IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OTTIS J. CUMMINGS **APPELLANT**

V. **NO. 2009-KA-0317-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Otis J. Cummings, Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable Clarence E. Morgan, III, Circuit Court Judge

This the 10 day of June, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Benjamin A. Suber
COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Choctaw County, Mississippi, and a judgment of conviction for the crime of Felony Driving Under the Influence against the appellant, Ottis J. Cummings. The trial judge subsequently sentenced the Appellant as a Habitual Offender pursuant to Section 99-19-83 of the Mississippi Code Annotated of 1972, to life imprisonment in the custody of the Department of Corrections. C.P. 56-57, R.E. 14. The conviction and sentence followed a jury trial on February 18, 2009, Honorable C. E. Morgan III, Circuit Judge, presiding. Cummings is currently in the custody of the Mississippi Department of Corrections.

FACTS

On or around May 19, 2008, Ottis Cummings (Cummings) was pulled over and arrested for suspicion of driving under the influence of alcohol. According to the testimony of Cummings, he had been working on a car for his nephew. Tr. 75. Cummings stated that from around four o'clock that afternoon till around ten o'clock that night he was putting a motor in a car. *Id.*

When Cummings quit working, he left and was on his way home. *Id.* Cummings decided to buy a beer before he left Louisville. Tr. 78. Cummings bought a thirty-two ounce beer, and he drank about one-fourth of the beer in the can. Tr. 75-78. After drinking a few sips of the beer, Cummings could not even drink the beer and placed the beer in the floorboard. Tr 77.

As Cummings was driving northbound on Highway 15 in Choctaw County, Officer John Marolt (Marolt) pulled over Cummings. Tr. 74. According to Cummings as soon as he observed blue lights, he tried to pull over to the right. *Id.* Due to the drop-off and dangerous terrain on the right side of the road, Cummings turned on his left turn signal and crossed Highway 15. *Id.* Cummings testified that by driving across the highway was the safest place to pull over for Marolt. Tr. 75.

Marolt claimed that he was sitting stationary on Highway 15 in Choctaw County at Woodmen of the World. Tr. 51. Marolt stated that he observed a van traveling eighty miles per hour. Tr. 52. Marolt indicated that after he caught up with the van, he initiated his blue lights. Tr. 53. Upon the issuance of the blue lights, Marolt claims that the van left the roadway on the right side, then came back onto the roadway, and then crossed back over the north and southbound lanes before it came to rest in a driveway. *Id.*

Marolt contends that when he approached the vehicle, the driver was holding the wheel with his forehead resting on the steering wheel. Tr. 54. Marolt stated that he could immediately smell the odor of intoxicating beverage. *Id.* As Marolt began talking to the driver, he noticed that the driver's speech was slurred and his pupils were dilated. *Id.*

Marolt further testified that he asked the driver if he had been drinking, to which the driver replied he had drank one beer. *Id.* When Marolt opened the door and asked the driver to step out of the vehicle, the driver stumbled and Marolt grabbed his arm and placed him into custody. *Id.*

Cummings asserts that once he pulled over for Marolt, Marolt jerked him out of the van. Tr. 77. Cummings testified that while he was working under the car that night some grit fell into his eyes and that could account for his red eyes. Tr. 75-76. Cummings also stated that he only drank a small amount of beer out of the beer can and placed the can in the floor board. Tr. 75. The beer in the floor was open, three fourths full, and Cummings claims that was the only beer that he consumed that night. *Id.* Cummings told the court that he takes around forty-five pills a day for being HIV positive and taking a lot of medicine could explain his condition on the night in question. Tr. 76.

Cummings was taken to jail where he refused the Intoxilyzer and was subsequently charged and convicted of Felony Driving while Under the Influence.

SUMMARY OF THE ARGUMENT

Appellant asserts that a life sentence without parole for essentially drinking a small amount of beer is unconstitutionally too severe and clearly disproportionate to the offense. A ***Solem*** analysis leads to the legally sound conclusion that Cummings' sentence is patently unconstitutionally disproportionate to his offense and should be vacated.

