

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICIA ANN BROWN

APPELLANT

VS.

NO. 2008-KA-0944

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The indictment was sufficient to inform Brown of the nature of the charges against her and did not violate her constitutional rights and the issue is procedurally barred for failure to raise an objection at trial.
- II. The trial court correctly admitted evidence including pictures of Brown and Holesome, evidence of cocaine present in the house and evidence that Holesome pled guilty to possession of cocaine.
- III. There was no error in the sentencing Brown to a longer sentence than Holesome who pled guilty.
- IV. Brown's mandatory life sentence due to her status as an habitual offender is not violative of the Eight Amendment.

SUMMARY OF THE ARGUMENT

The indictment was sufficient to inform Brown of the nature of the charges against her and did not violate her constitutional rights. Further, Brown's trial counsel made no objection to the sufficiency of the indictment at any time prior to or during the trial. The Mississippi Supreme Court has held that where a deficiency appearing in an indictment is non-jurisdiction, it may not be raised for the first time on direct appeal "absent a showing of cause and actual prejudice." Baker v. State, 930 So.2d 399 (Miss.Ct.App. 2005) (citing, Brooks v. State, 573 So.2d 1350, 1353 (Miss. 1990); Brasington v. State, 760 So. 2d 18, 26 (Miss.Ct.App.1999)) This issue is procedurally barred.

The trial court correctly admitted evidence including pictures of Brown and Holesome, evidence of cocaine present in the house and evidence that Holesome pled guilty to possession of cocaine. Brown argues that the pictures taken of herself and of Holesome on the front porch of the house were introduced by the State to show that Brown is white and Holesome is black. However, this argument is procedurally barred since there was no objection at trial.

Brown has waived her objection to evidence Holesome's guilty plea by introducing it at trial and by failing to object to its use by the prosecution. The Mississippi Court of Appeals has held that "failure to make a contemporaneous objection and allow the trial court opportunity to cure the defect is a procedural bar and constitutes a waiver of the argument on appeal." Baker v. State, 930 So.2d 399, 412-13 (Miss.Ct.App.2005) (quoting Mitchell v. Glimm, 819 So.2d 548, 552 (Miss.Ct.App.2002)). Furthermore, "an objection on one or more specific grounds constitutes a waiver of all other grounds." Burns v. State, 729 So.2d 203, 219 (Miss.1998). Further, there is not prejudice, since Brown attempts to shift blame to Holesome for the

possession of the crack cocaine, it is to her advantage that he has assumed responsibility for its possession.

Evidence of the cocaine found in the house was introduced only because in any criminal prosecution the State is entitled to tell "a rational and coherent story of what happened, as is the defendant." Neal v. State, 451 So.2d 743, 759 (Miss.1984) To tell the story coherently, the State was entitled to tell where the cocaine from Brown's pocket had come from and to explain its presence there. This allowed the State to rebut the argument that Officer Kevin Rogers was mistaken about the rock of crack cocaine which fell from Brown's pocket.

There was no error in the sentencing Brown to a longer sentence than Holesome who pled guilty. It is within the trial court's absolute discretion to impose any sentence within the bounds allowed by statute. Johnson v. State, 904 So.2d 162, 170 (Miss.2005). While Brown received the maximum sentence for her crime, her sentence was mandated by Section 99-19-83 Mississippi Code Annotated of 1972, as amended. Further this issue was not raised at the sentencing hearing or in post-trial motions and is therefore procedurally barred.

Brown's mandatory life sentence due to her status as an habitual offender is not violative of the Eight Amendment. Wall claims that the trial judge's sentence of life without parole was violative of the Eighth and Fourteenth Amendments and Article 3 § 28 of the Mississippi State Constitution. However, the record shows that Wall had been convicted of two previous crimes, robbery and armed robbery. These crimes of violence and drug offenses are the reason the legislature devised § 99-19-83. The imposition of such a sentence is within the sound discretion of the trial judge and is not found to be grossly disproportionate. Therefore, Wall's last assignment of error is also found to be without merit.

ARGUMENT

I. The indictment was sufficient to inform Brown of the nature of the charges against her and did not violate her constitutional rights and the issue is procedurally barred for failure to raise an objection at trial.

