IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TREY ALLEN BEAMON — APPELLANT

VS. — NO. 2007-KP-2170

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

TREY ALLEN BEAMON **APPELLANT**

vs. **CAUSE No. 2007-KA-02170-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a sentence imposed in consequence of a plea of guilty to the felony of robbery, as permitted by *Trotter v. State*, 554 So.2d 313 (Miss. 1989).

STATEMENT OF FACTS

The Appellant and one April Foster were indicted for having committed robbery by exhibition of a deadly weapon against a number of individuals. (R. Vol. 1, pg. 3). On 6 November 2007, the Appellant executed and filed a petition to enter a guilty plea, in which he indicated that he wished to plead guilty to robbery. (R. Vol. 1, pg. 9).

The Appellant's petition was brought before the Circuit Court for a hearing. After the usual enquiries by the court, the Appellant's plea was accepted. He was thereupon convicted of robbery and sentenced to a term of fifteen years imprisonment. (R. Vol. 1, pp. 12 - 18; 10 - 11).

In the course of the plea colloquy, the Appellant stated that April Foster and he took

approximately seven hundred dollars from the victims named in the indictment. According to the Appellant, he "put [the money] back for [his] son," by which he meant that he spent the money on his son. He further stated that he did not give Foster any of the money, this being because she did not ask for any. (R. Vol. 1, pp. 17 - 18). Furthermore, the Appellant stated that it was a part of his plea agreement that he be sentenced to a term of fifteen years imprisonment. (R. Vol. 16). The Circuit Court enquired of the State as to its recommendation as to sentence. The court accepted the State's recommendation of fifteen years imprisonment. (R. Vol. 1, pg. 18).

The Appellant filed his notice of appeal on 3 December 2007, (R. Vol. 1, pg. 20)

STATEMENT OF ISSUES

1. IS THE SENTENCE IMPOSED AGAINST THE APPELLANT FOR HIS FELONY OF ROBBERY DISPROPORTIONATE?

2. DID THE TRIAL COURT VIOLATE THE FOURTEENTH AND FIFTH AMENDMENTS TO THE FEDERAL CONSTITUTION BECAUSE IT DID NOT EXPLAIN TO THE APPELLANT WHY IT IMPOSED THE MAXIMUM TERM OF IMPRISONMENT FOR ROBBERY?

SUMMARY OF ARGUMENT

1. THAT THE FIRST ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT CERTAIN ALLEGATIONS OF FACT ALLEGED BY THE APPELLANT IN HIS BRIEF ARE NOT SUPPORTED BY THE RECORD; THAT THE SENTENCE IMPOSED BY THE CIRCUIT COURT IS NOT DISPROPORTIONATE

2. THAT THE CIRCUIT COURT DID NOT VIOLATE THE APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS BY NOT EXPLAINING TO THE APPELLANT THE REASON FOR THE SENTENCE IMPOSED

ARGUMENT

1. THAT THE FIRST ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT CERTAIN ALLEGATIONS OF FACT ALLEGED BY THE APPELLANT IN HIS BRIEF ARE NOT SUPPORTED BY THE RECORD; THAT THE SENTENCE IMPOSED BY THE CIRCUIT COURT IS NOT DISPROPORTIONATE

The Appellant contends that the sentence imposed against him – fifteen years, the maximum sentence imposable for robbery under Miss. Code Ann. Section 97-3-77 (Rev. 2006) – was constitutionally disproportionate considering his age of twenty - one years and lack of a criminal history. (Brief for the Appellant, at 7). The Court will observe, though, that there was no objection at the time of sentencing to the sentence imposed. Moreover, there was no attempt to make a showing that the sentence was disproportionate.

The Appellant also alleges that the trial court relied upon unverified statements made by April Foster, without the Appellant having had the right to cross - examine Foster on them. The Appellant then goes on to allege that the court erroneously believed that Foster was not involved in the robbery and goes on further to allege quite a few additional facts which have no support in the record before this Court. He even goes so far as to purportedly quote from a transcript of a guilty plea. (Brief for the Appellant, at 8 - 11). None of these allegations of fact are a part of the record; to the extent that portion of the "transcript" of some other guilty plea has been quoted, it, too, is not part of the record.

The issue of law regarding the constitutionality of the Appellant's sentence is not before the Court because the Appellant never objected to the sentence at the time of the plea or at sentencing. *Sims v. State*, 928 So.2d 984 (Miss. Ct. App. 2006)(citing *Reed v. State*, 536 So.2d 1336, 1339 (Miss. 1988). Moreover, since the Appellant made no attempt at the time of

sentencing to make a showing of the *Solem*[1] factors, there was no basis in the trial court, and none here, to disturb the sentence imposed. *Willis v. State*, 911 So.2d 947 (Miss. 2005).

As for the factual allegations alleged in the Appellant's brief which find no support in the record, those are to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983). It is the duty of an appellant to present a record sufficient to support his claims of error. Assertions of fact in an appellate brief which have no support in the record cannot be considered. *Culbert v. State*, 800 So.2d 546 (Miss. Ct. App. 2001)(citing *Ross v. State*, 603 So.2d 857 (Miss. 1992).

Consequently, the first issue presented on this appeal is not before the Court for review. However, assuming *arguendo* that the first issue is before the Court, notwithstanding the foregoing reasons why it is not, there is no merit in it.