The verdict was also against the overwhelming weight of the evidence. It is not unreasonable to assume that an open beer in the floor could cause Marolt to smell an intoxicating beverage when he approached the vehicle. Furthermore, due to Cummings around forty-five (45) pills for being HIV positive; the effect of the pills could have had an effect similar to that of being under the influence of alcohol. The verdict was against the

overwhelming weight of the evidence and this was reversible error. Cummings is entitled to a new trial.

ARGUMENT

ISSUE NO. 1

CUMMINGS' SENTENCE OF LIFE IN PRISON WITHOUT PAROLE AS AN HABITUAL OFFENDER FOR FELONY DRIVING UNDER THE INFLUENCE IS DISPROPORTIONATE TO THE CRIME AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Cummings asserts that a life sentence without parole is unduly harsh and constitutes cruel and unusual punishment. As alleged in the indictment, the prosecution submitted evidence that Cummings had two prior felonies and one conviction in 1979 for Burglary and sentenced to a term of five (5) years with two (2) suspended in the custody of the Mississippi Department of Corrections. Tr. 113-14, Exhibit S-B. Furthermore the prosecution alleged that Cummings was convicted 1979 for Aggravated Assault and sentenced to a term of two (2) years in the custody of the Mississippi Department of Corrections. Tr. 113-14, Exhibit S-C. Also, in 2000, Cummings was convicted of a felony DUI and was sentenced to two (2) years and six (6) months in the custody of the Mississippi Department of Corrections.

Appellant asserts that a life sentence without parole for consuming a small amount of beer is unconstitutionally too severe and clearly disproportionate to the offense. U.S. Const. Eighth and Fourteenth Amendments, Miss. Const. Art. 3 § 28.

The United States Supreme Court in ***Solem v. Helm***, 463 U.S. 277, 292 (1983), set out three factors for courts to consider when conducting a proportionality analysis. The criteria are:

(1) the gravity of the offense and the harshness of the penalty;

(2) the sentences imposed on other criminals in the same jurisdiction; and

(3) the sentences imposed for commission of the same crime in other jurisdictions.

In ***Solem***, the Court held a life sentence without parole to be unconstitutional for the crime of writing a $100 bad check on a nonexistent bank account, even though the defendant had been convicted of six prior felonies including three for burglary. *Id.*

The Mississippi Supreme Court has consistently applied ***Solem*** in reviewing the imposition of habitual sentences. The case of ***Clowers v. State***, 522 So.2d 762, 764 (Miss.1988), is a good example. In ***Clowers***, the defendant was an habitual offender with a new conviction of forging a $250 check. As an habitual offender, Clowers was subject to the mandatory maximum sentence of fifteen years without parole. *Id.* The trial court imposed a sentence of less than fifteen years on the grounds that the mandatory maximum sentence would be disproportionate to the crime. *Id.*

The ***Clowers*** Court affirmed the trial court, acknowledging that "a criminal sentence [even though habitual] must not be disproportionate to the crime for which the defendant is being sentenced." *Id* at 765. Also, even though a trial judge may lack the usual discretion in sentencing an habitual offender, it "does not necessarily mean the

prescribed sentence meets federal constitutional proportionality requirements." *Id.* See also ***Hoops v. State***, 681 So.2d 521, 538 (Miss. 1996).

In ***Oby v. State***, 827 So.2d 731 (Miss.App. 2002), where a violent habitual drug dealer's life sentence was affirmed as being proportionate, the Court reiterated the important point that in a ***Solem*** review, a "correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute." In other words, a reviewing court, and the trial court, should review an offender's past offenses together with the present offense.

In ***McGruder v. Puckett***, 954 F.2d 313, 317 (5th Cir.1992), the court recognized the ***Solem*** three-part test be applied "when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." The violent habitual defendant in ***McGruder*** was sentenced to life imprisonment after his last offense of auto burglary. McGruder's prior convictions were armed robbery, burglary, escape, and auto burglary, and the Fifth Circuit held that McGruder's life sentence was not grossly disproportionate to his current offense. The ***McGruder*** Court made it clear that an habitual sentence analysis is based on the sentence rendered in response to the severity of the current offense taking the prior offenses into consideration secondarily.

Cummings' criminal record, as evidenced by what is included in the record, was not nearly as bad as McGruder's. Furthermore, Cummings' prior violent offenses were thirty (30) years old. Cummings more recent offenses were felony DUI's.

