IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HERMAN JACKSON, JR. — APPELLANT

VS. — NO. 2007-KP-0394-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury of Coahoma County indicted defendant, Herman Jackson, Jr., for the crimes with Three Counts of Possession of a controlled substance in violation of *Miss. Code Ann.* § 41-29-139 and as a subsequent offender. (Indictment, cp.3-5). After a trial by jury, Judge Albert B. Smith III, presiding, the jury found defendant guilty of Count I- Misdemeanor Possession of Marijuana, Count II - Possession of Cocaine. (C.p.14-16). Defendant was sentenced to a fine for the misdemeanor possession and 8 years, and restitution. (Sentence order, cp. 70-73).

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

STATEMENT OF FACTS

Defendant was driving a car. Defendant did not have a driver's license. The car did not have an inspection sticker. Defendant was driving without insurance, which of course makes sense 'cause he didn't have a license. Oh, and he was speeding and caught on radar by an officer. So he was arrested. Upon being patted down illicit drugs were found, the car was impounded and more drugs found in the vehicle.

Defendant's first appointed attorney withdrew, and defendant tried to fire his second attorney and ending up at trial with defendant representing himself assisted by his appointed counsel. The Mississippi Supreme Court has opined "...[H]e who represents himself has a fool for a client." *W.H. Hopper and Associates, Inc. v. DeSoto County,* 475 So.2d 1149, 1153 (Miss. 1985). Contrary to the adage defendant, with assistance of his counsel, did quite well. The jury found defendant merely guilty of a misdemeanor on one of the felony charges submitted to the jury.

Now, on appeal, representing himself *pro se,* defendant raises a plethora of issues.

SUMMARY OF THE ARGUMENT

I.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL, AVAILABLE, AT TRIAL.

Issue II.

DEFENDANT WAS ADEQUATELY WARNED OF THE PERILS OF SELF-REPRESENTATION.

Issue III.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO RECUSE.

Issue IV.

THERE IS NO EVIDENCE IN THE RECORD OF PROSECUTORIAL MISCONDUCT.

Issue V. & VI

THE INDICTMENT WAS NOT DEFECTIVE. AND THE JURY INSTRUCTION WERE NOT IMPROPER. BOTH ISSUES ARE PROCEDURALLY BARRED.

ARGUMENT

I.

DEFENDANT HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL, AVAILABLE, AT TRIAL.

In this initial allegation of error defendant alleges ineffective assistance of counsel and seeks the relief of discharge.

Defendant correctly cites the appropriate standard to be applied to such question on review and does explicitly list 18 specific, claimed, deficiencies of trial counsel.

> ¶ 11. In order to prevail on a claim of ineffective assistance of counsel, Hull must demonstrate that his counsel's performance was deficient and that his deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof rests with Hull, and the Court will measure the alleged deficiency within the totality of circumstances. Hiter v. State, 660 So.2d 961, 965 (Miss.1995). However, a presumption exists that the attorney's conduct was adequate. Burns v. State, 812 So.2d 668, 673(¶ 14) (Miss.2001).
>
> ¶ 12. Hull must show that there is a "reasonable probability" that but for the alleged errors of counsel, the sentence of the trial court would have been different. Nicolau v. State, 612 So.2d 1080, 1086 (Miss.1992).

Hull v. State, 2007 WL 4303508 (Miss.App. 2007).

1 & 2) Defendant asserts his attorney had a conflict of interest because his attorney would not file certain motions pre-trial at the request of defendant.

> ¶ 16. . . . In Powell v. State, 536 So.2d 13, 16 (Miss.1988), the court held that "the mere fact that the attorney did not file a motion for discovery is not sufficient to raise an ineffective assistance of counsel claim." The Powell court determined that " 'the filing of pretrial

motions fall squarely within the ambit of trial strategy.' " This Court does not normally, and will not do so here, second guess counsel's trial strategy. . . .

Graham v. State, 861 So.2d 1053 (Miss.App. 2003).

Decisions regarding the filing of motions pre-trial, whether requested by defendant or not is within the gambit and trial strategy of defense counsel. Further defendant cannot claim prejudice as he himself brought these motions to the court's attention and got rulings.

