IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES CALVIN WILLIAMS — APPELLANT

VS. — NO. 2008-KA-1767

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES CALVIN WILLIAMS **APPELLANT**

vs. **CAUSE No. 2008-KA-01767-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Forrest County, Mississippi in which the Appellant was convicted and sentenced for his felony of felon in possession of a firearm.

STATEMENT OF FACTS

The Appellant brings no challenge here as to the sufficiency or the weight of the evidence of his guilt. It is therefore unnecessary to set out the evidence of his guilt in any detail.

The evidence adduced by the State was that the Appellant, at about 2.20 on the morning of 30 August 2007, was riding a bicycle on a sidewalk in a high - crime area of Hattiesburg. The bicycle did not have reflectors. Two police officers were patrolling the area at the time and observed the Appellant riding the bicycle on the sidewalk, which was a violation of a city ordinance.

The officers attempted to stop the Appellant in order to inform him that he could not ride a bicycle on a sidewalk. It was not their intention to effect an arrest at the time. The Appellant, though, did not stop and did not obey the order of the officers to stop. Instead, the Appellant kept riding his bicycle and sped up. The Appellant subsequently wrecked his bicycle. The officers attempted to restrain the Appellant, but he resisted them. As this was occurring, a firearm fell from the Appellant's waistband. The gun was loaded, with one round in the chamber.

The Appellant was a convicted felon at the time he was in possession of the firearm.

STATEMENT OF ISSUES

1. DID THE STATE FAIL TO PROVE THAT THE APPELLANT WAS AN HABITUAL OFFENDER UNDER MISS. CODE ANN. SECTION 99-19-81

2. DID THE TRIAL COURT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION TO SUPPRESS?

3. DID THE TRIAL COURT ERR IN ALLOWING "TRACE" EVIDENCE?

SUMMARY OF ARGUMENT

1. THAT STATE SUFFICIENTLY PROVED THE APPELLANT'S HABITUAL OFFENDER STATUS

2. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS

3. THAT THE TRIAL COURT SUSTAINED THE OBJECTION MADE BY THE DEFENSE TO THE TESTIMONY OF THE WITNESS MITCHELL

ARGUMENT

1. THAT STATE SUFFICIENTLY PROVED THE APPELLANT'S HABITUAL OFFENDER STATUS

In the First Assignment of Error, the Appellant claims that the State failed to prove

beyond a reasonable doubt during the sentencing hearing that he had been twice previously convicted of felonies. His claim appears to rest upon the allegation that a judgment of conviction or other such document concerning a 1992 conviction for grand larceny was not introduced into evidence.

The indictment alleged that the Appellant had been previously convicted in 1988 of felonious possession of a controlled substance and in 1992 of the felony of grand theft. The State sought sentencing under Miss. Code Ann. Section 99-19-81. (R. Vol. 1, pg. 8).

During the guilt phase of the trial, the State, though the Circuit Clerk, introduced into evidence a sentencing order regarding the Appellant's 1988 conviction for possession of a controlled substance, the order being admitted without objection by the defense. (R. Vol. 2, pp. 92 - 93; State's Exhibit 3). This was admitted, of course, in order to prove that the Appellant was a convicted felon at the time he possessed the firearm.

During the sentencing hearing, the State, without objection, produced a certified copy of a judgment of conviction against the Appellant in Forrest County Circuit Court cause number 15,294, which conviction occurred in 1992. The State also relied upon the possession of a controlled substance conviction which had been earlier put into evidence. The prosecutor "submitt[ed] into evidence two certified copies of prior convictions" as to the 1988 and 1992 convictions, and gave them to the trial judge at the judge's request.

Before pronouncing sentence, the trial court asked the Appellant whether he was the person named in the judgments of conviction. The Appellant replied affirmatively. The Appellant then asked the trial court whether his 1992 conviction made him "an habitual". The court responded that it was the two previous convictions that made him an habitual offender. (R. Vol. 2, pp. 126 - 127). While it may be that the trial court did not expressly state that the

orders were to be admitted, by his actions he clearly intended to and did admit them to evidence. He asked to see the orders and he questioned the Appellant about his convictions, and he relied upon them in his sentencing order.

