

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

REGINALD D. CLAY

APPELLANT

V.

NO. 2008-KA-0691-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

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.

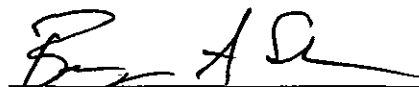
1. State of Mississippi
2. Reginald D. Clay, Appellant
3. Honorable E J. Mitchell, District Attorney
4. Honorable Robert W. Bailey, Circuit Court Judge

This the 10 day of November, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
ISSUE NO. 1	
CLAY’S LIFE SENTENCE AS AN HABITUAL OFFENDER FOR POSSESSION OF COCAINE IS DISPROPORTIONATE TO THE CRIME AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT	4
ISSUE NO. 2	
THE TRIAL COURT ERRED IN DENYING CLAY’S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.	8
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

CASES

<i>Amiker v. Drugs For Less, Inc.</i> , 796 So.2d 942, 947 (Miss.2000)	9
<i>Bell v. State</i> , 769 So.2d 247 (Miss. App. 2000)	7
<i>Bush v. State</i> , 895 So.2d 836, 844 (Miss. 2005)	9-11
<i>Clowers v. State</i> , 522 So.2d 762, 764 (Miss.1988)	5, 6
<i>Davis v. State</i> , 724 So. 2d 342	7
<i>Fultz v. State</i> , 573 So.2d 689 (Miss. 1990)	11
<i>Hawthorne v. State</i> , 883 So.2d 86 (Miss. 2004)	12
<i>Herring v. State</i> , 691 So.2d 948, 957 (Miss.1997)	9
<i>Hoops v. State</i> , 681 So.2d 521, 538 (Miss. 1996)	6
<i>McGruder v. Puckett</i> , 954 F.2d 313, 317 (5th Cir.1992)	6
<i>McQueen v. State</i> , 423 So.2d 800, 803 (Miss.1982)	9
<i>Oby v. State</i> , 827 So.2d 731 (Miss.App. 2002)	6
<i>Rummel v. Estelle</i> , 445 U.S. 263, 267 (1980)	7
<i>Solem v. Helm</i> , 463 U.S. 277, 292 (1983)	5

STATUTES

Miss. Code Ann. §99-19-83	8
Miss. Const. Art. 3 § 28	5
Mississippi Code Annotated Section 99-18-83	1-4

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STATEMENT OF THE ISSUES

ISSUE NO. 1

CLAY'S LIFE SENTENCE AS AN HABITUAL OFFENDER FOR POSSESSION OF COCAINE IS DISPROPORTIONATE TO THE CRIME AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING CLAY'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgment of conviction for the crime of Possession of Cocaine against the appellant, Reginald Darnell Clay. The trial judge subsequently sentenced the Appellant as a Habitual Offender under Mississippi Code Annotated Section 99-18-83 to life imprisonment in the custody of the Department of Corrections. C.P. 49, R.E.18. The conviction and sentence

followed a jury trial on February 20, 2008, Honorable Robert Walter Bailey, Circuit Judge, presiding. Clay is currently in the custody of the Mississippi Department of Corrections.

FACTS

On July 23, 2006, Officer Russell was on general patrol in Meridian and Officer Moore was accompanying Officer Russell on patrol. Tr. 70. Officer Russell is the canine handler for Lauderdale County Sheriff's Department Work Patrol and Officer Moore was employed with the East Mississippi Drug Task Force. Tr. 70, 95.

The officers observed a vehicle run a stop sign. Tr. 70-71. The officers activated the lights on the police car and attempted to pull over the blue and white Oldsmobile. Tr. 71. The vehicle with what appeared to be three individuals drove two or three hundred yards before pulling over. *Id.* Both Officers claimed that while they were waiting for the vehicle to stop, the back seat passenger of the vehicle was acting suspicious. Tr. 71, 98. The individual in the back seat of the car was constantly moving around, ducking around in the back seat. *Id.*

Once the vehicle pulled over, Officer Russell approached the driver. Tr. 72. A strong smell of alcohol coming from the vehicle and a strong smell of marijuana coming from the driver. *Id.* The driver admitted that he had been drinking earlier and had been smoking marijuana. *Id.* The driver was Roger Hearn. *Id.*

