not on Parker's.

counsel is truly race neutral and not a pretext for discrimination. *Jones v. State*, 951 So.2d 568 (¶17)(Miss. App. 2006). However, the court never made such a finding in the record below.

This Court recently upheld the trial judge's decision not to allow a strike against a juror simply because the juror was a military veteran and a supervisor. *Perry v. State*, 949 So.2d 764 (¶9-12) (Miss.App. 2006). However, counsel gave additional reasons for striking Juror No. 32, besides the fact that he was a military veteran. He was seventy-nine (79) years old and not simply a veteran, but career military retiree from the Navy. Tr. 100. As the Mississippi Supreme Court has held, establishing a race neutral reason is not a difficult task. *Stewart v. State*, 662 So.2d 552, 558 (Miss. 1995). In fact, the *Stewart* court went on to cite age as a race neutral reason. *Id.* [citations omitted]. Furthermore, Juror No. 32 had previously served on a civil jury.[5] Even if military service is not a race neutral reason, counsel gave two other viable reasons. The trial did not even consider these reasons, are rule that they were pretextual, but instead held that because counsel had previously accepted the jury an another trial, the juror could not be stricken peremptorily. This was error.

Age, like any other facially race neutral rase can be pretextual. *Williams v. State*, 909 So.2d 1233 (¶9-11) (Miss.App. 2005). However, again, appellant can not stress enough that the trial judge did not make that finding. He did not find counsel's reasons were pretextual, only that she had to kept the juror because she had previously accepted him. There is no

[5] The record is little unclear on exactly what type of verdict this civil jury returned. The record only states, "He served on civil jury, ruling and made a return verdict..." Tr. 101.

indication in the record that counsel's strike evidenced disparate treatment. Therefore, there is no basis for the trial judge's ruling. Accordingly, Parker is entitled to a new trial.

ISSUE NO. 4 THE TRIAL JUDGE ERRED IN REFUSING A MISTRIAL AFTER THE PROSECUTOR IMPROPERLY QUESTIONED A DEFENSE CHARACTER WITNESS ABOUT APPELLANT'S OTHER PENDING CHARGES.

As briefly mentioned in Issue 2, *infra*, during the direct examination of Melanie Corbell, Parker's employer, she stated Parker had a good reputation for truth and honesty. Tr. 239. The following cross-examination ensued.

> [BY MR. ALLGOOD:] Of course, I assume that you realize it's not honest to sell drugs, in that correct?
> A. Yes, sir.
> Q. Are you aware or did you know that he had been charged with three counts of selling cocaine and two counts of possessing cocaine all on separate occasions on separate days in Lowndes County, Mississippi?
> BY MS. JOURDAN: Your Honor, I would object.
> BY MR. ALLGOOD: She opened the door to this, Your Honor.
> BY MS. JOURDAN: No, Your Honor, I did not. We did not open the door.
> BY THE COURT: All right. Let me see you both at the bench.
> (WHEREUPON, THE ATTORNEYS & COURT REPORTER APPROACHED THE BENCH FOR A BENCH CONFERENCE.)
> BY THE COURT: What's the objection?
> BY MS. JOURDAN: Your Honor, I would object. She said she was familiar with his reputation and it was good.
> BY MR. ALLGOOD: For truth and honesty, she opened the door, Your Honor. And she put a character witness on and I can ask her about specific instances whether or not that would affect that opinion.
> BY THE COURT: Let me send the jury home. Then, this witness will have to be back in the morning.

Tr. 239-40.

After sending the jury home for the night, the court then ordered counsel to provide some law on the issue the following morning. Tr. 242. The next day, the prosecutor

provided the court with the case of *Porter v. State*, 735 So.2d 987 (Miss. 1999).[6] In *Porter*, the Supreme Court found that the trial judge had committed reversible error in allowing the State to cross-examine defense character witnesses on whether or not their opinion of the defendant would change if they were aware of other pending charges. *Id.* at ¶9. The trial judge in the case at bar recognized that under *Porter*, the prosecutor had committed reversible error, as he did not request a balancing test prior to questioning the witnesses about the other charges. Tr. 243. See *Porter*, at ¶4-5, citing M.R.E. 608(b) and *Brent v. State*, 632 So.2d 936, 945 (Miss. 1994). The defense then made a motion for a mistrial.

> BY MS. JOURDAN: Yes, Your Honor. Your Honor, at this time I would move for a mistrial. I understand the Court's position and I appreciative of the fact the Court is willing to give a cured [sic] instruction to the jury on this matter at this time. But I think this is the kind of bell that once rung cannot be unrung. And clearly, the jury is going to – I think the cumulative nature of the acts would prejudice the jury and based on that question along to find client guilty. So, accordingly, Your Honor, I would move for a mistrial at this time.

