IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IVAN RUSSELL MCCLELLAN — APPELLANT

VS. — NO. 2009-KA-0327-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2009-KA-0327-SCT**

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STATEMENT OF ISSUES

I. THE TRIAL COURT PROPERLY DENIED MCCLELLAN'S MOTION TO SUPPRESS.

II. THE JURY'S VERDICTS ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT DID NOT ALLOW ALLEGEDLY IMPROPER IMPEACHMENT EVIDENCE, AS THE DEFENDANT CHOSE NOT TO TESTIFY.

IV. THE OFFENSES OF POSSESSION OF TWO OR MORE PRECURSORS AND POSSESSION OF 250 DOSAGE UNITS OF PSEUDOEPHEDRINE ARE NOT SUBJECT TO THE MERGER DOCTRINE.

STATEMENT OF FACTS

On the afternoon of December 5, 2007, Columbus Police Department Officer John Pevey responded to a call from dispatch advising that a white male and white female made a large purchase of pseudoephedrine from Fred's Dollar Store. T. 80. Dispatch also advised that the couple left the store in an older model blue vehicle. T. 81. Mississippi Bureau of Narcotics Agent Eddie Hawkins communicated with Officer Pevey via radio that he would report to Fred's to speak

with the employee who alerted authorities about the purchase so that Officer Pevey could attempt to locate the couple in the blue vehicle. T. 82. After speaking with the Fred's employee, Agent Hawkins advised Officer Pevey that the individuals in question were Ivan Russell McClellan and Katina McGee, and that they were traveling in an older-model blue Mustang with an Alabama tag. T. 83-84.[1] After being advised of the make and model of the vehicle and the direction it was traveling when McClellan and McGee left Fred's, Officer Pevey spotted the vehicle at another pharmacy, Dutch Village Family Pharmacy. T. 83-84. Officer Pevey parked in a car dealership parking lot across the street from Dutch Village to observe McClellan and McGee. T. 84. Agent Hawkins, who was in an unmarked vehicle, drove to Dutch Village and conducted surveillance from the parking lot. T. 85-86. When McClellan and McGee left Dutch Village, Agent Hawkins went in and inquired about their purchase, while other officers tailed McClellan's Mustang. T. 87. When Agent Hawkins confirmed that the pair purchased more pseudoephedrine from Dutch Village, the officers determined that they had sufficient cause to pull McClellan over. T. 89.

The blue Mustang was stopped, and the occupants were asked to present identification. After the officers confirmed that the occupants were in fact McClellan and McGee, consent to search the vehicle was sought and obtained. T. 91. A total of 308 tablets of pseudoephedrine, some of which were hidden in the gear shifter casing, three cans of starting fluid, three bottles of granular drain opener, a bottle of isopropyl alcohol, and lithium batteries were found in the car. T. 91, 94. McClellan and McGee were arrested and charged with possession of precursors. T. 100.

After being Mirandized, McClellan gave a statement admitting that he was going to use the

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[1]The identities of the defendant and his accomplice were known to the Fred's employee because state law requires retailers to check the photo identification of persons purchasing pseudoephedrine. T. 83.

items seized to cook crystal meth. He was ultimately tried and convicted of possession of two or more precursors with intent to manufacture methamphetamine and possession of more than 250 dosage units of pseudoephedrine with the intent to manufacture methamphetamine. McClellan was sentenced as a habitual offender to serve thirty years on Count I and five years on Count II, with both counts running concurrently.

SUMMARY OF ARGUMENT

The trial court properly denied McClellan's motion to suppress because the officers had reasonable suspicion grounded in specific and articulable facts that McClellan was engaged in criminal activity.

McClellan's convictions are entirely supported by the evidence. Based on the evidence presented, including McClellan's lawfully obtained confession, the jury could have found him guilty as an accomplice or under the theory of constructive possession.

The State presented no evidence to impeach McClellan, as he chose to not testify. Additionally, McClellan also failed to proffer his testimony. Where a criminal defendant chooses not to testify after the trial court rules that the defendant's prior convictions may be used as impeachment evidence, the defendant is procedurally barred from arguing on appeal that the ruling prevented him from putting on a defense if he fails to proffer his testimony.