Officer Russell called for a DUI officer to come speak to Hearn, Officer Moore was with the passenger of vehicle, and Officer Russell spoke with the rear passenger of the

vehicle. *Id.* Officer Russell asked the rear passenger of the vehicle to step out to speak with him. *Id.* The individual in the back seat of the vehicle was Reginald Clay. *Id.*

Officer Russell claimed that Clay was very nervous and looking around real fidgety. Tr. 73. Clay was asked whether he had any guns, knives, or hand grenades in his pocket and he indicated that he did not. *Id.* Officer Russell then conducted a pat down of Clay for weapons. Officer Russell claimed that as he was patting down Clay, he felt something hard in the upper part of Clay's pocket. *Id.*

Officer Russell continued to testify that Clay allegedly tried to run when Officer Russell asked him what was in his pocket. *Id.* However, according to Officer Russell, he grabbed Clay before he could get away and he heard glass breaking. *Id.* The glass on the ground, according to Officer Russell, was a pipe used to smoke crack cocaine. *Id.* As Officer Russell continued to search Clay, he allegedly found a rock of crack cocaine in Clay's right front pocket. Tr. 74.

After the rock was tested and identified as crack cocaine, the officers search the vehicle. *Id.* During the search, Officer Moore purportedly located a bag of crack cocaine at the rear passenger area of the vehicle. Tr. 74-75, 107.

Clay was arrested, charged, and convicted of Possession of Cocaine. Clay is currently incarcerated with the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

Clay asserts that sentence of life imprisonment without parole for possessing essentially a small amount of cocaine is unconstitutionally too severe and clearly

disproportionate to the offense. A *Solem* analysis leads to the legally sound conclusion that Clay's sentence is patently unconstitutionally disproportionate to his offense and should be vacated.

The verdict was also against the overwhelming weight of the evidence. Other than the testimony of the officers, no evidence is present to show that there was in fact a crack pipe or rock like crack cocaine substance on Clay. The little bag of crack cocaine was found under the carpet of someone else's vehicle. These items were not connected to Clay in any way by the evidence at trial besides mere presence in the vehicle he was driving. The verdict was against the overwhelming weight of the evidence and this was reversible error. Clay is entitled to a new trial.

ARGUMENT

ISSUE NO. 1

CLAY'S LIFE SENTENCE AS AN HABITUAL OFFENDER FOR POSSESSION OF COCAINE IS DISPROPORTIONATE TO THE CRIME AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Clay asserts that a life sentence without parole is unduly harsh and constitutes cruel and unusual punishment. As alleged in the indictment, the prosecution submitted evidence that Clay had four prior felonies in Lauderdale County, one conviction in 1993 for burglary and sentenced to a term of fifteen (15) years in the custody of the Mississippi Department of Corrections. C.P. 3, R.E. 11. Furthermore the prosecution alleged that Clay was convicted in 1993 for possession of cocaine and sentenced to a term of one (1) year in the custody of the Mississippi Department of Corrections. *Id.* In 2001, the prosecution asserted that Clay

was convicted of uttering forgery and sentenced to a term of six (6) years and three hundred sixty-four (364) days in the custody of the Mississippi Department of Corrections. Finally in 2002, the prosecution claimed that Clay from convicted of felony DUI and sentenced to a term of one (1) year in the custody of the Mississippi Department of Corrections.

Clay asserts that a life sentence without parole for possessing essentially a small amount of cocaine is unconstitutionally too severe and clearly disproportionate to the offense. U.S. Const. Eighth and Fourteenth Amendments, Miss. Const. Art. 3 § 28.

The United States Supreme Court in *Solem v. Helm*, 463 U.S. 277, 292 (1983), set out three factors for courts to consider when conducting a proportionality analysis. The criteria are:

- (1) the gravity of the offense and the harshness of the penalty;
- (2) the sentences imposed on other criminals in the same jurisdiction; and
- (3) the sentences imposed for commission of the same crime in other jurisdictions.