Tr. 244.

The trial judge denied the request for a mistrial, and instead decided to ask the jury if they could disregard the prosecutor's question about other pending drug charges. Tr. 245-46. Without repeating the question, which the jury was left to ponder all night long, the court informed the jury that there was an objection to the last question asked of the witness by the prosecutor. The court stated the question should be stricken and asked if the jurors could disregard the question. The record indicates all the jurors stated that they could. Tr. 248.

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[6] Incorrectly cited in the record as the case of Charles Pope Porter at 735 So.2d 907. Tr. 243.

> ¶ 23. This Court "will not reverse on the failure to grant a mistrial unless the trial court abused its discretion in overruling the motion for a mistrial." *Bass v. State*, 597 So.2d 182, 191 (Miss.1992). "The judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared." *Roundtree v. State*, 568 So.2d 1173, 1177 (Miss.1990) (citation omitted). "Where 'serious and irreparable damage' has not resulted, the judge should 'admonish the jury then and there to disregard the improp[riety].' " Id. at 1178 (citing *Johnson v. State*, 477 So.2d 196, 210 (Miss.1985)).

Carpenter v. State, 910 So.2d 528, 534 (Miss. 2005).

The appellant would assert that the question about Parker's other pending drug cases was unduly prejudicial and mandated a mistrial. The prosecutor admitted he was aware of the *Porter* case, but thought it had been overruled[7]. Tr. 244-45. The jury was allowed to think about the question overnight before being instructed to disregard it. It was simply not possible for the jury to disregard such a prejudicial question, especially in light of the defense Parker had already set forth. It is clear that evidence of prior offenses committed by a defendant, not resulting in a conviction, is generally inadmissible for impeachment purposes. *Neal v. State*, 451 So.2d 743, 758 (Miss. 1984).

Curative instructions are not always enough, and each case must be reviewed on its own peculiar facts. *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981). In *Henderson*, even though jury was instructed to disregard, it was reversible error to cross-examine a witness on whether or not he had been indicted and asking a co-indictee whether or not he had already been convicted of the charged crime. In *Williams v. State*, 539 So.2d 1049,

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[7] It should also be remembered that compounding this error was the prosecutor's reference, over objection, to Parker previously being searched by police. Tr. 222-24.

1052-53 (Miss. 1989), the Supreme Court found the trial judge's instruction to disregard repeated references to a tape of the child victim was insufficient to remove the prejudice to the defendant.

Parker is therefore entitled to have a new jury consider his case free from the prejudice of knowing he had other pending narcotics charges.

ISSUE NO. 5 APPELLANT'S SENTENCE WAS VINDICTIVE AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT GIVEN APPELLANT'S MENTAL ILLNESS.

Although not raised at trial or cited in his motion for a new trial, the appellant would assert that his sentence of thirty-four (34) years to serve for two sales of cocaine was unduly harsh, and constituted cruel and unusual punishment under the Eight Amendment to the United States Constitution. See also Miss. Const. Art. 3 § 28. The Mississippi Supreme Court has previously allowed this type of claim to be raised for the first on appeal, since it affects appellant's fundamental rights. *Bush v. State*, 667 So.2d 26, 28 (Miss. 1996), citing *Gallion v. State*, 469 So.2d 1247, 1249 (Miss. 1985).

The appellant would first acknowledge that the sentence in the case *sub judice* is within the statutory limits. Sale of cocaine under Miss. Code Ann. §41-29-139 carries a maximum prison sentence of thirty (30) years. Parker was sentenced to consecutive terms of twenty (20) years and fourteen (14) years, well within the statute's limits. Ordinarily, such a sentence will not be considered unduly harsh.

> ¶ 15. As a general rule, sentencing is within the trial court's discretion and will not be disturbed on appeal if the sentence is within the term provided by statute. *Davis v. State*, 724 So.2d 342, 344 (¶7) (Miss.1998). However, a

> sentence that is "grossly disproportionate" to the crime committed is subject to attack on Eighth Amendment grounds. *Id.*

Edge v. State, 945 So.2d 1004 (¶15) (Miss.App. 2007).

Notwithstanding, there appears to be a national trend to take a closer look at the sentences handed out, especially to young African-Americans, for sale of small amounts of crack cocaine. The United States Supreme Court just this month gave federal judges the discretion to go outside the federal sentencing guidelines in crack cocaine cases. See *Kimbrough v. United States*, No. 06-6330, 2007 WL 4292040 (2007).

