IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES CALVIN WILLIAMS		APPELLANT
V.		NO. 2008-KA-1767-COA
STATE OF MISSISSIPPI		APPELLEE

BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

This appeal proceeds form the Circuit Court of Forrest County, Mississippi, and a judgment of conviction for the crime of possession of a firearm by a convicted felon entered against James Calvin Williams following a jury trial held on October 1, 2008, the Honorable Robert Helfrich, Circuit Judge, presiding. (C.P. 25-26, R.E. 5-7). Williams was sentenced as a habitual offender

pursuant to Mississippi Code Annotated Section 99-19-81, and the trial court ordered him to serve a term of ten (10) years. (C.P. 25-26, Tr. 126-127, R.E. 6-7). The trial court denied Williams' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (C.P. 30-33, R.E. 8-10). Williams is presently incarcerated in the custody of the Mississippi Department of Corrections and now appeals to this Court for relief.

STATEMENT OF THE FACTS

Williams lived at 614 Martin Luther King Avenue in Hattiesburg, Mississippi. (Tr. 74). On August 30, 2007, Williams was riding his bicycle on the sidewalk along his street at about 2:20 a.m. (Tr. 67). Officers Kyle Stuart and Brandon Jones of the Hattiesburg Police Department were patrolling the area. (Tr. 67). Officer Jones was following behind Officer Stuart in a separate patrol car. (Tr. 80). No crimes in the area had been reported that night. (Tr. 75,).

As the officers pulled onto Williams' street they noticed him riding his bike down the sidewalk–an act the officers considered "unusual" and/or "suspicious." (Tr. 67, 80). In this regard, Officer Stuart testified that "[Williams] was right around [Rowand Elementary] school" and he was riding his bike in "a high crime area." (Tr. 67). And according to Officer Jones, "it's very suspicious to have a - - for someone to be riding that early in the morning in front of an elementary school riding down the sidewalk. No one else is out. Pretty much everybody is in home in bed." (Tr. 80).

Allegedly, the officers believed that Williams was violating city ordinances by riding his bicycle on a city sidewalk and failing to have the proper "safety reflectors and the head lamp that it's supposed to." (Tr. 67, 80). So, they decided to stop Williams who, at the time, was only three or four houses down from his own home. (Tr. 67-68, 74, 80-81). Both Officer Stuart and Officer Jones testified that they had no intention of arresting Williams at this time. (Tr. 76, 81). Officer

Jones testified as to his intent:

Q. What was your intention at that point?

A. To conduct a field contact report, which is a form that we have at the Hattiesburg Police Department that when we out with people at this early hours in the morning in a high crime area, very well known for burglaries and different crimes of that nature, it's a form that we fill out their information, submit it into the detectives, and they have that kind of information in case a burglary was to occur at the Rowan Elementary School, they can go back and talk to that subject to find out if he saw anything or he might be a suspect at that time.

(Tr. 81). Officer Stuart also testified as to his intent:

Q. But [Williams] was - - he was doing nothing that raised any suspicion that he was doing anything dangerous when you saw him, was he?

A. Other than the violations that were committed and us wanting to make a field contact with him.

Q. Riding a bicycle down the sidewalk and you just wanted to see what he was doing there, right?

A. Yes, sir.

Q. You were patrolling for burglaries, drug users, and suspicious people, I believe is what you testified to a moment ago; is that correct?

A. Yes, sir.

Q. And you had no reason to believe that he was a burglar, did you?

A. At the time I wasn't aware.

Q. And you had no reason to believe that he was a drug user, did you?

A. At the time I wasn't aware of it.

Q. And so you just wanted to stop and just see why he was out there?

A. Yes, sir.

Q. All over riding a bicycle?

A. Yes, sir.

(Tr. 75).

As the officers approached, Williams peddled his bike into the Rowan Elementary School parking lot. (Tr. 67, 81). The officers followed and parked their cars in the parking lot without turning on their blue lights or a siren: "We did not approach it in any manner like that. It was just a casual encounter." (Tr. 82). Williams peddled his bike around the police cars and began to peddle away from the cars, apparently assuming that the police officers did not intend to stop him. (Tr. 67-69, 81-82). As Williams peddled away from the police cars, the officers were exiting their cars and ordered Williams to stop; Officer Jones then began chasing Williams,[1] who wrecked his bicycle as he looked back. (Tr. 67-69, 82-83).