Counsel for the Appellant states that the 1992 conviction does not appear to have been included in the exhibits sent up with this appeal. We have not found it among the exhibits either. However, this is no cause to vacate the Appellant's sentence. This is not an instance in which it may be said that the State failed to prove habitual offender status.

It is quite clear from the transcript that the prosecutor put into evidence a 1992 judgement or order of conviction, and that the trial court relied upon it, as well as the 1988 judgment, to find that the Appellant was an habitual offender. There was indeed no objection by the defense, or perhaps more precisely and significantly, no claim raised by the defense that the State had proved only one conviction. Moreover, the Appellant himself admitted the existence of the convictions, including the 1992 conviction, and he even went so far as to ask a question with respect to the 1992 conviction.

In the sentencing order in the case at bar, the court set the Appellant's prior convictions out in detail. The 1992 conviction occurred on 2 July 1992 in the Circuit Court of Forrest County, in cause number 15,294. The conviction was for grand larceny, and the Appellant was sentenced to a term of three years imprisonment. (R. Vol. 1, pg. 26)

The comments made by the prosecutor, trial court, and the Appellant made it as clear as it can be that the 1992 conviction was put into evidence, and that there was no objection made against it. It may be that the order or judgment of conviction was not included in the exhibits, but this does not compel the conclusion that it was not an exhibit. Given the comments made about this missing exhibit, it is clear that it was by oversight that it was not included in the

exhibits.

The Appellant asserts that the opinion in *Vince v. State*, 844 So.2d 510 (Miss. Ct. App. 2003) compels this Court to set aside the Appellant's sentence as an habitual offender. In that case, the prosecutor attempted to prove that appellant's prior conviction by reference to an NCIC printout, which indicated that that appellant had been convicted in 1976 in Louisiana. While it is unclear from the opinion whether the NCIC report was actually admitted into evidence, the Court simply noted that it was not among the exhibits and not listed as an exhibit, and that for those reasons the State failed in its burden to prove the prior felonies.

We do not think that *Vince* should be controlling here. First of all, if it had been simply a matter of oversight or negligence on the part of the court reporter or Circuit Clerk to include the NCIC report, that problem could have been easily corrected by supplementing the record. If, on the other hand, the report had never been introduced into evidence, then this Court's decision should have been bottomed on that reason. This Honorable Court has from time to time supplemented appellate records *sua sponte*. Perhaps that should have done in *Vince* if the that appellant failed in his duty to see to it that proper record had been presented to the Court. Or if it had been attempted without success, then the opinion might better have simply stated that the record did not show that the State ever established the prior convictions by competent evidence.

Unlike *Vince*, though, as we have said above, the State did present the trial court with an order or judgment of conviction concerning the Appellant's 1992 conviction. The transcript of the sentencing hearing clearly shows this, as does the sentencing order itself. There was no objection to it, and there was no claim raised by the defense that the State had failed in its burden of proof.

Moreover, unlike *Vince*, the Appellant admitted that he was one and the same person as

that person named in the 1992 order, and then he asked a question about his 1992 conviction. The Appellant thus effectively if not actually admitted in 1992 conviction. Where a person admits his prior convictions in an habitual offender sentencing hearing, that admission is sufficient to permit sentencing as an habitual offender. *Sanders v. State*, 786 So.2d 1078, 1082 (Miss. Ct. App. 2001).

That the Appellant was sentenced to a term of imprisonment of a year or more was established. The trial court's sentencing order clearly demonstrates that.

