CERTIFICATE OF INTERESTED PERSON

DEBRA S. FIELD

v.

STATE OF MISSISSIPPI

NO. 2008-TS-00793-COA

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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

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STATEMENT OF THE ISSUES

1. The Court erred in sentencing Appellant, a first offender to the maximum confinement permitted by law, because the court did not realize that he had discretion to sentence Appellant to a lesser punishment.

2. The Court erred in refusing jury instruction D-2.

3. A. The Court erred in overruling Appellant's objection to the state introducing evidence that Appellant was in possession of a marijuana cigarette and in denying the consequent motion for mistrial.

3. B. The Court erred in granting the state's request that the mistrial in the prior trial for invisibility of the jury to reach a verdict not be permitted in evidence.

STATEMENT OF THE CASE

Debra S. Field appeals her conviction from the Circuit Court of Newton County, Mississippi of the crime of feloniously possessing a Schedule II controlled substance, namely cocaine, more than .10 grams but less than 2 grams and sentence of a $1,500.00 fine and confinement for a term of eight (8) years in the custody of the Mississippi Department of Corrections.

This case is a retrial of Appellant on the charge of possession of a small amount of cocaine. The first trial had ended in conviction of Appellant for misdemeanor possession of marijuana and a mistrial on the cocaine charge because of the inability of the jury to reach a verdict (c.p. 23).

After selection of the jury, the prosecution brought up in conference with the Court Appellant's counsel, out of the presence of the jury, its plans to introduce the cocaine into evidence.

Mr. Harris, counsel for Appellant, asked (T-34):

> MR. HARRIS: Are y'all going to be able to get all the leafy green substance out of the bag?
> MR. KILGORE: Probably not.
> MR. THAMES: Do all we can.

The discussion continued (T-35):

> THE COURT: Let me see the bag as far as any evidence of leafy substance - -
> MR. KILGORE: Your Honor, just be warned, it - - the bag is leaking little flakes of deteriorating marijuana.
> THE COURT: All right.
> MR. KILGORE: And what Shawn's talking about is, seeing this bag, there are flakes, because one of the bags busted since the last trial.

The discussion was consummated with the following (T-36):

> MR. HARRIS: Your Honor, just don't want any issue of marijuana in this one.
> THE COURT: All right. The Court, of course, will instruct - - not going to make 'em comment on it, but the Court has already been advised that the only issue is the cocaine. So I don't know any other way to do it, meaning I don't want to call attention to anything in front of the jury, so - -
> MR. HARRIS: Right

A combined hearing out of the presence of the jury on the admissibility of a statement by Appellant and the legality of the roadblock (and validity of the search) and

the admissibility of results of the search including cocaine had been held at the prior trial. At the suggestion of the Court (T-36) and the request of the prosecutor, agreed to by Appellant's counsel, the Court decided not to rehear these matters but to make the hearing at the prior trial part of the present trial and insert it in the record of the present trial as if it had been reheard, apparently in the interest of judicial economy.

Newton County Sheriff's Department investigator, Toby Pinson testified at the hearing that his brother Jeremy Pinson, an officer with the Town of Hickory police department, was assisting him with a roadblock (T-40), that Appellant approached the roadblock in a truck and was stopped, that he smelled alcohol on Appellant's breath, that Appellant was not under the influence of alcohol so that the alcohol impaired her ability to understand Miranda warnings, that he went to her truck and removed a cigarette case from her purse sitting in the truck cab(T-42), while she was guarded by Jeremy Pinson, that he pulled a rolled cigarette from the case, that he suspected that the rolled cigarette was a marijuana cigarette, that later on he again looked in the case and saw what was apparently rock cocaine in the case (T-43), that Appellant admitted that the case belonged to her but denied that the cocaine was hers.