The offenses for which McClellan was convicted are not subject to the merger doctrine because neither offense is a lesser offense of the other. Simply because McClellan was prosecuted for more than one statutory offense arising out of a basic set of facts does not mean that the offenses for which he was convicted are subject to the merger doctrine.

ARGUMENT

I. [redacted]

McClellan claims that the officers lacked reasonable suspicion for the investigatory stop because the initial description of the suspect vehicle relayed by dispatch was vague. Although the initial description from dispatch may have been vague, the officers were provided with much more detail about the pseudoephedrine purchases, the identities of the purchasers, and a detailed description of their vehicle before making a stop. [redacted] T. 83,180. [redacted] T. 84, 131, 180. The Fred's employee also advised that he called the other two Fred's stores in Columbus and discovered that McClellan and McGee had also purchased pseudoephedrine from those stores that very day. T. 131-33. After Agent Hawkins relayed the information gathered from the Fred's employee to Officer Pevey, Officer Pevey spotted what he believed was McClellan's vehicle in yet another pharmacy parking lot. T. 84. Rather than making the investigatory stop at that point, the officers waited for McClellan to drive off, so Agent Hawkins could go in and inquire as to the couple's purchase. [redacted] T. 88, 177. At this point, the officers determined that they had enough information to conduct an investigatory stop.

A police officer may conduct an investigatory stop if the officer has "reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted

in connection with a completed felony or some objective manifestation that the person stopped is, or is about to be engaged in criminal activity." *Williamson v. State*, 876 So.2d 353, 355 (¶12) (Miss. 2004) (quoting Floyd v. State, 500 So.2d 989, 992 (Miss.1986)). Reasonable suspicion may be based on the officer's personal observations, or an informant's tip, so long as the tip bears indicia of reliability. *Id.* at (¶11) (citing *Floyd v. City of Crystal Springs*, 749 So.2d 110, 118 (Miss.1999)). In *Williamson*, Officer Overstreet received a tip from a pharmacy employee that two white males had purchased a large quantity of pseudoephedrine from a particular store. *Id.* at 354 (¶2). The tipster also advised that the two white males left the store in a white van, and gave the license plate number and direction in which the van was traveling. Id. Officer Overstreet located the van, followed it to Fred's Dollar Store, and obtained consent to search the van. *Id.* at (¶¶4-6). This Court concluded that the information provided by the pharmacy employee, "the color of the van, the number and race of occupants, the license plate number and the direction of travel, including the name of the street" provided a sufficient basis for Officer Overstreet's reasonable suspicion to stop the vehicle. *Id.* at 356 (¶¶13-16). In the present case, Officer Pevey was provided with much more detail. [redacted] The tipster in the present case did better than describe the race and gender of the suspects by providing their race, gender and names. Additionally, the officers in the present case knew that McClellan had made large purchases of pseudoephedrine from at least four pharmacies that day. Considering the totality of the circumstances, it is clear that the officers had reasonable suspicion, grounded in specific and articulable facts, to believe that McClellan was engaging in felonious activity.

McClellan also claims that his confession should have been suppressed because it was the

result of an illegal arrest. However, as shown, the officers had reasonable suspicion to conduct the investigatory stop. The permissible stop was followed by McClellan's consent to search the vehicle and his lawful arrest. Because no illegal arrest occurred, there is no reason to conduct the test enunciated in *Brown v. Illinois* to determine the admissibility of McClellan's confession.

II. [redacted]

McClellan's second assignment of error is that the verdicts were against the overwhelming weight of the evidence. Reviewing courts examine the evidence in the light most favorable to the verdict in determining whether a verdict is against the overwhelming weight of the evidence. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005) (citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). Additionally, a reviewing court will not disturb a verdict based on a claim that a conviction is against the weight of the evidence, unless allowing the verdict to stand would sanction an unconscionable injustice. *Id.* While acknowledging that two or more methamphetamine precursors and more than 250 dosage units of pseudoephedrine were discovered in his vehicle during a consensual search, McClellan claims that the State failed to prove that he actually or constructively possessed said contraband. For the following reasons, McClellan's second assignment of error is without merit.