The record clearly establishes that the State produced a certified copy of the judgment of conviction concerning the 1992 conviction and presented it to the trial court. There was no objection to the copy, and no defense attempted as to the Appellant's habitual offender status. The Appellant admitted the conviction. The trial court took the judgment of conviction into consideration along with the 1988 judgment and found, properly, that the Appellant was an habitual offender. So seen, the complaint raised here is simply that the 1992 judgment was not sent up with the other exhibits. However, it was the Appellant's duty to present a complete record, not the State's duty. *Hill v. State*, 4 So.3rd 1063 (Miss. Ct. App. 2009). We think he ought to supplement the record with the order.

2. THAT THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS

In the Second Assignment of Error, the Appellant asserts that the trial court erred in overruling his motion to suppress. In that motion, the Appellant alleged that the police officers did not have probable cause to arrest him, and did not have grounds for a *Terry*[1] stop. As relief,

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[1] *Terry v. Ohio*, 392 U.S. 1, 22 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

he sought the suppression of evidence found in consequence of his arrest or detention. (R. Vol. 1, pg. 12).

There was a hearing on this motion. In the course of that hearing, Officer Kyle Stewart testified that he was on patrol in the area of Martin Luther King Avenue at twenty minutes past two on the morning of 30 August 2007. A brother officer, Brandon Jones, was also on patrol at that time with him.

They observed the Appellant riding a bicycle on a sidewalk in front of a school. The bicycle had no reflectors. The bicycle was in violation of city ordinance on account of the lack of the reflectors. Stewart further testified that it was unusual to find a person riding a bicycle in that area at that time of night. Stewart and Jones decided they wanted to talk to the Appellant about the fact that he was riding a bicycle on a sidewalk and that the bicycle did not conform to city ordinance.

As the officers got out of their car, the Appellant proceeded around the car, in what appeared to be an attempt to flee. The officers gave loud, verbal commands to stop, but the Appellant kept on. Jones then gave chase, the Appellant attempting to build speed. After about fifty yards, though, the Appellant wrecked his bicycle in the middle of the street.

Both officers got to the Appellant and attempted to put handcuffs on him. The Appellant, though, resisted the officers and kept trying to reach for something in his waistband. At some point, a gun fell out of the Appellant's waistband. After this happened, the officers were able to complete their object of handcuffing the Appellant.

The decision to stop the Appellant arose from the facts that he was riding on a sidewalk, riding a bicycle that had no reflectors, and because it was very late at night. The area is also a high - crime area. It is contrary to Hattiesburg's ordinances to ride a bicycle on a sidewalk, and

to ride one that does not possess reflectors.

The trial court found that the officers had "adequate reason" to approach the Appellant. (R. Vol. 2, pp. 2 - 11). We bear in mind here the standard of review appurtenant to the claim that the trial court erred in denying relief on the motion to suppress. *Rainer v. State*, 944 So.2d 115 (Miss. Ct. App. 2006).

Here, the Appellant begins his argument by alleging that the officers had no probable cause to effect an arrest at the time they first observed him. While conceding that it is a violation of Hattiesburg's ordinances to ride a bicycle on a sidewalk, he asserts that a violation of that ordinance is not an indictable offense under Miss. Code Ann. Section 99-3-7(1) (Supp. 2008). Thus, says the Appellant, he could not have been properly arrested without a warrant for violating that ordinance.

The Appellant also admits that it is a violation of the city's ordinances to ride a bicycle in a public street without reflectors on the bicycle. But he says he was not riding such a bicycle in the street. He further claims that Miss. Code Ann. Sections 63-7-7 and 63-7-13(4) set out safety equipment requirements for bicycles driven on highways.