Officer Stuart started to join Officer Jones in the foot-chase but opted instead to pursue Williams in his car. (Tr. 69). However, by the time Officer Stuart got in his car and looked up, the pursuit of Williams had already ended; Officer Jones had already physically retrained Williams and was attempting to handcuff him. (Tr. 69). The distance between where the officers initially noticed Williams and where Williams wrecked his bike and was restrained by Officer Jones was only about fifty (50) or sixty (60) yards. (Tr. 69, 82).

According to the officers, Williams resisted being handcuffed and appeared to be reaching for his waistband. (Tr. 70, 83-84). Allegedly, a gun fell out of Williams' waistband as the officers

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[1] At trial, the officers testified that Williams's peddling of his bicycle around the police cars and away from them led them to believe that Williams was attempting to flee "because he did not stop," and "it seemed very obvious that he did not want to talk to us and wanted to get away from our presence." (Tr. 68, 81).

struggled to handcuff him. (Tr. 70, 84).[2] Officer Stuart then drew his firearm and pointed it at Williams who was now unarmed, partially handcuffed, and physically restrained by Officer Jones. (Tr. 70). The officers recovered a 380 Loricin handgun from the ground. (Tr. 70-71, 84-85, Ex. S-2). After running Williams' information, the officers determined that he was a convicted felon,and arrested him. (Tr. 73).

Prior to trial, Williams filed a motion to suppress evidence of the firearm, his identity, and all statements and/or testimony pertaining to the firearm. (C.P. 12-13, R.E. 3-4). In his motion, Williams argued that this evidence was obtained in violation of his rights under the Forth Amendment to the United States Constitution and Section 23 of the Mississippi Constitution. (C.P. 12-13, R.E. 3-4).

At the hearing on the matter, only Officer Stuart testified. (Tr. 3-8). He testified generally in accordance with the facts stated above, i.e., that Williams was riding his bicycle down the sidewalk with no reflectors; the officers decided to stop him; Williams peddled around and away from the police cars; the officers ordered Williams to stop, Williams wrecked his bicycle as Officer Jones began to chase him; and a gun fell to the ground as the officers struggled to handcuff Williams. (Tr. 3-8). Officer Stuart acknowledged that the requirement that a bicycle have lights and reflectors applies only if the bicycle is operated on a highway (or street). (Tr. 7). He also admitted that he had never written a ticket for riding a bicycle on the sidewalk or failing to have the proper reflectors on a bicycle, and no vehicle or home had been reported stolen or broken into on the night in question.

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[2] At trial, Officer Stuart testified that, after the gun was recovered and Williams was handcuffed, he and Officer Jones searched Williams and found a holster on his waist. (Tr. 72). However, he also testified that the gun was in the holster when it fell to the ground. (Tr. 72).

(Tr. 7-8).

The State claimed that "police can approach an individual for the purpose of investigating possible criminal activities" and argued:

> [I]t was 2a.m. in the morning on a dark street. This was around a high school that an individual was riding a bicycle on the sidewalk. Of course, any police officer is going to stop and do a brief question/answer asking him if he is okay.

(Tr. 10). The State also asserted that officers had "a reason to stop" Williams because he was riding his bike down the sidewalk in violation of "city ordinance 231," and the police had probable cause to arrest Williams when he "fled." (Tr. 10). The trial court denied Williams' motion to suppress, stating simply:

> I believe the city ordinance is - - you cited a state statute, but I believe they had an adequate reason to approach Mr. Williams. When Mr. Williams ran is where the problem began. I note your motion to suppress and I'm going to overrule it in all particulars.

(Tr. 11).

The case proceeded to trial, at the conclusion of which, the jury found Williams guilty of possession of a firearm by a convicted felon. (Tr. 124, R.E. 5). At the sentencing hearing, the State attempted to prove that Williams was a habitual offender under Mississippi Code Annotated Section 99-19-81. To do this the State relied on a certified copy of Williams' prior conviction for possession of a controlled substance in 1988, which was admitted into evidence during the State's case-in-chief. (Tr. 125-26). The State also claimed that Williams had a second prior felony conviction for grand larceny that occurred in 1992. (Tr. 126). The trial court asked to see the copies; however, a copy of Williams' alleged 1992 conviction for grand larceny does not appear as an exhibit. The trial court then asked Williams if he had anything to say before sentencing, and Williams asked for mercy. (Tr. 126). The trial court then asked Williams if he was the same "James Calvin Williams that was

convicted at least twice previously," to which he responded, "Yes, Sir." (Tr. 126). The trial court adjudged Williams a habitual offender under Section 99-19-81 and sentenced him to serve the maximum term of incarceration of ten (10) years without the possibility of parole, probation, or early release. (Tr. 126, 127, C.P. 25, R.E. 6-7).