Before embarking on a discussion of constructive possession, the State would first note that the jury was properly instructed on accomplice liability. C.P. 30. It is well settled that one who is present and aids, assists, or encourages a principle in the commission of a crime is likewise guilty as a principle. *Vaughn v. State*, 712 So. 2d 721, 724 (¶11) (Miss. 1998); *Hooker v. State*, 716 So. 2d 1104, 1110 (¶19) (Miss. 1998). The evidence showed, at a minimum, that McClellan and McGee purchased pseudoephedrine from three Fred's Dollar Stores and Dutch Village Family

Pharmacy in a single day, several precursors were discovered in McClellan's car, and McClellan confessed that he was going to "cook" meth with the seized precursors which McGee helped him obtain. T. 83-84, 89, 91-99,126, 131-33, Exhibit 12. In *Grant v. State*, Grant, the owner of the searched vehicle, claimed that she was unaware that her passenger/boyfriend was in possession of a large amount of marijuana. 788 So. 2d 815 (Miss. 2001). The contraband was found in the passenger's luggage which was located in the trunk. *Id.* at 817 (¶2). On appeal, Grant claimed that State failed to present legally sufficient evidence to support her conviction for possession of a controlled substance. This honorable Court found that Grant's statement to police in which she acknowledged that she was aware of her passenger's possession of marijuana and the passenger's intent to sell the marijuana to help fund their travels sufficiently showed that Grant was guilty under a theory of accomplice liability. I*d.* at 817-818 (¶6). Similarly, in the present case, McClellan's defense was an attempt to shift responsibility of the possession of precursors to his passenger. T. 236, 239, 241. [redacted] Accordingly, the State's evidence supports the jury's finding that McClellan was, at a minimum, guilty as an aider and abettor of possession of precursors.

Addressing McClellan's specific argument, the evidence also showed that McClellan was in constructive possession of numerous precursors. [redacted] 718 So.2d 1107,1111 (¶13) (Miss. 1998). The presumption is rebuttable, and McClellan attempts to rebut the presumption simply by noting that he was not the sole occupant of his vehicle and by claiming that there was no proof that he had access or control to any of McGee's belongings. Appellant's Brief at 15.

First, the mere fact that the owner of a vehicle has a passenger in his vehicle is not enough on its own to rebut the presumption that the owner is in constructive possession of contraband found his vehicle. *Barker v. State*, 826 So.2d 103, 106 (¶13) (Miss. Ct. App. 2002). Second, the following cases show that McClellan's attempt to rebut the presumption was thwarted by his confession in which he admitted that he was going to use the precursors to make meth and that McGee merely "was helping me get some of the items needed." Ex. 12. In *Ginn v. State*, Ginn was riding in the passenger seat of a car registered to her grandfather, while Ginn's friend, Hill, was driving the vehicle. 860 So.2d 675 (Miss. 2003). After an investigatory stop, precursors were found in the vehicle. *Id.* at 679 (¶4). This Court found that Ginn's attempt to rebut the presumption that she was in constructive possession of the precursors found in the vehicle over which she exercised dominion and control failed because of a statement she gave to authorities admitting, "I also believe that on other occurrences pills that we (Ginn and Hill) purchased were for Kris Ray." *Id.* at 686 (¶33). Also in *Stingley v. State*, marijuana was found in a duffel bag in the trunk of a vehicle driven by Stingley. 966 So.2d 1269,1271 (¶3) (Miss. Ct. App. 2007). Both Stingley and his passenger were arrested for possession of marijuana with intent to sell. *Id.* The searched vehicle actually belonged to Stingley's cousin. At trial, Stingley testified that during his trip, a valet attendant had access to his car. He also claimed that only his passenger had opened the trunk of the car during their travels. The court of appeals found that the appellant's incriminating statement made to officers after the search which expressed his knowledge of contraband in the trunk and his intent to use the contraband was sufficient to support a finding that Stingley was intentionally and consciously in constructive possession of the marijuana. *Id.* at 1273 (¶14).

Finally, Mississippi recognizes the concept of joint constructive possession. *Barker*, 826 So. 2d at 106 (¶9); *Wall*, 718 So.2d at 1111 (¶13). It is therefore of little consequence that some

of the contraband was found in luggage which may have belonged to McGee. The evidence showed that McClellan and McGee purchased pseudoephedrine from four pharmacies together in a single day, and McClellan admitted that they were acting together to obtain precursors so that he could cook meth.