In *Solem*, the Court held a life sentence without parole to be unconstitutional for the crime of writing a \$100 bad check on a nonexistent bank account, even though the defendant had been convicted of six prior felonies including three for burglary. *Id.*

The Mississippi Supreme Court has consistently applied *Solem* in reviewing the imposition of habitual sentences. The case of *Clowers v. State*, 522 So.2d 762, 764 (Miss.1988), is a good example. In *Clowers*, the defendant was an habitual offender with a new conviction of forging a \$250 check. As an habitual offender, Clowers was subject to the mandatory maximum sentence of fifteen years without parole. *Id.* The trial court imposed

a sentence of less than fifteen years on the grounds that the mandatory maximum sentence would be disproportionate to the crime. *Id.*

The *Clowers* court affirmed the trial court, acknowledging that "a criminal sentence [even though habitual] must not be disproportionate to the crime for which the defendant is being sentenced." *Id.* at 765. Also, even though a trial judge may lack the usual discretion in sentencing an habitual offender, it "does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements." *Id.* See also *Hoops v. State*, 681 So.2d 521, 538 (Miss. 1996).

In *Oby v. State*, 827 So.2d 731 (Miss.App. 2002), where a violent habitual drug dealer's life sentence was affirmed as being proportionate, the Court reiterated the important point that in a *Solem* review, a "correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute." In other words, a reviewing court, and the trial court, should review an offender's past offenses together with the present offense.

In *McGruder v. Puckett*, 954 F.2d 313, 317 (5th Cir.1992), the court recognized the *Solem* three-part test be applied "when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." The violent habitual defendant in *McGruder* was sentenced to life imprisonment after his last offense of auto burglary. McGruder's prior convictions were armed robbery, burglary, escape, and auto burglary, and the Fifth Circuit held that McGruder's life sentence was not grossly disproportionate to his current offense. The *McGruder* court made it clear that an habitual

sentence analysis is based on the sentence rendered in response to the severity of the current offense taking the prior offenses into consideration secondarily.

Applying the analysis from *McGruder* to the present case, Clay's sentence was grossly disproportional. Clay was sentenced to life imprisonment for possessing a small amount of cocaine and apparently the trial court did not even consider the severity of the current offense prior to sentencing Clay to life. Clay's criminal record, as evidenced by what is included in the record, was not as bad as McGruder's.

In *Rummel v. Estelle*, 445 U.S. 263, 267 (1980), the defendant had two prior felonies of credit card fraud and uttering a forgery, and was convicted of a third felony of false pretenses. Rummel was sentenced to life in prison, a mandatory recidivist sentence for non-violent offenders. The Court held that Rummel's sentence was not unconstitutionally disproportionate to the offense "even though the total loss from the three felonies was less than \$250," in part because he was eligible for parole after twelve (12) years. Clay has no hope for parole.

In *Bell v. State*, 769 So.2d 247, (¶8-16) (Miss. App. 2000), a drug dealer was tried and sentenced as a non-violent habitual offender. The trial judge reviewed Bell's prior convictions and afforded Bell the opportunity to present mitigating evidence. According to the court in *Bell*, the trial judge is required to justify, on the record, any sentence that appears harsh or severe for the charge. Citing *Davis v. State*, 724 So. 2d 342 (¶10) (Miss. 1998), the *Bell* Court recognized that, "[i]n essence, the Mississippi Supreme Court set forth a

requirement that the trial judge justify any sentence that appears harsh or severe for the charge." *Bell*, 769 So. 2d at ¶15.

The previous convictions of Bell were acknowledged by the trial judge at the sentencing hearing prior to Bell receiving his habitual sentence. The *Bell* court "considered the gravity of the offense with the harshness of the sentence before imposing the thirty year sentence" which was a proper use of "the broad discretionary authority granted to it." Bell's sentence was not seen as disproportionate, so no further review under *Solem* was conducted. *Id.* at ¶16.

In the present case, Clay was convicted of possession cocaine. The trial judge did not appear to consider to the gravity of the offense with the harshness of the sentence before imposing the sentence of life. The court sentenced Clay, in accordance with Miss. Code Ann. §99-19-83, to life imprisonment for possessing a small amount of cocaine.