SUMMARY OF THE ARGUMENT

The State failed to prove beyond a reasonable doubt that Williams was a habitual offender under Mississippi Code Annotated Section 99-19-81. A copy of Williams alleged conviction for grand larceny in 1992 (one of the two felonies the State relied on) does not appear in the record as an exhibit and is not listed as such in the court reporter's official transcript. Under this Court's holding in *Vince v. State*, 844 So. 2d 510, 517-18 (¶¶22-26) (Miss. Ct. App. 2003), Williams is entitled to have his sentence vacated; the judgment finding him a habitual offender reversed and rendered, and his case remanded for re-sentencing.

The trial court also erred in overruling Williams' motion to suppress. The officers' seizure of Williams and the firearm violated his rights under the Forth Amendment to the United States Constitution and Article 3, Section 23 of the Mississippi Constitution. The officers did not have the authority to arrest Williams, as a violation of a city ordinance alone (as opposes to violation of a State statute, regardless of whether an ordinance is involved) is not an "indictable offense" withing the meaning of our warrantless arrest statute, Mississippi Code Annotated Section 99-3-7 (Rev. 2007). *See Letow v. U.S. Fidelity & Guaranty Co.*, 120 Miss. 763, 83 So. 81 (Miss. 1919). Additionally, if Williams encounter with police is characterized as an investigatory stop, the officers had no basis to reasonably belief that Williams was armed at the time Officer Jones arrested Williams. Further, the officers conduct far exceeded the scope of an investigatory stop, in that, Williams was immediately arrested. Therefore, the gun was the product of an unreasonable seizure,

and the trial court erred in overruling Williams' motion to suppress. Consequently, this Court should reverse Williams' conviction and render a judgment of acquittal in his favor, as the State cannot establish the charge against him without evidence of the gun.

Finally, the trial court erred in allowing the State to elicit testimony from Sergeant Mark Mitchell regarding the results of an ATF gun trace and that Williams' name appeared nowhere on the trace as a purchaser. This evidence suggested that Williams obtained the gun by theft or other illegal means. Because the State is only required to prove mere possession, evidence as to the manner in which Williams obtained the gun was irrelevant and inadmissible. Further, the probative value of this evidence, *if any*, is clearly outweighed by the danger of unfair prejudice, and this evidence was inadmissable for this reason also. Because this evidence prejudiced Williams' defense by suggesting that he obtained the gun illegally, Williams is entitled to a new trial.

ARGUMENT

I. THE STATE FAILED TO ESTABLISH THAT WILLIAMS WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED SECTION 99-19-81.

During sentencing, the State sought to prove that Williams was a habitual offender under Section 99-19-81. (Tr. 126). As explained above, the State attempted to submit into evidence a certified copy of Williams' prior offenses–a 1988 conviction for possession of a controlled substance, which was admitted during the guilt phase of the trial as Exhibit S-3 (Tr. 93, Ex. S-3) and an alleged 1992 conviction for grand larceny. (Tr. 126). However, a copy of the alleged 1992 grand larceny conviction does not appear in the record as an exhibit nor was it listed as such in the court reporter's official transcript. As explained below, the State failed to prove beyond a reasonable doubt that Williams had two prior felony offenses, and he had received a sentence of at least on (1) year for each conviction.

Although, no challenge or objection was made by Reed's trial counsel, this Court may review issues as plain error where a fundamental right of the defendant has been impacted. *Jefferson v. State*, 958 S0. 2d 1276, 1281 (¶15) (Miss. Ct. App. 2007) (citing *Moore v. State*, 755 So. 2d 1276, 1279 (¶ 9) (Miss. Ct. App.2000)). A defendant has "a fundamental right to be free from an illegal sentence." *Clark v. State*, 960 So. 2d 521, 524 (¶9) (Miss. Ct. App. 2006) (citing *Sneed v. State*, 722 So.2d 1255, 1257 (¶11) (Miss.1998)).

In order to sentence a defendant as a habitual offender under section 99-19-81, the State bears the burden of proving all of the section's elements beyond a reasonable doubt. *Vince v. State*, 844 So. 2d 510, 517 (¶22) (Miss. Ct. App. 2003). Two of the essential elements the State must prove under Section 99-19-81 are that the defendant "shall have been convicted twice previously of any felony" for which the defendant "shall have been sentenced to separate terms of one (1) year or more." Miss. Code Ann. § 99-19-81.