McClellan's convictions are entirely supported by the evidence. At the very least, the jury could have found that McClellan was guilty as principle for aiding and assisting McGee in the purchase of two or more precursors and more than 250 dosage units of pseudoephedrine with the intent to manufacture meth. A more reasonable view of the evidence, however, shows that McClellan was in fact in constructive possessions of the contraband found both in the passenger compartment and trunk of his vehicle. Any concern that some of the contraband was found in a suitcase with women's clothing is alleviated by the theory of joint constructive possession. McClellan simply cannot rebut the presumption that he was in constructive possession of the contraband in light of his lawfully obtained confession.

III. [redacted]

McClellan claims that the trial court erred in its *Peterson* analysis by finding that his prior conviction for burglary could be used as impeachment evidence because the evidence was more prejudicial than probative.

First, and most obvious, the trial court did not allow impeachment evidence, as McClellan chose to not testify. McClellan claims that the trial court's ruling resulted in McClellan not being able to put on a defense. [redacted]

we declined that the

in the

however, there are no judicial or dept decisions to substantiate

[redacted] 584 So.2d 393, 395 (Miss. 1991) (citing *Saucier v. State*, 562 So.2d 1238, 1245 (Miss.1990)). See also *Jackson v. State*, 910 So.2d 658, 670-71 (¶¶41-43) (Miss. Ct. App. 2005); *Seals v. State*, 740 So.2d 340, 341 (¶¶4-5) (Miss. Ct. App. 1999). The reason for the procedural bar has been explained by this honorable Court as follows.

Read more into the case... you must proffer...

> If such a defendant has in his distant past a conviction of a serious felony, as here, he may well be faced with a Hobson's choice in deciding whether to testify. On the other hand, if a defendant in fact has nothing of substance to say in his own defense, we are hardly likely to give the time of day to his suggestion that his right of allocution was chilled by the foreknowledge that the prosecution would present his prior conviction.

Heidel, 584 So. 2d at 395 (quoting *Saucier v. State*, 562 So.2d 1238, 1245 (Miss.1990)). Because McClellan failed to proffer his testimony, he is procedurally barred from arguing that the trial court's ruling which would have allowed the State to impeach him with a prior burglary conviction prevented him from putting on a defense.

IV. [redacted]

McClellan correctly notes that two independent crimes merge into one when the greater crime includes by necessity all the elements of the lesser crime. *McDonald v. State*, 921 So.2d 353, 356 (¶9) (Miss. Ct. App. 2005). McClellan's claim that he could not be convicted for both possession of two or more precursors and possession of more than 250 dosage units of pseudoephedrine because the two offense merge into one is contrary to the very explanation of merger which McClellan offers in his brief.

Mississippi Code Annotated §41-29-313(1)(a)(I) makes it unlawful for any person to knowingly or intentionally possess two or more precursors with the intent to manufacture

defense counsel's statements in [illegible] + [illegible] is not raised by the appellant

methamphetamine. Miss. Code Ann. §41-29-313(1)(a)(I). Among the precursors listed in the statute is pseudoephedrine. Miss. Code Ann. §41-29-313(b)(iv). [redacted] The two crimes simply cannot merge because neither offense is a lesser offense of the other.

An example of two offenses merging into one is "if a person violently strikes another with a deadly weapon, causing the victim's death, the culprit cannot be charged separately with homicide and with assault." *Smith v. State*, 818 So.2d 383, 386 (¶9) (Miss. Ct. App. 2002) (citing *Faraga v. State*, 514 So.2d 295, 311 (Miss. 1987)). This is true because the single act of striking another resulted in two offenses, and the greater crime of homicide includes by necessity all the elements of the lesser crime of assault.

McClellan's reliance on *Wolf v. State*, 281 So. 2d 445 (Miss. 1973) is misplaced. In *Wolf*, the appellant was convicted of both possession and production of marijuana. *Id.* The problem in *Wolf* was that both offenses stemmed from a single act of Wolfe growing more than 1000 marijuana plants. In the present case, a conviction of Count I possession of two or more precursors was not dependent on McClellan's possession of 250 dosage units of pseudoephedrine. Instead, the evidence presented to establish a conviction of Count I possession of two or more precursors was that McClellan possessed lithium, ether, and isopropyl alcohol with the intent to manufacture methamphetamine.