3) Failure to object to amendment of indictment to conform to facts.

Such amendments to an indictment are legal as allowed by statute. Counsel for defendant knew this and is not required to make spurious objections.

¶ 16. . . . [A]mendments to indictments are allowed to conform to the proof educed at trial. Miss.Code Ann. Section 99-17-13 (Rev.1994). ...

Pearson v. State, 740 So.2d 346 (Miss.App. 1999).

4) Failure to Challenge Arrest.

Trial counsel, after seeing the evidence and how it was obtained , need not make spurious motions or objections.

¶ 35. Finally, McKee argues trial counsel was deficient by failing to seek suppression of the cocaine found in the truck he was driving. As discussed at length above, there was no violation of any constitutional rights with respect to the search and seizure of evidence from the truck or from McKee's person. Counsel did not perform defectively by recognizing this and declining to make spurious objections or motions. We will not revisit this discussion here further.

McKee v. State, 878 So.2d 232 (Miss.App. 2004).

5) Failure to seek suppression of evidence seized from vehicle.

Again, trial counsel as part of trial strategy need not make every known objection or motion knowing that the law and facts are contrary. Such is, in fact, a showing of a knowledgeable trial practitioner and evidence of effective advocacy. *McKee v. State*, 878 So.2d 232 (Miss.App. 2004).

6) Failure to object to admissibility of evidence.

The admission of evidence and objections to the admission of evidence are all within the gambit of trial strategy and not held to be ineffective assistance of counsel. *Jackson v. State*, 969 So.2d 124 (Miss.App. 2007).

7 & 8) Failure to investigate or interview witnesses.

Defendant makes a convoluted argument about investigating ownership of the vehicle, etc. Further, it would appear defendant is taking words out of context in the transcript and parsing others. The truth of this argument is -- it doesn't matter, not at all. Defendant does not dispute that facts that he was driving, speeding, he didn't have a license, he didn't have insurance or a current inspection sticker on his vehicle. He carried no identification or other documentation. Plus, when arrested prohibited substances were found on his person when he was searched further at the sheriff's department more illegal drugs were found. Believe me further investigation would

have only turned up more damaging facts, history on this defendant. Additionally, this issue is without merit because defendant makes no claim on how this supposed failure prejudiced him. The fact that the car was being sold, or stolen, or didn't belong to him doesn't matter. Not a bit. No prejudice, no claim. *Dahl v. State*, 2007 WL 4303497 (¶ 11)(Miss.App. 2007).

10) Failure to make an opening statement.

The Mississippi Supreme Court has the making of an opening statment is a strategic one. Within this argument defendant cites not to case law, authority, transcript, nor makes any argument. Such a decision is not per se ineffective and defendant has not shown any prejudice. Such is not ineffective assistance in this case.

> ¶ 38. Golden argues that his counsel was ineffective for failure to give an opening statement. This Court has held that the decision of whether to make an opening statement is a strategic one. Gilliard v. State, 462 So.2d 710, 716 (Miss.1985). Furthermore, "[f]ailure to give an opening statement is not per se ineffective assistance of counsel." Branch v. State, 882 So.2d 36, 55 (Miss.2004). Additionally, counsel for the defendant has failed to show how trial counsel's failure to give an opening statement prejudiced Golden. As such, we find that this argument has no merit.
>
> *Golden v. State,* 968 So.2d 378 (Miss. 2007).

11) Trial counsel never asked defendant who owned the vehicle.

It doesn't matter, didn't ma the day he was arrested, didn't matter the day of trial, and most assuredly doesn't matter now. Plus, no claim of how this prejudiced

defendant. Consider again it was defendant who was driving without license, insurance, inspections sticker, speeding while having drugs on is person in a vehicle with other drugs. Ownership of the vehicles doesn't matter. *Dahl v. State*, 2007 WL 4303497 (¶ 11)(Miss.App. 2007).

12 & 13) Failure to object to the testimony of Officer Duncan.

Short answer, – trial counsel did object to the testimony of Officer Duncan and it was sustained! Tr. 61-62. So much for that argument. And, again, defendant parses language and takes it out of context. Plus he really can't claim prejudice as counsel did object, was sustained. No relief should be granted on this claim of ineffective assistance. *Dahl v. State*, 2007 WL 4303497 (¶ 11)(Miss.App. 2007).