In the instant case, the State presented insufficient evidence to prove that Williams was convicted of grand larceny in 1992 and, also, that he was sentenced to one (1) year or more on if he was, in fact, convicted of that charge. Significantly, the alleged certified copy of the 1992 conviction does not appear as an exhibit; it was not listed as such in the court reporter's official transcript, and the record contains nothing regarding this conviction aside from the State's bare assertion of such and Williams' acknowledgment that he "was convicted twice previously."

This Court's opinion in *Vince v. State*, 844 So. 2d 510, 517-18 (¶¶22-26) (Miss. Ct. App. 2003), is controlling of this issue. In *Vince*, the State sought to prove that the defendant therein was a habitual offender under Section 99-19-81, by producing "an NCIC compilation of a defendant's criminal history" at the sentencing hearing. *Vince*, 844 So. 2d. at 517 (¶¶21-22). The court in *Vince* did not reach the issue of whether the NCIC document was sufficient to establish the defendant's

status a habitual offender; instead, the court held that the State failed to prove the defendants habitual status beyond a reasonable doubt because the NCIC document was not a part of the record, did not appear as an exhibit, and was not listed as such in the court reporter's official transcript. *Id.* at 517 (¶22). Accordingly, the court vacated Vince's sentence, reversed and rendered the judgment finding him a habitual offender, and remanded the case for the sole purpose of re-sentencing. *Id.* at 517 (¶22), 519 (¶30).

The instant case is indistinguishable in any material particular from *Vince*. The alleged certified copy of Williams' 1992 grand larceny conviction is not a part of the record; it does not appear as an exhibit; and it is not listed as such in the court reporter's official transcript. Williams acknowledgment that he was "was convicted twice previously" does not prove beyond a reasonable doubt that he was specifically convicted of the 1992 felony of grand larceny, and it certainly does not establish that he was sentenced to a term of one (1) year or more on that charge. Consequently, the State failed to prove beyond a reasonable doubt that Williams was a habitual offender under Section 99-19-81, and this Court, pursuant to *Vince*, should vacate Williams' sentence as to his habitual status, reverse and render the judgment finding him a habitual offender, and remand this case for re-sentencing.

II. THE TRIAL COURT ERRED IN OVERRULING WILLIAMS' MOTION TO SUPPRESS.

On appeal, determinations of reasonable suspicion and probable cause are subject to de novo. *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 113 (¶11) (Miss. 1999) (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663 (1996)). Also, "the trial judge's findings [are reviewed] using the applicable substantial evidence'/'clearly erroneous standard." *Id.* (citing *McNeal v. State*, 617 So. 2d 999, 1007 (Miss. 1993)). Under Mississippi law, it is well-established "that the

provisions for search and seizure are strictly construed against the state and in favor of the citizen." *Barker v. State*, 241 So. 2d 355, 358 (Miss. 1970). "If a search [or seizure] is deemed unreasonable, then all evidence seized during that search [or seizure] is inadmissible for the jury or court to consider as evidence of the defendant's guilt." *McFarlin v. State*, 883 So. 2d 594, 598 (¶9) (Miss. Ct. App. 2004) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868 (1968)).

A. The officers did not have authority to arrest Williams.

"The Fourth Amendment to the United States Constitution and Article 3, Section 23 of the Mississippi Constitution of 1890 prohibit unreasonable searches and seizures made without probable cause, except under certain limited exceptions." *Rainer v. State*, 944 So. 2d 115, 118 (¶6) (Miss. Ct. App. 2006) (citing *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157 (1982)); *Walker v. State*, 881 So. 2d 820, 827 (¶14) (Miss. 2004)).

Under Mississippi law, "an arrest occurs when a person is subjected to actual or constructive seizure or detention of [his person], or his voluntary submission to custody. . . ." *Jones v. State*, 841 So. 2d 115, 126 (¶19) (Miss. 2003) (quoting *Bearden v. State*, 662 So. 2d 620, 623 (Miss. 1995)); *see also*, *Harper v. State*, 635 So. 2d 864 (Miss. 1994) ("an arrest requires 'either physical force ... or, where that is absent, submission to the assertion of authority.'")(quoting *California v. Hodari*, 499 U.S. 621, 626, 111 S.Ct. 1547, 1551 (1991)). Thus, under the facts of the instant case Williams was arrested no later than the moment that Officer Jones physically restrained him and attempted to handcuff him.

Mississippi Code Annotated Section 99-3-7 addresses warantless arrests and provides in pertinent part that:

> (1) An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or

> when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it. . . .