He further testified that he, Jeremy Pinson and Appellant, were the only persons present at the roadblock (T-44), that he (Toby Pinson) was not then a departmental supervisor. The Newton County Sheriff's Department Law Enforcement Policies and Procedures was admitted into evidence as an exhibit. Officer Pinson read from it (T-45,

46):

Q. Okay. Can you read what that is at the top there?
A. "Newton County Sheriff's Department, Law Enforcement Policy and Procedures."
Q. You had not been advised of that report?
A. I haven't read it. No, sir.
Q. And what's it dated?
A. 26th of July, '05.
Q. If you will under procedure attached there, read that first paragraph.
A. Officer Safety Check Road Block."
Q. Yes.
A. "After the need has been determined, the Sheriff or his designated representative may plan and approve a safety check roadblock. A departmental supervisor must be present and control any safety check roadblock. His responsibilities while the roadblock is being conducted, including - - insure that " - - keep reading?
Q. Yeah.
A. "One, appoint an officer to act as a safety officer with the responsibility to constantly evaluate safety aspects of the operation. Two, necessarily warning lights or signs are provided. A, to provide early warning alert to oncoming motorists of roadblock, and B. Near enough to the checkpoint officers and patrol units can intercept those vehicles whose drivers are attempting to leave the scene."

He further testified that Deputy Sheriff Billy Pat Walker, a departmental supervisor, had authorized the roadblock but did not ever come to the location of the roadblock.

At the same hearing Jeremy Pinson testified only about the stop and statement that the cigarette case belonged to her, essentially echoing his brother's testimony.

Appellant's counsel objected to (T-54) admission of the statement testimony about the result of the search and the admission into evidence of the cocaine.

The Court overruled the objection and denied the motion to suppress.

In the trial of the case-in-chief, former Newton County Sheriff's investigator Toby Pinson testified for the State that on June 10, 2007 at 3:00 p.m. he had set up a "safety check" on McDonald Road (T-63) (apparently a roadblock checkpoint), when about 3:20 p.m. a truck driver by Appellant came up and was stopped. Pinson had been assisted by his brother Jeremy Pinson, an officer with the town of Hickory, Mississippi police department (T-40), but not a Sheriff's Department employee.

Apparently appellant was the only person stopped during the existence of the road block, because the Pinsons terminated its existence after Appellant was arrested.

Officer Toby Pinson testified that after he set up a safety and license checkpoint, Appellant was stopped driving a truck, that she had no driver's license, that she said the truck was not hers, that he smelled intoxicating beverage on her breath, that she gave him permission to search the truck, that Jeremy Pinson guarded her while Toby searched her purse which was in the vehicle, that a rolled cigarette was in plain view in a cigarette case (T-67), that he had believed the cigarette to be a marijuana joint.

No evidence was adduced that Appellant had been charged with DUI.

Appellant objected to the witness referring to her apparently having ingested alcohol and his objection was overruled (T-65, T-66). Appellant reiterated his objections, heard outside the presence of the jury and Pinson testified (T-67) that he found what he believed to be a marijuana cigarette in a cigarette case in the truck. Appellant objected and moved for a mistrial. The objection was overruled and the motion denied.

After Pinson completed his direct testimony, Appellant renewed his motion for a

mistrial (T-72, at seq.) and the motion was denied.

Keith McMahan, Mississippi Crime Lab forensic scientist testified (T-103) that the substance found by the Pinsons in the cigarette case was .38 grams of cocaine.

The State rested (T-106). Appellant renewed her motion for a mistrial, Appellant moved for a directed verdict and the trial court denied both.

Appellant testified for the defense that she and about other people had been camping along the Pearl River near Carthage, that her van broke down as she started to return home to Newton County, that she borrowed a truck from a neighbor to return home (T-112), that she had shared her cigarettes with other people at the campsite, that others had had her cigarette case in their possession for different periods of time, that the cocaine was not hers and she had not known that it was in the bottom of the case.

Appellant was convicted and sentenced.

SUMMARY OF THE ARGUMENT

1. Sentencing should be proportionate to the crime and should be on exercise in discretion by the Court.

2. A defendant is entitled to a jury instruction which gives his or her theory of the case.

3. A. Evidence of other crimes is inadmissible.

3. B. Introduction of a topic into evidence opens the door to permit introduction of other evidence on the topic.

4. A roadblock results in an unreasonable search if written directives on roadblock operation are not substantially followed.

ARGUMENT

I.

THE COURT ERRED IN SENTENCING APPELLANT, A FIRST OFFENDER TO THE MAXIMUM CONFINEMENT PERMITTED BY LAW, BECAUSE THE COURT DID NOT REALIZE THAT HE HAD DISCRETION TO SENTENCE APPELLANT TO A LESSER PUNISHMENT

Appellant, a first offender, was sentenced to eight years of confinement, the maximum period of confinement allowed for the crime of which she was convicted. Section 41-29-139(c)(1)(B), Mississippi Code of 1972 authorizes imprisonment for not less than two years nor more than eight years.