[redacted]

[redacted]. The case of [redacted], 921 So.2d 353 (Miss. Ct. App. 2005) is instructive. In *McDonald*, the appellant was convicted of sale of a controlled substance and possession of a controlled substance with intent to distribute, both of which are violations of Mississippi Code Annotated §41-29-139(a)(1). *Id.* On appeal, McDonald argued that his separate charges of possessing a controlled substance and selling a controlled substance merged, because the only difference between the two offenses is the additional step of actually selling the drugs. *Id.* at 356 (¶9). However, McDonald sold an undercover agent crack cocaine, and when he was subsequently pulled over, more crack cocaine was found in his vehicle. *Id.* at 356-357 (¶11). The court of appeals found that because McDonald remained in possession of crack cocaine after selling the undercover agent a portion of crack cocaine, he was properly convicted of both sale and possession. *Id.* The *McDonald* court also distinguished *Laughter v. State*, 241 So. 2d 641 (Miss. 1970), a case on which McClellan relies in his brief. Laughter's convictions for possession and sale were reversed because both charges were based on a single occurrence when Laughter obtained a certain amount of marijuana which he turned around and sold. *Laughter*, 241 So. 2d at 644. The situation in *Laughter* presents a classic example of merger of offenses because Laughter necessarily had to possess the marijuana before he could sell it. But as the *McDonald* court explained, if a person possesses a large quantity of a controlled substance and sells only a portion of it, the remaining quantity which he keeps in his possession after the sale is the proper basis of a possession charge in addition to a sale charge. *McDonald*, 921 So.2d at 356 (¶10). The present case is certainly distinguishable from *Laughter* because only one of McClellan's convictions is based on the possession of pseudoephedrine.

Hunt v. State, 863 So. 2d 990 (Miss. Ct. App. 2005), is also instructive. Hunt, like McClellan, was convicted for possession of two or more precursors and for possession of 250

dosage units of pseudoephedrine. *Id.* Unlike the present case, Hunt's charge for possession of two or more precursors was based in part on the possession of the same pseudoephedrine which was used in Count II possession of 250 dosage units of pseudoephedrine. *Id.* at 992 (¶5). Attempting to resolve the double jeopardy problem, the trial court struck the pseudoephedrine from Count I, leaving five other precursors to satisfy that charge. *Id.* 992-93 at (¶7). Because the amendment to the indictment was substantive, the reviewing court necessarily examined the original or "unamended" indictment in reviewing Hunt's multiplicity argument. *Id.* at 993 (¶10). Hunt's conviction for Count II possession of 250 dosage units of pseudoephedrine was necessarily reversed, as Hunt clearly could not be put twice in jeopardy for the possession of pseudoephedrine. *Id.* *Hunt* makes clear, however, that there would have been no problem with a conviction for possession of two or more precursors and a conviction for possession of 250 dosage units of pseudoephedrine if Hunt had been properly charged. *Id.*

The offenses of possession of two or more precursors and possession of 250 dosage units do not merge because one offense is not a lesser offense of the other, nor has McClellan been put twice in jeopardy for the same offense. While possession of two or more precursors is found in the same code section as possession of 250 dosage units of pseudoephedrine, they are separate and distinct crimes. The court of appeals recently noted that a defendant was properly charged with both possession of two or more precursors and possession of anhydrous ammonia because Mississippi Code Annotated § 41-29-313(2) deals separately with anhydrous ammonia, making it unlawful to possess with knowledge that it will be used to manufacture methamphetamine. *Edmonson v. State*, No. 2007-CP-02213-COA (Miss. Ct. App. Aug. 11, 2009). The same is true in the present case. Simply because McClellan was prosecuted for more than one statutory offense arising out of a basic set of facts does not mean that the offenses for which he was convicted are

subject to the merger doctrine.

CONCLUSION

Fore the foregoing reasons, the State asks this honorable Court to affirm McClellan's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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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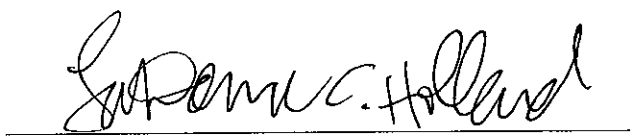
This the 28th day of August, 2009.



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