Miss. Code Ann. §99-3-7(1). Under this Section, a police officer may make a warantless arrest "for an *indictable offense* committed . . . in his presence." Miss. Code Ann. § 99-3-7. As explained below, Williams' conduct did not amount to an "indictable offense" within the meaning of Section 99-3-7; therefore, the officers lacked authority to arrest him without a warrant.

In the instant case, the officers claimed that Williams violated city ordinances by (1) riding his bicycle without the proper reflectors and headlamps, and (2) riding his bike down the sidewalk. (Tr. 4-5, 67, 80).

Under Mississippi Code Annotated Section 21-13-19,[3] a municipality "has authority to declare as offenses against it conduct declared unlawful as misdemeanors under the laws of the state." *Sartain v. City of Water Valley*, 528 So. 2d 1125 (Miss. 1988) (citing Miss. Code Ann. § 21-13-19 (1972)). The City of Hattiesburg exercised this right and included an ordinance providing as much. See Hattiesburg, Ms., Code of Ordinances ch. 1, § 1-9 (2009).

Williams' alleged failure to have the proper reflectors or headlamps on his bicycle is controlled by Mississippi Code Annotated Sections 63-7-7 and 63-7-13(4), which require that a bicycle operated on a "highway" must have a headlamp and reflectors. Miss. Code Ann. § 63-7-7

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[3] Mississippi Code Annotated Section 21-13-19 provides in pertinent part as follows:

> All offenses under the penal laws of this state which are misdemeanors, together with the penalty provided for violation thereof, are hereby made, without further action of the municipal authorities, criminal offenses against the municipality in whose corporate limits the offenses may have been committed to the same effect as though such offenses were made offenses against the municipality by separate ordinance in each case. . . .

and 63-7-13(4) (Rev. 2004).[4] Because Williams was riding his bike on the sidewalk, he was not in violation of this statute. Therefore, the officers lacked authority to arrest him for this.

As to riding a bike on the sidewalk, the State (at the suppression hearing) cited "city ordinance 231" as controlling. (Tr. 10). The State produced no copy of the ordinance. Apparently, the State was referring to Hattiesburg City Ordinance 23-11, which provides as follows:

> Bicycles, etc. on sidewalks; penalty.
>
> It shall be unlawful for any person to ride a bicycle, skateboard, scooter, skates or other wheeled vehicles on the sidewalks or any other posted city property within the limits of the city.

Hattiesburg, Ms., Code of Ordinances ch. 23, art. I, § 23-11 (2009).

Although Williams apparently violated this ordinance on the night in question, the officer had no authority to arrest him because, as explained below, a violation of a city ordinance alone (as opposes to violation of a state statute, regardless of whether an ordinance is involved) is not an "indictable offense" withing the meaning of Section 99-3-7.

In *Letow v. U.S. Fidelity & Guaranty Co.*, 120 Miss. 763, 83 So. 81 (Miss. 1919), the Mississippi Supreme Court addressed whether police had authority to make a warantless arrest for the defendant's violation of a city ordinance requiring possessors of land abutting sidewalks to keep the sidewalks free from obstructions. *Letow*, 83 So. 2d at 82. In *Letow*, the court rejected the contention that the police had authority to make a warantless arrest under the predecessor to Section 99-3-7 (section 1447, Code of 1906 (section 1204, Hemingway's Code)) for a violation of the city ordinance. *Id.* at 82-83. In so doing, the court held that a violation of a municipal ordinance is not

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[4] "Highway" is defined as "every way or place of whatever nature open to the use of the public for the purpose of vehicular travel, and shall include streets of municipalities." Miss. Code Ann. § 63-1-3 (Rev. 2004).

an "indictable offense" within the meaning of Section 99-3-7 *Id.*

More recently, in *Pulliam v. City of Horn Lake, Mississippi*, 32 F.3d 565 (5th Cir. 1994), the Fifth Circuit Court of Appeals rejecting the contention that violation of a municipal ordinance only authorized a warrantless arrest under Section 99-3-7. *Pulliam*, 32 F.3d 565.[5] In so doing, the court analyzed Section 99-3-7 in light of *Letow* and *Paramount-Richards Theatres v. City of Hattiesburg*, 49 So.2d 574 (Miss.1950), a case that a party claimed to have overruled *Letow*. *Id.* The court noted thatt noted that the conduct at issue in *Paramount-Richards* "violated both a state statute and a city ordinance[;]" whereas the conduct at issue in *Letow*, violated only a city ordinance, as did the conduct in the *Pulliam* case. *Id.* The court concluded by explaining:

> In sum, *Letow* and *Paramount-Richards* are in harmony; **conduct that violates a municipal ordinance, by itself, is not an 'indictable offense' within the meaning of [Mississippi Code Annotated Section 99-3-7] (Letow); conduct that violates a state criminal statute, regardless of whether an ordinance is in play, is (Paramount-Richards)**. The district court recognized correctly that violation of the ordinance was not an arrestable offense under state law.