The Appellant's argument apparently rests upon a rather recondite area of the law, that being the question of whether violations of municipal ordinances are "indictable offenses", in the context of warrantless arrests under Miss. Code Ann. Section 99-3-7(1) (Supp. 2008). In *Letow v. United States Fidelity and Guaranty Co.*, 120 Miss. 763, 83 So. 81 (1919), a Hattiesburg policeman made a warrantless arrest of a person who had violated an ordinance which prohibited the obstruction of sidewalks. The arrest was justified under the version of what is now Section 99-3-7 then in force. The Court held that a warrantless arrest for violation of a city ordinance which did not incorporate State misdemeanor laws could not be upheld under that section,

violations of ordinances not being "indictable offenses" under that section. For a warrantless arrest for a violation of a city ordinance that does not embody State law misdemeanors, there must be an ordinance adopted providing that authority for the city's police officers. On the other hand, police officers may make warrantless arrests for misdemeanor State law offenses committed in their presence under Section 99-3-7. *City of Hattiesburg v. Beverly*, 123 Miss. 759, 86 So. 590 (1920).

The Appellant's attempted point, then, is that the officers in the case at bar could not make a warrantless arrest for riding a bicycle on a sidewalk or for failing to have reflector on the bicycle since those vices are such by operation of ordinance and not by statute. The record appears to be silent as to whether Hattiesburg's police officers have been authorized to make warrantless arrests for violations of ordinances which do not embody State misdemeanor laws.

The Appellant did not raise this issue in the hearing on the motion to suppress. What he did assert was that the attempted stop was pretextual; that the officers had no articulable suspicion that the Appellant had committed or was about to commit a crime; that the provisions of law concerning reflectors only applied to bicycles operated on a road; and a claim (without evidence) that the "statute" concerning riding a bicycle on a sidewalk had never been enforced. That being so, he may not here raise the issue of whether a person who violates a city ordinance may be arrested under Section 99-3-7. *Smith v. State*, 986 So.2d 290 (Miss. 2008)(objection on one or more grounds operates as a waiver of all other grounds). Assuming for argument that the lack - of - authority argument is before the Court, there is no merit in it.

The Appellant, in claiming that the officers had no authority to arrest him without a warrant, forgets or ignores a fundamental fact. That fact is that the officers did not intend to arrest the Appellant when they first espied him. They merely intended to warn him that he was in

violation of at least one city ordinance. Whether the officers could have arrested the Appellant without a warrant on account of his violation of the ordinances is neither here nor there in view of this. So far as we have been able to determine, there is nothing in the law regarding arrests for violations of municipal ordinances that prohibits police officers from detaining a violator for the purpose of pointing out to him the fact that he has offended an ordinance.

The officers were on patrol in a high crime area, late at night, and they saw the Appellant committing one or more violations of city ordinances. They simply wished at that point to give the Appellant a warning. They had more than an "articulable suspicion" that the Appellant was in violation of the law. The Appellant fled instead of stopping and speaking with the officers. The officers unquestionably had the right to stop the Appellant for his violation of the city ordinance and inform him of the fact that he was in such violation.

Entirely aside and independent of municipal law issues, the officers and had every right to chase and detain the Appellant when he fled. *Carr v. State*, 770 So.2d 1025, 1028 (Miss. Ct. App. 2000). The Appellant's flight was unprovoked; the officers plainly had the right to detain him. *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). The Appellant was not simply going about his business: He was in violation of the law regardless of whether the officers were empowered to arrest him, and he fled. In the event, the Appellant was not arrested because he was riding an improperly equipped bicycle on a city street. He was arrested on account of the fact that, after he was detained, he was found to be a felon in possession of a firearm. He could just as well have been arrested for failure to obey a lawful order of a law enforcement officer. *Qualls v. State*, 947 So.2d 365, 372 - 373 (Miss. Ct. App. 2007).