Sentencing is an exercise in discretion by the trial judge, whose discretion is broad. Where it is clear that he or she exercises no sentencing discretion, as where he or she routinely metes out the maximum sentence for a particular crime, appellate review is appropriate. U.S. v. Hurt, 488 F. 2d 970 (5th Cir. 1974), an inflexible sentencing policy based solely on the crime charged is not an exercise of informed judicial discretion. U.S. v. Hartford, 489 F. 2d 652, 656 (5th Cir. 194). A sentencing decision must be tailored to fit the offender and not merely the offense.

In the case before the Court, the sentencing Court made clear that he was not

exercising discretion (T-148):

> I have no choice but to do this, and I sentence you
> to serve a terms of 8 years in the custody of the
> Mississippi Department of Corrections.
> Pay a fine of $1,500.00 and all costs of Court.

The trial court's expressed opinion of its lack of choice was a denial that the sentence was the Court's exercise of discretion.

In Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001 (1983) the United States Supreme Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted", in accord with the Eight Amendment protection against cruel and unusual punishment.

A sentence of the maximum period of confinement allowed, to a female fifty year old first offender, can not be proportionate to the crime.

Appellant should be resentenced to confinement more appropriate for a non-violent first offender, fifty years old.

II.

THE COURT ERRED IN REFUSING JURY INSTRUCTION D-2

In the case before the Court, the trial court refused jury instruction D-2, (T-124) which reads as follows:

> The Court instructs the jury that the Defendant is a competent
> witness in his own behalf and his testimony should not be
> disregarded simply because he is the Defendant. The Defendant
> is clothed with the same mantel of credibility as all other witnesses
> that have testified before you and in considering your verdict, you
> are to give his testimony the same weight and credibility you would
> with any other witness in the light of the evidence.

This instruction is not duplicative of other instructions and is supported by the evidence. A defendant is entitled to a jury instruction which gives his or her theory of the case. Young v. State, 451 So. 2n 208 (Miss. 1984); De Silva v. State, 91 Miss. 776, 45 So. 611 (1908). Indeed, where there is serious doubt whether a requested jury instruction should be given, the doubt should be resolved in favor of the accused. Lenard v. State, 552 So. 2d. 93 (Miss. 1989); Wadford v. State, 385 So. 2d 951, 955 (Miss. 1980).

Refusal to grant such instructions is reversible error. The verdict in the case before the Court should be overturned.

III.

Prior to trial, the Court and the parties had a preparatory conference on the need to keep the proof from revealing to the jury that Appellant had had in her possession a marijuana cigarette, she having already been convicted of misdemeanor possession of the marijuana. The Court appeared to instruct the parties that the marijuana was not to be brought up during the trial (T-36):

> MR. Harris: Your Honor, just don't want any issue of marijuana in this one.
> THE COURT: All right. The Court, of course, will instruct - - not going to make 'em comment on it, but the Court has already been advised that the only issue is the cocaine. So I don't know any other way to do it, meaning I don't want to call attention to anything in front of the jury, so - -
> MR. HARRIS: Right.

During the trial, Newton County Sheriff's investigator Toby Pinson testified for the prosecution as follows with the following objection, motion, and ruling (T-67, T-68):

> Q. Okay. Tell us what happened as you were searching the vehicle?

A. I went to search the vehicle to see if there was any alcoholic beverages in the vehicle. As I was looking in the vehicle, they had a purse in the vehicle, and inside the purse there was a cigarette case. And in plain view, you could see a rolled up - - looked - - believed to be a marijuana joint.

Q. Okay. And - -

MR. HARRIS: Your Honor, I'm going to object to that And move for a mistrial.

THE COURT: Objection is overruled, and the Motion for a Mistrial is overruled.

Pinson testified on direct examination about the marijuana cigarette in response to questions from the prosecutor (T-68, T-69):

Q. (By Mr. Kilgore) Officer Pinson, what did she say to you at that point?

A. She stated she understood her rights. I went and got the cigarette case and asked her was it her cigarette case. She stated that, it was. I asked her - - I pulled out the marijuana joint and asked her was it hers and she said she forgot it was in there.