Brown argues that because the indictment did not distinguish between the quantities of cocaine found separately in the possession of Brown and her co-defendant, Holesome, that the indictment was flawed for failing to cite a specific charge against Brown for the single rock that fell from her pocket. However, Brown's trial counsel made no objection to the sufficiency of the indictment at any time prior to or during the trial. The Mississippi Supreme Court has held that where a deficiency appearing in an indictment is non-jurisdiction, it may not be raised for the first time on direct appeal "absent a showing of cause and actual prejudice." Baker v. State, 930 So.2d 399 (Miss.Ct.App. 2005) (citing, Brooks v. State, 573 So.2d 1350, 1353 (Miss. 1990); Brasington v. State, 760 So. 2d 18, 26 (Miss.Ct.App.1999)) This issue is procedurally barred. Further, Brown is unable to show actual prejudice. The outcome would have been the same even if the indictment had specified the single rock she was charged with possessing, since that rock was clearly in her possession, was proven to be crack cocaine and was proven to weight 1.3 grams.

Further, the State maintains that the indictment was correct. In Hines v. State, Hines was charged with sexual battery. He argued in effect that the indictment should have contained a bill of particulars, complaining that the indictment failed to specify which organ of Hines' body was said to have penetrated which orifice of the victim. Hines sought to invoke his constitutional right to double jeopardy protection once his trial has was concluded, arguing that if his organ(s)

and the victim's orifice(s) were not identified, he could be subject to repeated retrials with the state each time charging a different organ and/or orifice.

The court noted that this argument would not wash. Any acquittal under the indictment at issue would have afforded Hines collateral estoppel protection in the event of a second trial. Sanders v. State, 429 So.2d 245 (Miss.1983). The court noted, "[m]oreover, it would seem apparent that the broader the charging language of the indictment, the broader the double jeopardy protections afforded. By reference to the charging language of this indictment, an acquittal would no doubt have afforded Hines a double jeopardy shield against any subsequent prosecution for any penetration of the victim. "on or about May 24, 1982", period. Seen in this light Hines' double jeopardy attack on the indictment results only in his being hoist upon his own petard." Similarly, had Brown been acquitted in the trial court, the more broadly worded indictment in the instant case would protect Brown from any charges of possession of cocaine stemming from the search of Holesome's house on the date of her arrest.

Brown argues that the indictment was not specific enough for her to prepare a defense. However, the Trial Court stated clearly that Brown was only being accused of possession of the rock of cocaine which fell from her pocket. She was not in actual possession of the cocaine found in Holesome's house and the prosecution did not attempt to show that she was in constructive possession of the cocaine found in Holesome's house. She did not live in the house, was outside the house when the officers arrived.

The evidence at trial clearly showed that Holesome was in possession of the cocaine and paraphernalia found in the house and no argument was made that Brown was in possession of those items. This issue is without merit and the jury's verdict and the judgment of the trial court

should be upheld.

II. The trial court correctly admitted evidence including pictures of Brown and Holesome, evidence of cocaine present in the house and evidence that Holesome pled guilty to possession of cocaine.

A. Brown's argument that the trial court erred in admitting the pictures of herself and Holesome into evidence is procedurally barred.

Brown argues that the pictures taken of herself and of Holesome on the front porch of the house were introduced by the State to show that Brown is white and Holesome is black.

(Appellant's Brief at 17.) However, this argument is procedurally barred since there was no objection at trial. Further, Defense exhibit D-6 shows both Holesome and Brown sitting on the porch of the house. The racial identity of each is evident in the photograph and was introduced into evidence by defense counsel at trial. (Tr. 142) There is no indication anywhere in the record that the prosecution attempted to smear Brown by gratuitously suggesting an interracial relationship. The attempts to define the true nature of the relationship between Brown and Holesome are to counter Brown's story that she appeared on the doorstep at 4:00 a.m. to help Holesome reconcile with his wife. Further, in both instances, defense counsel's objection was sustained and the jury was instructed to disregard the question. "[W]hen a trial court instructs the jury, it is presumed the jurors follow the instructions of the court." Grayson v. State, 879 So.2d 1008, 1020(32) (Miss.2004) (quoting Williams v. State, 684 So.2d 1179, 1209 (Miss.1996)). This issue is without merit and the trial court's ruling should be affirmed.

