

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-KP-01373

WELDON FOXWORTH

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF FOR APPELLANT

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The State of Mississippi has filed its brief in this case asking that the appeal be dismissed on the premises that the appeal is in the wrong court and that this court has no jurisdiction. Appellant would assert that the state's argument is incorrect because of the following:

REPLY ARGUMENT

PROPOSITION ONE

a) Appellant had a right to appeal the sentence of the trial court directly to the Supreme Court under the procedure which this Court fashioned in Trotter v. State, 554 So.2d 313, 86 A.L.R. 4th 327 (Miss. 1989) which has been since recognized in other cases.

"[W]hile [Mississippi Code Annotated] section 99-35-101 (Rev. 2007) prevents a defendant from appealing his guilty plea itself, a defendant may pursue a direct appeal asserting the illegality of the sentence imposed pursuant to his guilty plea." Flowers v. State, 978 So. 2d 1281, 1285 (¶11) (Miss. Ct. App. 2008). There is no rule, yet, that a circuit court judge must inform a defendant who pleads guilty that he has the right to appeal his sentence. The argument made by the state regarding the jurisdiction of this Court holds no merit where Foxworth could appeal either, or both, of the proceedings in

the trial court to this Court directly. Trotter allows a criminal defendant who pleads guilty to "challenge the sentence that results from the guilty plea on direct appeal[.]. . . . [it] does not stand for the proposition that a trial judge must inform a criminal defendant about his right to directly appeal the sentence resulting from the guilty plea." Coleman v. State, 979 So. 2d 731, 733 (¶4) (Miss. Ct. App. 2008). Foxworth is not asserting that the trial court was obligated to advise him of his right to appeal the guilty plea. Such an issue is not necessary in this case where the Notice of Appeal was timely filed.

The state's argument on this issue must fail where this Court has jurisdiction of the appeal no matter whether it be from the verdict of the jury or from the plea of guilty. The state further fail to recognize that Foxworth was initially convicted by the jury of the same identical crimes in which he was subsequently convicted of by a plea of guilty. The verdicts of the jury must stand where there is no order by the trial court a to set aside the verdicts or an order from this Court reversing such verdicts. The appeal in this case was actually from the jury verdicts and not the plea of guilty where the pleas of guilty was legally devoid since the trial court had no authority or jurisdiction to accept a plea of guilty to charges which had previously been disposed of by the jury.

PROPOSITION TWO

b) Appellant was subjected to double jeopardy, in violation of the 5th and 14th Amendments to the United States Constitution, where he was subjected to convictions on the exact same charges on two separate occasions.

The Fifth Amendment's protection against double jeopardy, by its very nature, typically applies to criminal proceedings. Breed v. Jones, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 246 (1975). "Double jeopardy allows a defendant to be protected against . . .

multiple punishments for the same offense." *Houston v. State*, 887 So. 2d 808, 814 (¶23) (Miss. Ct. App. 2004) (citing *Greenwood v. State*, 744 So. 2d 767, 770 (¶14) (Miss. 1999)). The same elements test is used to determine whether or not double jeopardy attaches. *Id.* If the offenses contain the same elements, "they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *Id.*

In the instant case Foxworth was prosecuted successfully for the offenses of possession of marijuana and possession of cocaine with the intent to distribute as well as conspiracy to possess and distribute. The jury heard the charges and reached a finding of guilty in regards to such charges. (R. pp. 50-52) In lieu of imposing sentence, the trial court allowed the defendant to enter a plea guilty to the offenses of simple possession of marijuana and cocaine. The conspiracy charge, even after a jury had rendered a guilty finding, was dismissed.¹

The current case exemplifies what the United States Supreme Court projected as unworkable jurisprudence lacking constitutional and statutory legs. It is noteworthy that the record in this case reflects that misdemeanor reckless driving charges were pending in justice court at the time of trial. Normally, double jeopardy would not attach to two offenses overlapping from the same transaction or occurrence so long as one of the offenses contained an element not present in the other. *Graves v. State*, 969 So. 2d 845, 847 (¶¶8-9) (Miss. 2007) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

PROPOSITION THREE

¹ This case represents a case of first impression where jury convictions are disregarded by the Court and pleas of guilty to lesser offenses are substituted. The only possible explanation to such an action would be that the state was convinced the convictions would not withstand an appeal. This is the only logical explanation where a jury has went to the time and the state to the expense of a trial by jury and concluded that trial to have the verdicts voluntarily disregarded. However, this tactic should not suffice where it offended the double jeopardy clause.

c) The sentence imposed upon Appellant was excessive which is the driving force of the appeal in this case. The state proceeded with the charges of mere possession of marijuana and cocaine. The indictment fails to set forth the amount of such substances which was involved in the offense. The amount of such controlled substance constitutes a crucial element in sentencing. The Court imposed a sentence of 30 years on each count of possession of marijuana and possession of cocaine. The law allows 30 years to be imposed for possession of cocaine only where the amount involved 30 grams or 40 dosage units or more. Miss. Code Ann. Sec. 41-29-139 (c)(1)(E). The indictment failed to charge such amount. In the case of possession of marijuana, the statute permits a 30 year sentence only where the amount possessed is five (5) kilograms or more. Miss. Code Ann. Sec. 41-29-139 (c)(2)(G). Again, the indictment never charged said amount. (R. Vol. 1 pp. 7-12)

Even if the Court reject Appellant's double jeopardy argument and allow the guilty pleas to stand, Foxworth has been sentenced illegally and excessively. The Court was not authorized to impose a 30 year sentences for mere possession under the contents of the indictment filed in this case. This Court must reject the argument by the state as it relates to the jurisdiction issue the pleas of guilty because Foxworth had the right to directly appeal the sentence to this court as being illegal and excessive. On the jury verdict, Foxworth had a statutory right to appeal the conviction and sentence.

CONCLUSION

Foxworth would respectfully ask this Court to reject the state's argument and find that Appellant suffered a violation of his constitutional rights under the 5th and 14th Amendment where the trial court had no jurisdiction to subject Appellant to double

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