In the case at bar, the record reflects that after appellant was convicted by the jury, the court held a brief sentencing hearing. Tr. 313-22. The trial judge asked Parker if he had anything to say before he handed down his sentence. Parker, on the advise of counsel, told the court he was sorry, and asked the court for leniency.

> BY THE DEFENDANT: Yes, sir, I would, Your Honor. I would just like to say I'm sorry. And ever since I've gotten out of the Pines and try to better myself, you know, I just want you to be lenient and not so hard on me with the time you give me, sir. That's all.

Tr. 316.

Counsel then explained that after Parker was arrested on these series of charges, all of which occurred in a one week period in July of 2005, Parker told his family about his drug problem. Tr. 316. He successfully completed an inpatient drug rehabilitation program and got a job. C.P. 58, Tr. 317. After straightening his life out for several months, Parker was indicted in April of 2006 for the July of 2005 sale offenses. C.P. 5, R.E. 16.

The court, however, proceeded to comment about Parker's exercise of his right to trial, and faulted him for not expressing remorse prior to trial.

> BY THE COURT: And I'm not trying to downplay even his mom. But the time for some measure of coming forward saying I'm sorry for what I've done was before a trial. Then, I'm satisfied that there's some level of remorse.
>
> But once a jury says in fairly quick order he's guilty of two counts. And then he says I'm sorry, my concern about remorse is pretty much out the window.

Tr. 317.

Counsel attempted to explain that this was Parker's first felony conviction. Tr. 318-17. However, the court interrupted and pointed out that he had a youth court offense that "was probably a felony, would have been handled as an adult probably." Tr. 318. Parker was twenty-nine (29) years old at the time of trial. Tr. 202. The youth court matter had to be at least twelve (12) years old. Parker clearly had no significant record prior to July of 2005. C.P. 48. He had countless letters written on his behalf by family and friends who knew him and requested the judge consider his mental illness and his drug problem, along with his subsequent rehabilitation. C.P. 59-74. Instead, the court used the letters against Parker, commenting that some were written well before trial.

> BY THE COURT: This is certainly an American, he's entitled to every constitutional right. But I saw the film just as the jury did. And I heard his excuse for what he was doing. And I look at the letters. Some of them were written by in May. And the letters all say gosh, he's messed up, and he has had this drug problem. And what I'm concerned about is, there should have been some level of remorse – I understand remorse when it's as some of his letters say, well, he's messed up. He's had a drug problem and all of that in May when they write the letter, instead of going to trial and saying I didn't sell cocaine. I was there to deliver Aspirin.

> And now come to me and say well, gee, I'm sorry for what I've done. When the jury soundly rejected what he said.
>
> I mean he got on the stand under oath and gave an explanation for something apparently that the jury just flat out rejected. And now I am to surmise that he's sorry. That's the problem that I have.
>
> I'm very serious about taking the oath. It's the one place where people swear to tell the truth, the whole truth and nothing but the truth. And then they get on the witness sometimes and tell anything but the truth. And that's apparently what has happened here. I mean, by the tender of these letters, everybody knew he had a drug problem. And I'm not blaming the lawyer. This rests squarely on Mr. Parker's shoulders, no one else.
>
> There's good people that like you. But what I have is, you get on the stand and tell them a story that was apparently was false. And the jury rejected it. And now I am to believe that you're sorry. Well, I believe you are sorry. I believe you're sorry that the jury didn't buy your argument.

Tr. 318-19.

Counsel attempted to explain that she told Parker it would be important for him to express his remorse to the court. Tr. 320.

> BY THE COURT: No. No. But the problem is, like I said, apparently all of these witnesses knew that he has had this drug problem for some time. And then he goes to trial and says, I didn't do this. As a matter of fact I was delivering Aspirin. And that is soundly rejected.
>
> When – it seems to me that the truth would have served him better to begin with. And said you know what, I did this. I'm sorry.

Tr. 320.

The Mississippi Supreme Court has held that a defendant's lack of remorse is something a sentencing judge can take into consideration. *Payton v. State*, 897 So.2d 921 (¶104) (Miss. 2003). However, an expression of remorse at sentencing should not be used as an aggravator because it was not professed prior to trial.