B. Brown's argument regarding the introduction to the testimony of Holesome's conviction is procedurally barred.

Brown argues that testimony regarding Holesome's plea and conviction resulted in a fundamentally unfair trial. As Brown's counsel notes in her brief, there was no objection at trial

to this testimony. Further, Brown's trial counsel directly addresses the issue first in the cross examination of Officer Kevin Rodgers, asking, "Have you been to Julius Holesome and asked him to change his statement to put any of the illegal drugs on Ms. Brown?" (Tr. 151) The issue was then on the table for cross examination. (Tr. 152.) Brown's trial counsel further questioned Officer Mike Doss about Julius Holesome's role in the possession of the cocaine and directly addressed Holesome's conviction and subsequent incarceration. (Tr. 224) The following colloquy took place:

- Q. To your knowledge Julius Holesome has claimed responsibility for that, correct?
- A. He has claimed that the dope in the house belonged to him, yes, sir.
- ...
- Q. ... Are you saying that Julius Holesome lied and went to jail for something that wasn't his?

Brown has waived this objection by introducing it at trial and by failing to object to its use by the prosecution. The Mississippi Court of Appeals has held that "failure to make a contemporaneous objection and allow the trial court opportunity to cure the defect is a procedural bar and constitutes a waiver of the argument on appeal." Baker v. State, 930 So.2d 399, 412-13 (Miss.Ct.App.2005) (quoting Mitchell v. Glimm, 819 So.2d 548, 552 (Miss.Ct.App.2002)). Furthermore, "an objection on one or more specific grounds constitutes a waiver of all other grounds." Burns v. State, 729 So.2d 203, 219 (Miss.1998).

Brown's trial counsel addressed the testimony as it came from Bonnie Ripley, objecting only that Ripley had no personal knowledge of Holesome's conviction. (Tr. 175) Brown has thus waived all other objections to the admissibility of Holesome's plea of guilty to the possession of

the cocaine in the house.

Further, Brown cannot show any prejudice from admission of testimony that Holesome had pled guilty to possession of the crack cocaine. It was, in fact, to her advantage, as her counsel argued, to show that Holesome had pled guilty to possession of the crack cocaine found in the house, that Holesome had possessed the cocaine rather than Brown. In fact, Brown's counsel argued that because Holesome was in possession of the crack cocaine in the house, that it was possible that Holesome could have tossed the rock of crack cocaine which was found at Brown's feet.

Brown argues that the prosecution assured her that it would not introduce evidence of cocaine found in the house. However, Brown did not object on grounds of this "assurance" at trial and the objection is waived. Further, the prosecutor's statement was premised on whether or not Brown would attempt to have Holesome take credit for the crack cocaine that was in Brown's pocket. While Brown did not subpoena Holesome for trial, she did rely on the argument that Holesome was responsible for the crack which was found in her possession. Further, the prosecution was entitled to tell a whole, rational and coherent story to the jury. Neal v. State, 451 So.2d 743, 759 (Miss.1984). Because Brown argued that the rock of cocaine which fell from her pocket might have been placed there by someone else, possibly Holesome, the prosecution was required to prove that she had purchased cocaine and to show where the remaining cocaine was found.

This issue is without merit and the jury's verdict and the rulings of the trial court should be upheld.

C. The evidence of the crack cocaine which was found in Holesome's

house was correctly admitted into evidence.

Brown further argues that evidence of the cocaine found inside the house was inadmissible at trial. However, at trial, the only cocaine Brown was alleged to have possessed is the single rock that fell from her pocket. Evidence of the cocaine found in the house was introduced only because in any criminal prosecution the State is entitled to tell “a rational and coherent story of what happened, as is the defendant.” Neal v. State, 451 So.2d 743, 759 (Miss.1984) To tell the story coherently, the state was entitled to tell where the cocaine from Brown’s pocket had come from to explain it’s presence there. This allowed the State to rebut the argument that Officer Kevin Rogers was mistaken about the rock of crack cocaine which fell from Brown’s pocket.