Id.

In the instant case, Williams violated *only* a city ordinance by riding his bicycle down the sidewalk. Accordingly, his conduct does not amount to an "indictable offense" under Mississippi Code Annotated Section 99-3-7, and the officers (or rather Officer Jones) lacked authority to arrest Williams at the moment he physically retrained Williams and began handcuffing hm, i.e., at the moment Williams was arrested.[6] Significantly, the gun was only discovered after, and as a result of

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5 Although the *Pulliam* is assigned a citation in the Federal Reporter, it appears the case was not selected for publication.

6 It should also be noted that Williams' arrest and the gun's seizure cannot be justified on his alleged "attempt to flee," because one has the right to resist an unlawful arrest. *Smith v. State*, 128 So.2d 857 (Miss. 1961). Moreover, the contention that Williams was fleeing at

Williams' arrest–it allegedly fell to the ground during Officer Jones' struggle to handcuff Williams second hand. Consequently, evidence of the gun was the fruit of an unlawful seizure, and the trial court erred in overruling Williams' motion to suppress evidence of the firearm.

B. Williams seizure was unreasonable even if characterized as an investigative stop, as the facts did not permit a reasonable belief that Williams was armed, and, further, the officers conduct far exceeded the permissible scope of such a stop if warranted.

Under *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868 (1968), a police officer may make a brief investigative stop so long as the officer possesses "a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 675 (2000) (citing *Terry*, 392 U.S. at 30, 88 S.Ct. 1868); *See also Florida v. Royer*, 460 U.S. 491, 499, 103 S.Ct. 1319 (1983) (*Terry* stop proper upon "articulable suspicion that a person has committed or is about to commit a crime."); *Dies v. State*, 926 So. 2d 910, 918 (¶22) (Miss. 2006) (citation omitted).

The reasonableness of a *Terry* stop is determined under a two-prong inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19-20.

Under *Terry*, officers are allowed to conduct "a limited search-a pat-down for weapons-for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous." *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574 (1975) (citing *Terry*, 392 U.S., at 19 n. 16, 88 S.Ct. at 1879)). However, to do so the officer must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts,

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all is very weak, as Williams rode his bicycle around the police cars (which turned on neither a light nor a siren) and began peddling away from the cars before the officers ordered him to stop. Furthermore, his flight ended as quickly as it began–he began peddling away; the officers ordered him to stop; and he wrecked his bike when turned to look back at the officers, who had just then indicated that they intended to stop him.

reasonably warrant' a belief that his safety or that of others is in danger." *Id.*

In the instant case, the officers, at the time Officer Jones physically restrained and began handcuffing Williams (i.e., arrested him) had no reason to believe that Williams was armed . It was only later, during the course of the struggle, that Williams allegedly began reaching for his waistband and the gun allegedly fell onto the ground. Significantly, this Court has held that "the reasonableness of official suspicion must be measured by what the officers knew *before* they initiated the search [or seizure]." *Rainer*, 944 So. 2d at 118 (¶6) (citing *Florida v. J. L.*, 529 U.S. 266, 271, 120 S.Ct. 1375 (2000)) (emphasis in original). Therefore, under the first prong of the *Terry* reasonableness inquiry, the officers action was not justified at its inception, as they did not possess a reasonable belief that Williams was armed. Thus, the officers conduct was unreasonable, and they lacked authority to conduct a *Terry* pat-down for weapons. .

Should this court determine that the officers had a reason to conduct a *Terry* stop, the officers conduct was not reasonably related to the reason that justified the stop in the first place, and Officer Jones' conduct in immediately executing a full-blown arrest far exceeded the scope of a permissible investigatory stop.

The Mississippi Supreme Court has explained that an "improper seizure results when an investigative stop of a suspect exceeds its limitations." *McCray v. State*, 486 So. 2d 1247, 1250 (Miss. 1986) (citing *Florida v. Royer*, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326 (1983)).