Even if this Court were to find that the Appellant was arrested without warrant for violating a city ordinance, and that the arrest was improper, this would not require this Court to

find error in the trial court's decision to overruled the motion to suppress. If indeed the officers thought they had the right to make an arrest under Section 99-7-3 for a violation of a city ordinance that did not embody some State misdemeanor, and if indeed Hattiesburg had no ordinance granting authority for arrest, this would amount to a mistake of law on the part of the officers. The officers clearly had probable cause to believe that the Appellant was in violation of the ordinance. Their mistake, if any, again assuming that the Appellant was arrested for the violation of the ordinance, would have been in being unaware of the subtle difference between the ability to make a warrantless arrest for State misdemeanors committed in their presence and making arrests without a warrant for violations of ordinances which do not incorporate a State misdemeanor. Such a mistake should not invalidate the arrest, given the fact that there was nothing to show that the officers were acting in bad faith and given the fact that there was clearly an objective basis for them to believe that the Appellant had violated the ordinance. *Moore v. State*, 986 So.2d 928 (Miss. 2008); *Loveless v. City of Booneville*, 972 So.2d 723 (Miss. Ct. App. 2007).

As we have said, the officers clearly had cause to chase after and detain the Appellant under *Terry v. Ohio*. Anticipating this, the Appellant claims that what the officers did afterwards resulted in an improper seizure of the Appellant's gun. He claims that the officers had no reason to think that the Appellant might be armed and that they should not have conducted a pat - down of the Appellant. He claims that what was done here was similar to what occurred in *Carr, supra*, after that appellant was detained.

The facts here are not similar to *Carr* in that respect. Here, the officers testified that the Appellant resisted them when they caught the Appellant. As the Appellant struggled with the officers, he began to attempt to reach an object stuck in his waistband. The officers did suspect

that the object might be a weapon. In the event, though, the gun fell out of the waistband in the course of the struggle. The police officers, unlike what occurred in *Carr*, did not search the Appellant's clothing. The Appellant only ceased resisting when one of the officers drew his weapon. (R. Vol. 2, pp. 5 - 6; 83 - 84). The gun fell out in the course of the struggle. There was no pat - down for a weapon.

Even had the gun not fallen out of the Appellant's waistband, the officers would have been justified in conducting a pat - down of the Appellant's person. They testified that the Appellant's actions suggested that he was armed, and what they could see tended to corroborate their suspicion. Had the Appellant not resisted the officers, they would have properly conducted the pat down, and had they done so, they would have properly relieved the Appellant of his weapon. *Wardlow, supra.* There was nothing at all unreasonable about the officers' actions.

In summary, the facts here clearly demonstrate that the Appellant committed one or more violations of Hattiesburg's ordinances in the presence of Hattiesburg police officers, late at night and in a high crime area. The officers attempted to detain the Appellant to inform him that what he was doing was contrary to city ordinance. They did not intend to arrest the Appellant. There was no foul in this, and the Appellant presents no authority to suggest otherwise. The officers did not attempt to detain the Appellant for no reason other than the fact that the Appellant was in a high crime area.

The Appellant fled, and his flight was unprovoked. The officers had every reason and right to chase him and detain him. The Appellant resisted. The gun fell from his waistband. There was no pat -down, though certainly one would have been permissible in view of the Appellant's action in trying to reach the gun and what the officers could see of what was in the Appellant's waistband. The officers had every right to protect themselves by preventing the

Appellant from having access to it. The Appellant was arrested, as best as we can tell, when the officers discovered that the Appellant was a convicted felon who, in their presence, had been in the possession of a handgun. The Appellant was not arrested because he had been riding an improperly equipped bicycle on a city sidewalk. The trial court was correct in denying relief on the Appellant's motion to suppress.

The Second Assignment of Error is without merit.

3. THAT THE TRIAL COURT SUSTAINED THE OBJECTION MADE BY THE DEFENSE TO THE TESTIMONY OF THE WITNESS MITCHELL

The State called a Mark Mitchell, a sergeant on the Hattiesburg police force, to testify as to the results of a "trace" he had performed on the Appellant's gun. The prosecutor at trial had the sergeant explain how the "trace" was performed. When the prosecutor asked the witness about the results of the "trace" performed on the Appellant's gun, the defense objected the ground that the results of the "trace" would be irrelevant. The defense further stated that there was no allegation that the Appellant came by possession of the gun through illegal means. The trial court delayed its ruling, stating, "Let's see where this is going". (R. Vol. 2, 94 - 98).