14) Failure to object to false testimony of Officer Duncan.

See above answer. Plus defendant himself aided by his attorney called this Officer in the defense case in chief. And defendant, aided by counsel, had the opportunity to ask all of those questions. Example, vehicle ownership, tr. 70-71. No truth to the matter and no prejudice shown. *Dahl, supra.*

15) Counsel not prepared for trial.

Looking to the transcript it is abundantly clear counsel for defendant was aware of the evidence, knew the gist of the testimony, was aware of the lab results, made objections and was available to consult with defendant. He was prepared. The

problem was his client. Be that as it may in totality trial counsel was presumed prepared and effective. Defendant short claim avers no actual prejudice so he cannot prevail on an ineffective assistance on this claim. *Dahl, supra.*

16) Failure to present any defense.

First of all a defense was presented. See transcript pp.93-135. Second closing arguments were made in his defense to which trial counsel objected, again, successfully. Defendant claims witnesses but does not list them or to what they may have testified and how such failure may have prejudiced his defense. Consequently, no merit to this claim *Dahl, supra.*

17) Failure to question officer about the passenger Willie Scott.

Again, defendant himself did much of the cross examination and questioning of this officer. And, again, – prejudice? None alleged. No relief. *Dahl, supra.*

18) Alleged Comments by defense Counsel.

Within the transcript, at trial, defendant himself avers that comments by his counsel offended him. Tr. 24. The comment, quoted from defendant himself, is significantly different in the trial transcript than he now forwards in his brief. Notwithstanding such inconsistencies, trial counsel actively worked for this defendant. The trial judge, more than once, extolled the virtues, capabilities and success of his defense attorney. And, it is worth noting that when confronted with

difficulties he turned to counsel for advice or correctly entering an objection or getting evidence admitted during his defense. (Defense case in chief). No ineffective assistance and no prejudice. *Dahl, supra.*

Totality of trial – defendant had Constitutionally effective assistance.

Issue II.
DEFENDANT WAS ADEQUATELY WARNED OF THE PERILS OF SELF-REPRESENTATION.

A look to the transcript shows defendant was determined and had made up his mind to "fire" his attorney for perceived inadequacies. Tr. 73. The judge did not want to grant defendant's wish, but did allow, hybrid representation.

As our State reviewing Courts have held such is legally sufficient.

> ¶ 31. Related to this issue is Busick's contention that he did not knowingly and voluntarily waive his right to counsel because the trial court failed to fully inform him of the dangers of self-representation. This issue is without merit. The record shows that the trial court fully complied with Uniform Rule of Circuit and County Court Practice 8.05 by thoroughly warning Busick of the dangers of self-representation, after which Busick unequivocally stated that he desired to proceed pro se with standby appointed counsel. Then, the court held that Busick understood what he was doing and made the decision knowingly and voluntarily. URCCC 8.05; Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Moreover, we harbor substantial doubt that a waiver of appointed counsel was required because the magnitude of appointed counsel's participation throughout the proceedings evinced an arrangement of hybrid representation. Metcalf v. State, 629 So.2d 558, 565-66 (Miss.1993).

Busick v. State, 906 So.2d 846 (Miss.App. 2005).

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

Issue III.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO RECUSE.

Defendant made a motion to have the judge recuse himself. The trial court denied the motion Tr. 22

> ¶ 29. "A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." Jones v. State, 841 So.2d 115 (¶ 60) (Miss.2003). "The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standards and is consistent in the application." Id. "On appeal, a trial judge is presumed to be qualified and unbiased and this presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption." Id. "In determining whether a judge should have recused himself, the reviewing court must consider the trial as a whole and examine every ruling to determine if those rulings were prejudicial to the complaining party." Id.
>
> *Jackson v. State,* 962 So.2d 649 (Miss.App. 2007).

Within the cited point of the transcript the trial judge had no memory of any prior altercation with this defendant. Further the trial court said he had no ill will against defendant and he would be given a fair trial. Deeper reading of the record reveals that is exactly what transpired.