In ***Rummel v. Estelle***, 445 U.S. 263, 267 (1980), the defendant had two prior felonies of credit card fraud and uttering a forgery, and was convicted of a third felony of false pretenses. Rummel was sentenced to life in prison, a mandatory recidivist sentence for non-violent offenders. The Court held that Rummel's sentence was not unconstitutionally disproportionate to the offense "even though the total loss from the three felonies was less than $250," in part because he was eligible for parole after twelve (12) years. However, Cummings has no hope for parole.

In ***Bell v. State***, 769 So.2d 247, (¶8-16) (Miss. App. 2000), a drug dealer was tried and sentenced as a non-violent habitual offender. The trial judge reviewed Bell's prior convictions and afforded Bell the opportunity to present mitigating evidence. According to the court in ***Bell***, the trial judge is required to justify, on the record, any sentence that appears harsh or severe for the charge. Citing ***Davis v. State***, 724 So. 2d 342 (¶10) (Miss. 1998), the ***Bell*** Court recognized that, "[i]n essence, the Mississippi Supreme Court set forth a requirement that the trial judge justify any sentence that appears harsh or severe for the charge." *Bell*, 769 So. 2d at ¶15.

The previous convictions of Bell were acknowledged by the trial judge at the sentencing hearing prior to Bell receiving his habitual sentence. The *Bell* court "considered the gravity of the offense with the harshness of the sentence before imposing the thirty year sentence" which was a proper use of "the broad discretionary authority granted to it." Bell's sentence was not seen as disproportionate, so no further review under ***Solem*** was conducted. *Id.* at ¶16.

In the present case, Cummings was convicted of felony driving under the influence. Yet, without commenting on the apparent harshness of the sentence, the court sentenced Cummings, in accordance with Miss. Code Ann. §99-19-83, to life imprisonment without the possibly of parole.

Applying the ***Solem*** test here, it is clear that the gravity of a felony DUI, with no results with the Intoxilyzer, only one (1) can of beer in the vehicle that was mostly full, and the fact that Cummings had red eyes is unreasonable. A ***Solem*** analysis leads to the legally sound conclusion that Cummings sentence is patently unconstitutionally disproportionate to his offense and should be vacated. Cummings case should be remanded for resentencing, with him present, to include a proportionality hearing is required by ***Bell***, *supra*.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING CUMMINGS' MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Should this Court reject Cummings contention that the sentence is unconstitutionally disproportionate to his offense, Cummings asserts, in the alternative, that not granting Cummings a new trial was against the overwhelming weight of the evidence.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing

Herring v. State, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical thirteenth juror." ***Lamar v. State***, 983 So. 2d 364, 367 (¶5) (Miss. App. 2008) (citing ***Bush***, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'" *Id.*

Cummings had a beer in the floor board that was approximately three-fourths full. Tr. 75. It is not unreasonable to assume that an open beer in the floor could cause Marolt to smell an intoxicating beverage when he approached the vehicle. That beer can was the only beer can found in the vehicle. Cummings testified that the only beer he had drank all day was from the can that in found in the floor board of the vehicle. Tr. 77.

Cummings also stated that the was taking approximately forty-five (45) pills for being HIV positive. Tr. 76. The effect of the pills on Cummings is unknown, but could have had an effect similar to that of being under the influence of alcohol. The effect of these pills could have been the reason that Cummings had red eyes, slurred speech, or any other reasons.

Since Cummings refused the Intoxilyzer, no results were presented to the court. Cummings stated that he had not been drinking and other than the testimony of the state trooper, no other evidence is present that Cummings had in fact drank any intoxicating beverages.

In light of the above-detailed evidence, the verdict reached in the instant case is contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an injustice. Therefore, the trial court erred in denying Cummings' motion for a new trial, and this Court should reverse Cummings' conviction and remand this case for a new trial.

CONCLUSION

A ***Solem*** analysis leads to the legally sound conclusion that Cummings' sentence is patently unconstitutionally disproportionate to his offense and should be vacated. Cummings also assents that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Ottis J. Cummings, Appellant

BY: 

BENJAMIN A. SUBER
[redacted]

CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Otis J. Cummings, 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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This the 10 day of June, 2009.

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