The sergeant then testified that the original purchaser lived in Purvis, Mississippi and that the gun was originally purchased on 22 January 1999. There was no record found to show how the Appellant came into possession of the gun. The sergeant testified that the Appellant's name did not appear in the course of the "trace" did not mean that the Appellant came into possession of the gun illegally. (R. Vol. 2, pp. 98 - 99).

With the examination of the witness completed, the prosecutor moved to for a ruling on the objection made by the defense, and to admit Mitchell's testimony. The defense responded that it had the same objection, that being that the testimony was irrelevant. The prosecutor then

stated it was the position of the defense that the Appellant was homeward bound when he met the police officers. The prosecutor believed he had to "combat" that position, so he wished to do so by arguing that the Appellant was not in rightful possession of the gun even if the Appellant was headed home. The trial court sustained the objection made by the defense. (R. Vol. 2, pp. 99 - 100).

Here, the Appellant asserts that the "trace" testimony was irrelevant. He further asserts that it was highly prejudicial under M.R.E. 403.

It is unnecessary to consider whether this testimony was irrelevant, in view of the trial court's ruling. Since the trial court sustained the defense objection, the Appellant is in no position to complain of that ruling.

As for the M.R.E. 403 claim, there was no objection made on the basis of that rule. The Appellant may not be heard to urge error in the Court for that reason. *Edwards v. State*, 838 So.2d 990, 993 (Miss. Ct. App. 2002).

In the event that the Court should for some reason be of the mind that the M.R.E. 403 issue is before the Court, there is no basis to find that the trial court abused its discretion in failing to sustain an unmade objection based on rule 403.

While the prosecutor's reasoning concerning the purpose of this testimony is perhaps abstruse, the Appellant was not harmed by it. The "trace" testimony did not establish that the Appellant came by possession of the gun in consequence of an illegal act. Indeed, there was no testimony that the gun was reported stolen. The sergeant admitted that Appellant might have innocently come into possession the gun (holding aside for the moment the fact that the Appellant was not by law permitted to possess a firearm). There was nothing in the testimony to show or imply that the Appellant had stolen the gun. Consequently, there was nothing in it to

prejudice the Appellant. It may be, as the Appellant suggests here, that the circumstances of how the Appellant came into possession of the gun were not particularly important in a prosecution of a felon in possession of a firearm, but the fact remains that the Appellant was not prejudiced by this "trace" testimony.

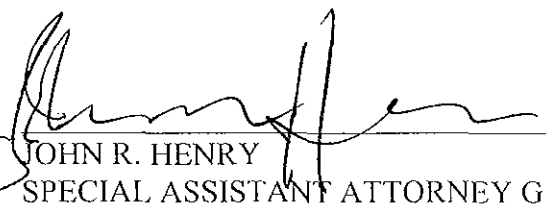
Furthermore, any error on the part of the trial court in this regard was surely harmless in light of the overwhelming evidence of the Appellant's guilt. Beyond any doubt, the Appellant was felon in possession of a firearm. He was not any more or less guilty of this felony whether he came by the gun by the commission of some other crime, and there was not the slightest chance that he would have been found not guilty of being a felon in possession of a firearm unless the jury for some reason engaged in an act of jury nullification.

CONCLUSION

The Appellant's conviction and sentence 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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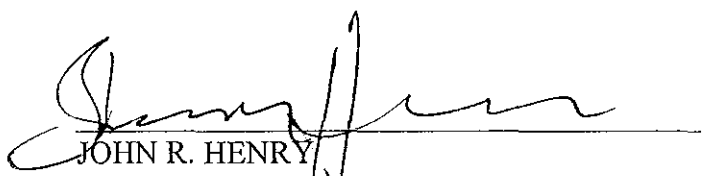
This the 22nd day of June, 2009.



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