To this end, this Court addressed a situation factually and legally similar to that of the instant case in *Carr v. State*, 770 So. 2d 1025 (Miss. Ct. App. 2000). In *Carr*, police officers were patrolling an area after a reported auto burglary when they noticed the defendant riding his bicycle down the street with a cordless telephone in his hand and a flashlight sticking out of his pocket. *Carr*, 770 So. 2d at 1027 (¶2). A police officer ordered the defendant to stop, but the defendant dismounted his

bicycle and fled on foot as the officer approached him. *Id.* at (¶3). After a chase, officers detained the defendant, searched him, and discovered gold jewelry and another person's checkbook, which was allegedly taken in a home burglary. *Id.* at (¶4).

On appeal, the defendant argued that the evidence was the product of an unreasonable search and seizure, as he did not consent and he was arrested without a warrant and/or probable cause. *Id.* at (¶6). The *Carr* court easily found that the officers lacked probable cause to arrest the defendant when they saw him riding down the street on his bicycle. *Id.* at (¶8). This Court then held that the defendant's riding a bicycle at 2:30 a.m. in an area where a crime had just been reported gave the officers reason "to undertake a brief investigatory stop to determine the circumstances of that individual's presence in that area." *Id.* (citing *Floyd*, 749 So. 2d 110). This Court noted that officers may conduct a *Terry* stop; however, it found that the officer's conduct was "substantially more intrusive than a *Terry* patdown." *Id.* at (¶9) (citing *Terry*, 392 U.S. 1, 88 S.Ct. 1868).

In reversing the trial court's denial of the defendant's motion to suppress, this Court concluded:

> The fact, standing alone, that Carr fled rather than voluntarily submit to the officer's verbal command to stop justified further investigatory work by the officer, *but it did not give rise to reasonable cause to arrest. Absent a lawful arrest, there could, of course, be no search incident to arrest.* Carr's motion to suppress those items discovered as the result of his detention and involuntary search had merit and should have been granted.

Id. at (¶10) (emphasis added).

Turning to the instant case, even assuming that the officers had a reasonable suspicion justifying a brief investigatory stop of Williams, their conduct was not reasonably related in scope to the reason justifying the stop. The officers decided to stop Williams for riding his bike on the sidewalk with no reflectors. (Tr. 67-80). The officers parked their cars without turning on their blue

lights or sirens, and Williams peddled around the cars and away from them, apparently believing that they did not intend to stop him. (Tr. 67-69, 81-82). At this time, the officers ordered Williams to stop, and he wrecked his bicycle as he turned to look back at them. (Tr. 67-69, 81-82). Under *Carr*, the officers' conduct was unreasonable and far exceeded the permissible scope of the stop, notwithstanding Williams' alleged flight.[7]

C. Conclusion

By enacting an ordinance against riding a bicycle on a sidewalk, the City of Hattiesburg has attempted to make wholly innocent conduct the subject of criminal prosecution. As evidenced by Williams' experience on the night in question, this ordinance is readily susceptible to arbitrary and discriminatory enforcement and, for all practical purposes, it allows police to exercise unfettered power to arrest citizens partaking in ordinary, common behavior.

Fortunately, prior Mississippi case law protects against this abuse of police power by holding that violation of *only* a municipal ordinance is not an "indictable offense" under Section 99-3-7. Therefore, the officers lacked probable cause to arrest Williams. Additionally, the officers conduct was not reasonable even if considered an investigatory stop because the officers had no specific and/or articulable facts from which they could possess a reasonable belief that Williams was armed.

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It should be noted that Williams alleged flight did not justify the officers' conduct, as a defendant's "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Rainer*, 944 So. 2d at 118 (¶6) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673 (2000)). To this end, "unprovoked flight" at the sight of police, as distinguished from "going about one's business," only provides the police with reasonable suspicion to make a brief investigatory stop. *See Wardlow*, 528 U.S. at 124-25, 120 S.Ct. 673; *Rainer*, 944 So. 2d at 118-19 (¶¶7-8). Furthermore, one has the right to resist an unlawful arrest, *see Smith v. State*, 128 So.2d 857 (Miss. 1961), and as demonstrated above, Williams' arrest under the municipal ordinance was unlawful.

Beyond all this, the officers conduct far exceeded the scope of an investigatory stop–it was a full blown arrest!

Because Williams' arrest (unreasonable seizure) occurred before the officers discovered the gun or had reason to suspect that Williams had a gun, the gun's seizure was the fruit of the poisonous tree; therefore, the trial court erred in overruling Williams' motion to suppress evidence of the gun.

Finally, because the State cannot prove that Williams possessed a firearm without evidence of the firearm, this Court should reverse the conviction and sentence entered in the trial court and render a judgment of acquittal in Williams's favor. Alternatively, Williams submits that he is entitled to a new trial.