Further, the trial court instructed the jury as follows:

The only drug evidence in question is that which the prosecution alleges that fell from Ms. Brown’s pocket. All other items found in the home are not the subject of charges in this case and may be considered by you only in weighing the credibility of other evidence or testimony received during the trial. (C.P. 113)

As noted earlier, juries are presumed to follow the trial court’s instructions. This issue is without merit and the trial court’s ruling should be affirmed.

III. The trial court did not err in sentencing Brown to a longer sentence than Holesome who pled guilty.

It is within the trial court's absolute discretion to impose any sentence within the bounds allowed by statute. Johnson v. State, 904 So.2d 162, 170 (Miss.2005). While Brown received the maximum sentences for her crime, her sentences were permitted by statute. This issue is without merit.

The record indicates that Brown was convicted of aiding and assisting an escape (1981)

for which she was sentenced to 5 years; armed robbery (1988) for which she was sentenced to 30 years; and, uttering a forgery (1988) for which she was sentenced to 10 years. Other convictions were noted at sentencing hearing, including an additional forgery and a charge for burglary of a dwelling. (Tr. 369) The Mississippi Supreme Court has held that armed robbery is a crime of violence per se. Ashley v. State, 538 So.2d 1181, 1185 (Miss.1989) (citing King v. State, 527 So.2d 641, 646 (Miss.1988)). Thus, Brown would be classified as a habitual offender according § 99-19-83 and could receive a life sentence without parole. For crimes classifiable as felonies in which significant terms of imprisonment in the state penitentiary can be given, the length of the sentence actually imposed is purely a matter of legislative prerogative. Hopson v. State, 625 So.2d 395, 404 (Miss.1993). Therefore, as long as the sentence is within the limits of the statute, the imposition of such sentence is within the sound discretion of the trial court, Mississippi appellate courts will not reverse it.

The trial court spent a great deal of effort reviewing Brown's prior criminal history before sentencing. She had, as the prosecutor noted, spent her entire adult life committing crimes against the people of the State of Mississippi. (Tr. 379) Additional counts of uttering a forgery and a count of burglary of a dwelling were noted in the record. (Tr. 379.) The trial court noted that Brown had eight or more prior felonies including a crime of violence, armed robbery, that had been disposed of in one way or another in the circuit courts of Pontotoc and Lee Counties. (Tr. 389). There is no indication in the record that Brown was "punished" for going to trial. The record reflects the trial court's careful assessment of her prior convictions and the correct application of Section 99-19-83 of the Mississippi Code Annotated, 1972, as amended.

Section 99-19-83 provides:

Every person convicted of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and *where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.*

According to the plain language of the statute, the trial court was without discretion to sentence Brown to anything less than life in prison without parole.

Further, Brown did not argue at her sentencing that it was error for her to receive a longer sentence than Holesome. Nor did she address this issue in her post trial motions. Brown's claim that the trial court erred by sentencing her to a longer term than Holesome is procedurally barred. By not raising this issue at sentencing, she has waived the issue. Falconer v. State, 873 So.2d 163 (Miss.App.,2004) (citing *Collins v. State*, 822 So.2d 364, 366 (Miss.2002)).

IV. Brown's mandatory life sentence due to her status as an habitual offender is not violative of the Eight Amendment.

Brown claims her life without parole sentence is disproportionate under the rationale of Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). "Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." Hoops v. State, 681 So.2d 521, 537 (Miss.1996). "Further, the general rule in this state is that a sentence cannot be disturbed on appeal so long as it does not exceed the maximum term allowed by statute." Hoops, 681 So.2d at 538 (quoting *Fleming v. State*, 604 So.2d 280, 302 (Miss.1992)). The three-pronged analysis as set forth by the United States Supreme Court in *Solem v. Helm*, is appropriate only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of "gross disproportionality." Hoops,

681 So.2d at 538. The three factors set out in *Solem* for courts to consider when conducting a proportionality analysis if the threshold comparison is met are:

- (a) gravity of the offense and the harshness of the penalty;
- (b) sentences imposed on other criminals in the same jurisdiction; and
- (c) sentences imposed for the commission of the same crime in different jurisdictions.