Q. But you understood that to mean that it was hers?

A. Yes, sir.

Appellant renewed his motion for a mistrial (T-73):

MR. HARRIS: Your Honor, the Defendant would move for a mistrial. We have gone to great lengths back in the back to discuss how we're going to separate this. She's charged with possession crack cocaine from the marijuana in the bag. How we're going to take it outside so the Crime Lab person can separate it and keep it separate and how we straightened out with the jury earlier that there were two counts she was charged with, when now there's only one. Because she's already been convicted of one count, Your Honor.
And we, now we have right before the jury that there was also a marijuana cigarette, which is a separate crime. Possession of marijuana. And the jury's aware of that, and so, Your Honor, for those reasons, we ask for a mistrial.

The argument on the motion continued to T-76:

MR. KILGORE: And that they were found in the exact same container, Your Honor, we think that that probative value is - -far outweighs the prejudicial value, in that it's part of the story - - part of the transaction that occurred.
THE COURT: Okay. All right. Your final argument.
MR. HARRIS: Your Honor, that can - - the problem he's talking about can be handled very easily by consultation with the witness about what can be gone into and what cannot be gone into. And as far as searching her purse, when you searched her purse, did you find something that caused you to inquire further with her, without having to go into what exactly was found.

The motion was again denied (T-79) and the following ensued:

MR. HARRIS: Well, Your Honor, the - - at this point in time, we would like to explain to the jurors, and it may be when my client takes the stand, what happened with this marijuana. And that encompasses the other trial. I think - - when it's, when it's brought out that she was found possessing marijuana, I think that is something the jury is going to want an explanation on.

The colloquy continued to T-86, T-87:

MR. HARRIS: Your Honor, am I allowed to discuss the fact that there was a previous trial and she was - - and she - - when she takes the stand, that she admitted previously that the marijuana was hers?
THE COURT: What does the State say to that?
MR. KILGORE: Your Honor, that falls squarely under 404, also. It's part of the same transaction as - - that's relevant.
THE COURT: Yeah, I - - the door, the proverbial door, the crack in the door. Now, the door's open, so the jury is entitled, at this point, it's probative for them to hear the whole story. And if they say, well, some other jury could not agree, then if that's a problem with the State, then that's the problem. So the answer would be yes.

and the colloquy continued (88, 89):

MR. KILGORE: Your Honor, quick question. We're not sure what the relevance of the finding of the jury on the cocaine charge would be. Why would that be probative of the current one, I mean, going into that aspect of it.

. . . . . .

THE COURT: I'm not going to allow you to go into the jury verdict on the not guilty verdict on the cocaine.
You can talk about the prior trial, about the marijuana, the misdemeanor aspect but - -

MR. KILGORE: Your Honor, just for the record, it was not a not guilty verdict. It was a hung jury. So just for clarification.

THE COURT: Well, that's true. And I guess that would make it even more irrelevant. No decision. Okay, anything further?

III.

A.

THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STATE INTRODUCING EVIDENCE THAT APPELLANT WAS IN POSSESSION OF A MARIJUANA CIGARETTE AND IN DENYING THE CONSEQUENT MOTION FOR MISTRIAL

In the pretrial conference the Court had ordered that evidence of the marijuana cigarette would not be introduced in the trial. When Pinson testified for the prosecution that he found the cigarette in Appellant's purse, Appellant objected and moved for a mistrial, overruled and denied.

This was error. Per M.R.E. 404(b) evidence of other crimes is inadmissible. Prosecutors should not elicit such testimony to try a criminal defendant for all his crimes rather than only for the one for which he is on trial. Flowers v. State, 773 So. 2d 309

(Miss. 2000); Patton v. State, 209 Miss. 138 46 So. 2d 90, (1950); Skinner v. State, 198 Miss. 505, 23 So. 2d. 501 (1945).

Further, in reversing its holding on the admissibility of evidence about the marijuana cigarette, the Court may have misled Appellant's counsel into taking an inferior tack in the trial, denying Appellant a fair trial, on violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

III.

B.