Applying the *Solem* test here, it is clear that the gravity of possession such a small amount of cocaine is petty. A *Solem* analysis leads to the legally sound conclusion that Clay's sentence is patently unconstitutionally disproportionate to his offense and should be vacated. If the Court does not reverse the conviction altogether, at a minimum, Clay's case should be remanded for re-sentencing, with him present, to include a proportionality hearing is required by *Bell, supra*.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING CLAY'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for Judgment of Acquittal Notwithstanding the Verdict (JNOV) or in the Alternative Motion for a New Trial, counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 40-41, R.E. 15. The trial judge denied this motion. C.P. 42, R.E. 17.

In *Bush v. State*, the Mississippi Supreme Court set forth the standard of review as follows:

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, Clay is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. During the trial, an officer with the Lowndes County Sheriff's Office testified, along with a Mississippi Highway Patrol Officer that at the time of the incident involving this case was a member of the East

Mississippi Drug Task Force. In their testimony, Officer Russell and Officer Moore stated that they stopped a vehicle after witnessing the vehicle drive through a stop sign without stopping. Tr. 71, 97

Upon stopping the vehicle, officers questioned the driver of the vehicle, who smelled like alcohol and marijuana. Tr. 72. Then the officers questioned the passenger and the passenger in the back seat. Officer Russell proceeded to pat down Clay looking for weapons and allegedly found some sort of crack pipe that fell to the ground and shattered. Officer Russell continued to search the person of Clay and found a small rocklike substance that Officer Moore testified he tested and the test resulted in a positive identification of crack cocaine. After this alleged positive result for crack cocaine, the officers began to search the vehicle and this search resulted in the finding of a small bag of what appeared to be a rocklike substance, crack cocaine. Tr. 74-75, 107.

The prosecution presented no evidence that the cocaine that was found under the carpet in the back seat of the vehicle belonged to Clay. The vehicle that Clay was in was not Clay's vehicle. The vehicle belonged to the driver, Roger Hearn.

Officer Russell testified that he found a glass crack pipe on the person of Clay. Tr. 73. However, no such glass crack pipe was entered into evidence. *Id.* Besides, the so called crack pipe was not even recovered from the stop. *Id.* The officers claim it was shattered on the ground, and did not attempted to even recover any of the glass or even take a picture of the broken glass. Tr. 73, 88. Officer Russell claims that he did not want to pick up any of

the glass because he did not want to cut himself or get stuck with anything off of the pipe. Tr. 88.

Furthermore, Officer Russell stated that as he continued to check the person of Clay that he found a small crack cocaine rock in the pocket of Clay. Tr. 74. Officer Russell retrieved a test kit out of his car to test the rock. *Id.* According to the testimony of Officer Russell and Officer Moore, the rock like substance did test positive for cocaine. *Id.* However other than the testimony of both officers, no such evidence was presented to the court?

In fact the so called rock like substance that was allegedly found on the person of Clay was all used up in the test kit. Tr. 87. According to Officer Russell, only a little bitty sliver is needed to test a substance. *Id.* Not only do the officers not even have the rock like substance, they do not have the test kit that they used to test the substance.

Other than the testimony of the officers, no evidence is present to show that there was in fact a crack pipe or rock like crack cocaine substance on Clay. The little bag of crack cocaine was found under the carpet of someone else's vehicle and Clay could have very easily never have known that the crack cocaine was hidden under the carpet. These items were not connected to Clay in any way by the evidence at trial besides mere presence in the vehicle he was driving. There were no fingerprints, no testimony from the owner of the vehicle and no testimony that Clay was using any of these items. See *Fultz v. State*, 573 So.2d 689 (Miss. 1990) (commenting that the police performed insufficient investigations where the owner of the vehicle was not interviewed and no fingerprints were attempted in

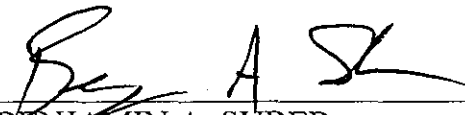

finding that the mere presence of marijuana in trunk of vehicle that belonged to someone else was not sufficient to confer possession upon driver).

The verdict was against the overwhelming weight of the evidence. Clay therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See Hawthorne v. State*, 883 So.2d 86 (Miss. 2004).

CONCLUSION

A *Solem* analysis leads to the legally sound conclusion that Clay's sentence is patently unconstitutionally disproportionate to his offense and should be vacated. Clay also assents that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Reginald D. Clay, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 10 day of November, 2008.



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