Solem v. Helm, 463 U.S. at 292, 103 S.Ct. 3001. *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct.

1133, 63 L.Ed.2d 382 (1980), serves as a guide in the determination of this threshold

comparison. The defendant in *Rummel* was sentenced to life in prison with the possibility of parole under a recidivist statute for a third non-violent felony conviction. Although the total loss from the three crimes was less than \$250.00, the United States Supreme Court found Rummel's sentence to be proportionate and not violative of the Eighth Amendment.

In light of *Rummel*, it cannot be argued that Brown's sentence was grossly disproportionate to her crime. In the present case, the record indicates that Brown was convicted of aiding and assisting an escape (1981) for which she was sentenced to 5 years; armed robbery (1988) for which she was sentenced to 30 years; and, uttering a forgery (1988) for which she was sentenced to 10 years. Other convictions were noted at sentencing hearing, including an additional forgery and a charge for burglary of a dwelling. (Tr. 369) The Mississippi Supreme Court has held that armed robbery is a crime of violence per se. *Ashley v. State*, 538 So.2d 1181, 1185 (Miss.1989) (citing *King v. State*, 527 So.2d 641, 646 (Miss.1988)). Thus, Brown would be classified as a habitual offender according § 99-19-83 and could receive a life sentence without parole. For crimes classifiable as felonies in which significant terms of imprisonment in the state penitentiary can be given, the length of the sentence actually imposed is purely a matter of

legislative prerogative. Hopson v. State, 625 So.2d 395, 404 (Miss.1993). Therefore, as long as the sentence is within the limits of the statute, the imposition of such sentence is within the sound discretion of the trial court, Mississippi appellate courts will not reverse it. On balance, these facts do not lend themselves to a finding that Brown received a sentence grossly disproportionate to her crime. Therefore, an extended proportionality review under *Solem* is not warranted.

“[T]he general rule in Mississippi is that a sentence that does not exceed the maximum term allowed by the statute, cannot be disturbed on appeal.” Edwards v. State, 800 So.2d 454, 468 (Miss.2001) (citing Fleming v. State, 604 So.2d 280, 302 (Miss.1992)). This Court “will review a sentence that allegedly imposed a penalty that is disproportionate to the crime.” Id.

In *Edwards*, the Mississippi Supreme Court discussed the proportionality analysis as laid out by the United States Supreme Court. The United States Supreme Court set forth a three-prong test for an Eighth Amendment proportionality analysis in *Solem* as follows:

- (i) the gravity of the offense and the harshness of the penalty;
- (ii) the sentence imposed on other criminals in the same jurisdiction; and
- (iii) the sentences imposed for commission of the same crime in other jurisdictions.

The Mississippi Supreme Court noted, however, that *Solem* was overruled in Harmelin v. Michigan, 501 U.S. 957, 965-66, 111 S.Ct. 2680, 2686-87, 115 L.Ed.2d 836 (1991) “to the extent that it found a guarantee of proportionality in the Eighth Amendment. In light of *Harmelin*, it appears that *Solem* is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of ‘gross disproportionality.’ ” Hoops v. State, 681 So.2d at 538 (citations omitted). The appellate courts will not apply the three-prong disproportionality test when there is a lack of this initial showing. Young v. State, 731 So.2d

1120, 1125 (Miss.1999); Williams v. State, 784 So.2d 230, 236 (Miss.Ct.App.2000). Applying the reasoning in Edwards to the case at bar, there is no merit to this issue.

CONCLUSION

Brown's assignments of error are without merit and the jury's verdict and the rulings of the trial court should be upheld.

Respectfully submitted,

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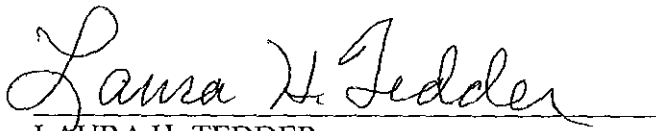
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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