The Appellant was sentenced to a term of fifteen years, the maximum sentence available for a conviction of robbery. This Court has held that a sentence that does not exceed the maximum allowed by statute may not be disturbed on appeal. It is only where a threshold comparison of the crime committed to the sentence imposed supports an inference of gross disproportionality that the factors in *Solem* will be considered. *Nichols v. State*, 826 So.2d 1288, 1290 (Miss. 2002). In the case at bar, the Appellant was originally charged with armed robbery, the charge having been reduced in a plea agreement to robbery. Fifteen years for a violent felony such as robbery is not grossly disproportionate. Lengthier sentences for non - violent felonies have been upheld against this claim. *E.g. Braxton v. State*, 797 So.2d 826 (Miss. 2005).

Even if this Court were to find that an inference of gross disproportionality existed in the case at bar, it could not undertake consideration of the *Solem* factors. The Appellant produced no

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[1]*Solem v. Helm*, 463 U.S. 277 (1983).

evidence at all on any of them. Nor did the Circuit Court consider those factors and make a finding with respect to them. Again, the issue is not before the Court. *Miller v. State*, 980 So.2d 927, 930 - 931 (Miss. 2008).

It is not necessary to respond to the allegations of fact alleged in the Appellant's brief that find no support in the record. Suffice it to say, there is absolutely nothing in the record to show or suggest that the Circuit Court was in any way misled as to the "real facts" or given "inaccurate information." As for cross - examination, mentioned by the Appellant, he waived the right of confrontation of witnesses by his guilty plea. *Horton v. State*, 584 So.2d 764, 767 (Miss. 1991). In any event, there is nothing to show that Foster gave any kind of testimony against him.

There is nothing to show that false or inaccurate information was the cause of the sentence imposed on the Appellant. While the Appellant references a pre-sentence report, no such report is part of this record. Moreover, the Circuit Court, when it did impose sentence, did not indicate that it was relying on the contents of a pre-sentence report. Rather, it is clear that it simply accepted the recommendation of the State. The Appellant knew this prior to the time the recommendation was made. Given the fact that this case began as an armed robbery case, the Circuit Court might have taken that into consideration when it accepted the State's recommendation.

The First Assignment of Error is without merit.

2. THAT THE CIRCUIT COURT DID NOT VIOLATE THE APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS BY NOT EXPLAINING TO THE APPELLANT THE REASON FOR THE SENTENCE IMPOSED

The Appellant has several complaints to make under his final assignment of error.

First, the Appellant complains about some alleged action on the part of the Circuit Court concerning his appeal and whether the Appellant could appeal *in forma pauperis*. The Appellant

is before the Court. The Appellant thus has no good complaint to make.

The Appellant then claims that there was mitigating evidence that should have been taken into account by the Circuit Court in determining sentence. The Appellant did not present such evidence during the plea colloquy and before imposition of sentence. The Circuit Court therefore cannot be faulted for having failed to take such evidence into consideration. As for the alleged items of mitigation presented here (Brief for the Appellant, at 15 - 16), they have no support in the record and should be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983).

As for the complaint that the Circuit Court did not explain why it saw fit to impose a fifteen-year sentence, there is no authority of which we are aware, in this State, that would require such an explanation. The Appellant certainly cites none, though he does cite decisions from the State of Wisconsin.

Those decisions are no authority in this jurisdiction. Beyond this, though, those decisions concern a system of indeterminate sentencing. Further, the Wisconsin court held that it had the power to review sentences. In this State, however, sentences imposed are unreviewable if they are within statutory limits. *Hoops v. State*, 681 So.2d 521, 537 (Miss. 1996). Put simply, this State follows a different rule from that in Wisconsin.

In any event, it is not difficult to divine the Circuit Court's reason for the sentence. As we pointed out above, the charge against the Appellant was originally one of armed robbery. There was a plea agreement in which the charge was reduced to robbery, with a recommendation of fifteen years by the prosecution. During the plea colloquy, the Appellant stated that he was aware of the State's recommendation as to sentence. The Circuit Court simply accepted the recommendation, and the Appellant obtained the benefit of his bargain. So understood, it is passing strange to find him here complaining about a lack of a reason for the sentence.

The Appellant then goes on to allege a number of things the State should have been required to explain. There is no rule of which we are aware that would require the State to explain its prosecutorial decisions. The Appellant cites no authority. There is, in any event, nothing in the record to support the claim that the State did not proceed against others who bore culpability for the felony. To the extent the Appellant alleges facts not supported by the record, those are to be ignored.

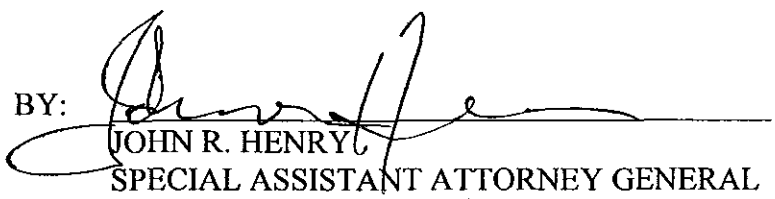
The Second Assignment of Error is without merit.

CONCLUSION

The sentence imposed by the Circuit Court upon the Appellant's conviction of robbery should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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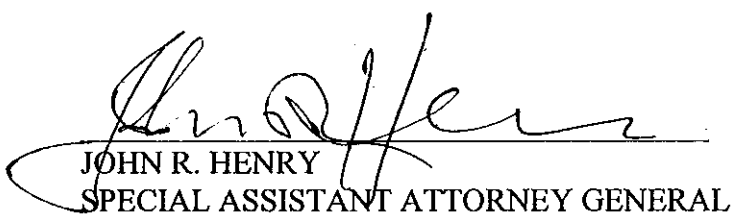
This the 20th day of November, 2008.



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