III. THE TRIAL COURT ERRED IN ALLOWING MARK MITCHELL TO TESTIFY THAT HE TRACED THE GUN'S HISTORY OF OWNERSHIP, AND WILLIAMS' WAS NOT LISTED AS A PURCHASER.

At trial, the State called Sergeant Mark Mitchell of the Hattiesburg Police Department as a witness. (Tr. 98). Sergeant Mitchell testified that he ran a trace of the gun recovered at the scene on the ATF data base in order to determine its ownership history–when and buy whom it was purchased. (Tr. 95-97). During Sergeant Mitchell's direct examination, the State showed him a copy of his trace results (what was marked as Exhibit S-4 for identification) and began to question him regarding the results. (Tr. 97, Ex. S-4 ID only).

Defense counsel then objected to the line of questioning as irrelevant and implied that the State was using it to infer that Williams obtained the gun illegally, a fact immaterial to the charge of possession of a firearm by a convicted felon. (Tr. 97-98). However, the trial court allowed the State to proceed by simply saying "Let's just see where this is going." (Tr. 98).

The State asked Sergeant Mitchell if Williams name was listed as a purchaser of the gun

anywhere in the trace results, to which Mitchell responded, "No, sir." (Tr. 98). The State then announced that it had no further questions. (Tr. 98). Before the State called its next witness, it moved to admit the gun trace document (Ex-S-4 marked for ID only) into evidence, and defense counsel renewed his earlier objection on the grounds of relevance. (Tr. 99-100). The trial court then sustained defense counsel's objection. (Tr. 100).

However, the damage was already done, as the State had been allowed to question Sergeant Mitchell about the gun trace results in a manner that suggested that Williams obtained the gun by illegal means. As explained below, Mitchell's testimony was irrelevant and inadmissible. Further, the probative value of this evidence, *if any*, was substantially outweighed by the danger of unfair prejudice, and it was inadmissible for this reason also.

This Court reviews the trial court's decision to admit or exclude evidence under the abuse of discretion standard of review. *King v. State*, 994 So. 2d 890, 897 (¶23) (Miss. Ct. App. 2008) (citing *Herring v. Poirrier*, 797 So. 2d 797, 804 (¶18) (Miss. 2000)). "However, the discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence." *Kea v. State*, 986 So.2d 358, 361 (¶12) (Miss. Ct. App. 2008) (quoting *Stubbs v. State*, 878 So. 2d 130, 134(¶7) (Miss. Ct. App. 2004)).

Mississippi Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. "Evidence which is not relevant is not admissible." M.R.E. 402.

To prove the crime of possession of a firearm by a convicted felon, the State is required to prove but two simple elements: "(1) possession of a firearm; (2) by one who has been convicted of a felony." *Short v. State*, 929 So. 2d 420, 427 (¶21) (Miss. Ct. App. 2006); Miss. Code Ann. §

97-37-5(1) (Rev.2006). Thus, the manner in which a defendant came into possession of the gun is not a fact of consequence in a prosecution under Section 97-37-5(1). It only necessary that the defendant possessed a gun. Accordingly, evidence as to how Williams obtained the gun was irrelevant, and the trial court erred in allowing Mitchell's testimony over defense objection.

Even if this evidence could somehow be considered relevant, it was still inadmissible because its probative value, if any, is surely outweighed by the danger of unfair prejudice. See M.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."). The State elicited testimony from Mitchell that Williams name appeared nowhere in the trace results as a purchaser. (Tr. 98). This testimony served only to prejudice Williams' defense by inferring that Williams obtained the gun by theft or means otherwise illegal. Therefore, the trial court erred in allowing the State to elicit this testimony from Sergeant Mitchell. Because this evidence prejudiced Williams' defense, he is entitled to a new trial.

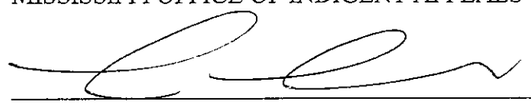
CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Williams respectfully requests this Court to reverse the trial court's judgment of conviction for possession of a firearm by a convicted felon, render a judgment of acquittal, and order Williams's immediate release. If this Court determines that acquittal is not proper, Williams requests that this Court vacate and/or reverse and render the portion of the judgement finding him a habitual offender, and remand this case for the sole purpose of re-sentencing pursuant to this Court's holding in *Vince*, 844 So. 2d at 517-18 (¶¶22-26).

Alternatively, Williams requests this Court to reverse and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for James Calvin Williams, 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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