In *Hampton v. State*, 815 So.2d 429 (¶15) (Miss.App. 2002), this Court held it was not *per se* improper for a prosecutor to make derogatory comments about a defendant's decision

to exercise his constitutional rights to have a trial. Although the Court found the comments were not reversible error, prosecutors were warned not to engage in such arguments. *Id.* It stands to reason that trial judges, all the more, should not hold it against a defendant for making the State prove its case. "The accused always has a constitutional right to put the State to the task of proving him guilty beyond a reasonable doubt." *Id.* at ¶21, Irving, Judge, Dissenting.

It is critical to note that Parker has a significant mental illness[8]. He was on disability. C.P. 47. Dr. Overstreet's opinion was that when Parker was inconsistent with his medication, he would begin to show bazaar behaviors. This caused him to start using drugs. C.P. 70. During his testimony, Dr. Overstreet stated failure to regularly take his drugs "can affect his judgment and can sometimes cause unusual abnormal type behaviors." Tr. 232. The trial judge abused his discretion in not taking this into consideration, as he did not even mention Parker's mental illness during his sentencing. Instead, his only concern seemed to be that a mentally ill defendant told a story on the stand instead of pleading guilty prior to trial.

Even during the hearing on the motion for a new trial, the judge again commented that Parker exercised his right to a trial instead of showing remorse ahead of time and pleading guilty.

> [BY THE COURT:] ... Ultimately, when I asked Mr. Parker to make any comment about it, he, as I recall, he basically just said that that was something that he kind of had made up. And the Court was more frustrated not so much that he had been convicted of selling cocaine, but that he had

[8] The record indicates he had even been hospitalized in the past. Tr. 205.

taken such kind of a cavalier attitude about coming up with some kind of explanation that was apparently not true. The jury rejected that argument.

Tr. 326-27.

Again, counsel tried to explain that Parker was not being frivolous to the court, but was following her advice. Tr. 328.

BY THE COURT: No. No. He has this right, this constitutional right. What concerned me at the time was, that he got on the stand and told what was ultimately a falsehood, rather than just saying either not taking the stand or not coming up with that story; which he had the right to do. But no one has the right to get on the stand and make up a story, and, you know, that it be false.

Every one has the right at the charge of the crime to make the State prove its case beyond a reasonable doubt. That's not what my concern was. But it was making up something that was false. And that's what caused me the concern and that what was in part motivated the sentence that I handed down.

Everyone has got the right to make the State prove its case. But no one has got the right to get on the stand and tell just an outright falsehood. So, no, I understand. And I understand the position that you're in.

Tr. 328-29.

In a circumstance such as this, when there was uncontradicted evidence of mental illness, the court had an obligation to ensure that Parker was capable of making good judgments. For example, the court questioned Parker very little about his right to testify.

[BY THE COURT:] ...One quick thing that I need to talk to Mr. Parker about. Mr. Parker, this is your day in court. You have the right to testify. You've got the right not to testify. I can't keep you from testifying. Neither can anyone else, your lawyer, your family, Mr. Allgood, no one. The decision is yours.

And you've got to make that call for yourself. Do you understand what I'm saying?

BY THE DEFENDANT: Yes, sir, Your Honor.

BY THE COURT: Okay. So, you understand that, right?

BY THE DEFENDANT: Yes, sir.

BY THE COURT: If you choose not to testify, I can even tell the jury they can't hold that fact against you.

BY THE DEFENDANT: Yes, sir.

I'm going to give everybody about a 15-minute break. And when you come back – when we come back, I'm going to ask you if you've made up your mind. How about that?

BY THE DEFENDANT: Yes, sir.

BY THE COURT: Okay. Court's in recess for about 15-minutes. Thank y'all.

Tr. 200-01.

However, when the recess ended, the court only asked if counsel wished to call any witnesses. Tr. 201. Parker, a young man diagnosed with Schizoaffective Disorder, was never warned by the court that if he testified to anything the court believed to be untrue, he would get a harsher sentence[9]. The court never inquired into whether his decision to testify was truly informed and voluntary, especially given his mental illness. The court never considered that his illness is what might have caused him to take the stand in the first place, and that he may have had very little understanding of the consequences if the court found he was being less the totally truthful with the jury. At the very least, Parker's sentenced should be vacated and his case remanded for a new sentencing hearing.

[9] Dr. Overstreet's letter explaining Parker's condition was dated November 3, 2006, and was sent to the court well before trial. C.P. 70.

CONCLUSION

Given the facts presented in the trial below, Parker is entitled to have his conviction reversed and remanded for a new trial. At the very least, he should be entitled to have his mental illness taken into consideration at a new sentencing hearing.

Respectfully submitted,
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By: 

Leslie S. Lee

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 17th day of December, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant, by United States mail, postage paid, to the following:

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