Now, as to defendant's claim he was beaten in from of fifty witnesses and hospitalized, – such is not supported by the record before this court.

Therefore based upon the standard recently reiterated in *Jackson* the State would ask this court to deny any relief based upon this claim.

Issue IV.
THERE IS NO EVIDENCE IN THE RECORD OF PROSECUTORIAL MISCONDUCT.

Within this extensive and fantastic allegation of error defendant broadly asserts vindictive prosecution, collusion of the justice system, the planting of evidence, falsification of documents, misconduct by everyone that approached him, numerous conspiracies and assorted misconduct on all sides.

> ¶ 41. . . . The standard of review for prosecutorial misconduct has been clearly established. "Where prosecutorial misconduct endangers the fairness of a trial and the impartial administration of justice, reversal must follow." Acevedo v. State, 467 So.2d at 226.

Goodin v. State, 787 So.2d 639 (Miss. 2001).

Looking to the record – as objectively as possible – it does not appear that any of the allegations raised are supported by the record. Oh, to be sure defendant claims there are inconsistencies and outright errors. And there were. For example the officer testified he put the wrong date on his report. He admitted his mistake. This does not make the document false or the evidence inadmissible – it is a mistake. Nothing more.

Accordingly, it is the contention of the State there was no conspiracy, plan, miscarriage of justice, collusion or prosecutorial misconduct.

No relief should be granted on this allegation of error.

Issue V. & VI

THE INDICTMENT WAS NOT DEFECTIVE. AND THE JURY INSTRUCTION WERE NOT IMPROPER. BOTH ISSUES ARE PROCEDURALLY BARRED.

The whole premise of this allegation of error appears to be that a plea of "nolo contendere" cannot be used to enhance punishment.

Such is not the law. The law is that prior judgments based on nolo contendere may be used for enhancement purposes. *Bailey v. State,* 728 So.2d 1070 (Miss. 1997). The State would kindly ask defendant to spread this bit of knowledge amongst his fellow inmates.

Next, defendant asserts the indictment was amended by jury instruction when "knowingly or intentionally" was changed to "willfully, feloniously."

> ¶ 25. We see no error for two reasons. First, the record reveals that no objection was made on these grounds at trial. The "[f]ailure to offer a timely objection to an instruction at trial constitutes a waiver of the issue on appeal." Roberson v. State, 838 So.2d 298, 305 (¶ 27) (Miss.Ct.App.2002). Second, the statute under which Steen was convicted only requires a person to either "knowingly or intentionally" sell a controlled substance. Miss.Code Ann. § 41-29-139(a) (Rev.2001). We find no merit to this issue.
>
> *Steen v. State,* 873 So.2d 155 (Miss.App. 2004).

The State could not find an objection on these grounds in the record and it is barred. Additionally, it is without merit in fact and law. The terms are in essence, interchangable, to wit:

> This Court has stated that "[i]t is inconceivable that an act willfully done is not also knowingly done." Ousley v. State, 154 Miss. 451, 122 So. 731 (1929). Stated differently, "willfully" means "knowingly." Moreover, "wilful" means nothing more than doing an act intentionally. Perrett v. Johnson, 253 Miss. 194, 175 So.2d 497 (1965). As we stated in Butler v. State, 177 Miss. 91, 170 So. 148 (Miss.1936),
>
> *Moore v. State*, 676 So.2d 244, 246 (Miss. 1996).

Now, looking to the list of supposed error in the reading of the instructions as opposed to the actual instruction. There is no objection in the record and this issue is barred.

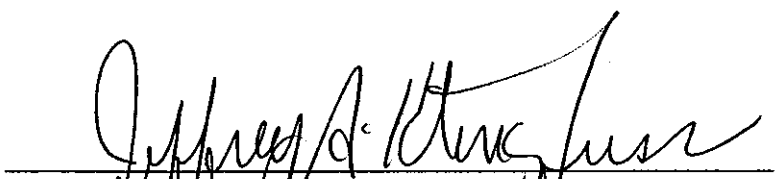
Accordingly, no relief should be granted on these allegations of error.

CONCLUSION

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

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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:

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