THE COURT ERRED IN GRANTING THE STATE'S REQUEST THAT THE MISTRIAL IN THE PRIOR TRIAL FOR INABILITY OF THE JURY TO REACH A VERDICT NOT BE ADMITTED INTO EVIDENCE

The indictment in the case before the Court charged Appellant with possession of a small amount of marijuana and a small amount of cocaine. In the prior trial on these two charges she was convicted of misdemeanor possession of marijuana (one marijuana cigarette), but a mistrial was declared on the cocaine charge because of the inability of the jury to arrive at a verdict.

In the trial of the case before the Court, on possession of cocaine, the Court overruled Appellant's objection to admissibility of evidence that Appellant was in possession of a marijuana cigarette, agreed to permit admission of evidence that Appellant had been convicted of possession of marijuana but denied Appellant the right to introduce evidence that the same jury had been unable to reach a verdict on the

possession of cocaine charge.

In refusing to permit introduction of evidence that the first trial resulted in a mistrial on the cocaine charge because the jurors could not agree on a verdict, the Court erred because the prior rulings "opened the door" to the topic of the prior trial. Further the result of the prior trial was relevant to the case before the Court because they arose from the same indictment and because both charges (possession of marijuana and cocaine) arose from the same indictment.

The device of "opening a door" to a topic is regularly used by our courts to admit otherwise inadmissible evidence of all types whether or not evidence on the same topic would have been inadmissible if objected to and no matter which party introduces the topic first. Phillips v. Illinois Central R. R. Co., 797 So. 2d 231 (Miss. App. 2000); Booker v. State; 745 So. 2d 850 (Miss. App. 1998); Eakes v. State, 665 So. 2d 852 (Miss. 1995); Brown v. State, 85 Miss. 511, 37 So. 957 (1905); Jones v. State, 342 So. 2d 735 (Miss. 1977).

IV.

THE SEARCH OF THE TRUCK WAS UNREASONABLE IN VIOLATION OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION

The Fifth Circuit has held in favor or persons who borrow automobiles from another that the borrower becomes a lawful possessor of the vehicle and thus has standing to challenge its search. U.S. v. Kye Soo Lee, 898 F. 2nd 1034 (5th Cir. 1990).

The validity of a search emanating from a roadblock depends on the validity of the roadblock. In the case before the Court, the roadblock had two defects:

(a) The roadblock did not comport with the written policy directives of the Newton County Sheriff's office in that no supervisor was present and the directives require the presence of a supervisor to "control" the roadblock.

(b) The policies further require that at least three Sheriff's department officers, a supervisor, a safety officer and a scribe, participate in the operation of the roadblock. Only two persons were present, neither of whom was a supervisor, and one of whom had no law enforcement authority at the location of the roadblock. Jeremy Pinson was not authorized to participate in the operation of the roadblock because his only authority was inside the town limits of Hickory, Mississippi. Section 99-3-1, Mississippi Code of 1972. Thus only one authorized law enforcement officer was present, and an unauthorized person participated in the operation of the roadblock.

In Delaware v. Prouse, 440 U.S. 648, 995. Ct. 1391, 59 L. Ed. 2d. 660(1979), the U.S. Supreme Court held that "a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution."

Although Mississippi does not require written policy directives for roadblock operation, where they exist, they should be followed. U. S. v. Huguenin 154 F.3d 547 (1998).

In City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct 447, the U.S. Supreme Court opinion that roadblock searches are unreasonable if they are not for approved purposes and conducted in an approved manner. Edmond holds that the purpose of the roadblock will be scrutinized and that a primary purpose of detecting ordinary criminal wrongdoing is inadequate. Edmond makes it clear that the operation of the roadblock will also be examined.

In the case before the Court, the substantial deviation from policy directives for roadblock operation resulted in an unreasonable search under the Fourth Amendment.

The Court erred in denying the motion to suppress.

CONCLUSION

The verdict should be overturned.

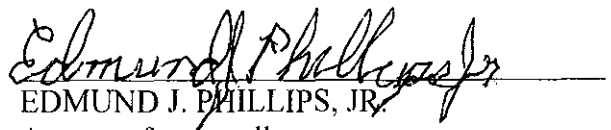
RESPECTFULLY SUBMITTED,

EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Vernon R. Cotten, 205 East Main Street, Carthage, MS 39051, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: December 1, 2008.



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