2009-KA-01219-COAT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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SUPREME COURT
COURT OF APPEALS

TRAVIS BUTLER		APPELLANT
VS.		No. 2009-KA-01219-COA
STATE OF MISSISSIPPI		APPELLEE

BRIEF OF APPELLANT

STATEMENT OF CASE

The appellant was indicted on a two count indictment. He was charged with armed robbery in violation of MCA Section 97.3 – 79 in the first count. In the second count he was charged with conspiracy MCA Section 97 -1-1 (V1, p. 9-10). The appellant was convicted of simple robbery as included in the first count 1 of the indictment. He was convicted as charged in the second count of the indictment. (V.1, p. 136)

The court imposed a sentence of 15 years on the first count of the indictment. On the second count of the indictment, a sentence of 5 years was imposed. These sentences were to run concurrently. (V.1, p. 128). In sentencing the defendant the Court stated his reasons as follows:

> "Alright Mr. Butler, the crimes against the person are terrible. We have got to stop the violence." (V. 1, Tr. Tr., p. 128)

After the Court made the statement into the record, his attorney, Ms. Kelly advised the Court the following p. (V.1 p. 129):

"Ms. Kelly: Your Honor, since this is his first offense and he doesn't have any criminal history, we would ask that you suspend some of the 15 years."

In response to this observation, the Court further stated in V. 1, p. 129:

"The Court: - - is a crime the Court feels strongly about, gun crimes against the person a totally different category. The Court will stay with its original sentence. Fifteen years in Count I; five years in Count II, both to run concurrent. Good luck."

The record reflects that the only issue before the jury was whether or not the appellant was guilty of armed robbery or simple robbery. The appellant's theory was reflected in Ms. Kelly's opening statement to the jury where she stated the appellant never denied the robbery. He admitted, in a video taped statement that he took the man's money. However, he denied that he had a gun. She concluded by advising the jury that he was not guilty of armed robbery. (V.1, p. 60; 61)

During the trial, the appellant testified on his own behalf. He stated that at the time that this crime was committed he was 20 years old on the date that this case was being tried. However, that at the time the offense occurred, he was only 18 years old. He further testified that on that date he was with his co-defendant, Anthony Barnett. Mr. Barnett asked him if he wanted to take a ride with him to Tunica. Mr. Barnett was driving. When they reached to Tunica, they stopped at the Grand Casino. Since the appellant was not old enough to go to the casino, he stayed in the car. While he was in the car, Mr. Barnett went inside Fitzgerald and stayed in there about 30 minutes. During this period of time, the appellant remained on the phone. When Mr. Barnett came out of the casino, they proceeded to another casino. When they arrived at this casino, Mr. Barnett did not go inside the casino, because he was trying to get locations to another casino. At that time, they pulled up on two Caucasian males and proceed to ask for directions. The appellant got out of the car and told a person that he identified as Mr. Crawford "give me your wallet". At that time he was under the influence of alcohol and marijuana. (V.1, p. 61-65) He was asked whether or not he had a gun in his hand at that

time or any time that night. He denied that he had a gun in his hand or had a gun that night. He was further asked did he own a gun. He further responded that he did not own a gun. Moreover, he further responded that there was not a gun in the car at anytime when asked that question. After this incident the appellant got back into the car on the passenger side of the vehicle. The co-defendant was scuffling with one of the victims. After a scuffle with the victim, the co-defendant got back into the driver side of the automobile and took off. They went to Oxford, Mississippi.

When they were proceeding to Oxford, Mississippi, a Sheriff automobile pulled up behind them. The co-defendant who was driving the car did not try to run from them. He pulled over into Harrah's parking lot at which time he was arrested.

The appellant further testified that once he got the wallet from the victim, when he got back into this automobile, he threw the wallet on the console of the automobile. He did not open the wallet to see what was in the wallet. (V.1, p. 61-69)

Finally, the appellant, in responding to the question "Is there anything else that you want to tell the jury about that night – that morning?" The appellant answered on (V.1, p. 69):

"I—it was really mis' – bad decision, bad mistake. I was young. I should have shown more remorse and now I understand that I know that – that, uh – I know because I have been a victim since that point in time of that taking place, I know how it feels and I understand. And I just have a big huge remorse for –of the situation that took place."

STATEMENT OF ISSUES

I.

WHETHER OR NOT THE COURT ABUSED HIS BROAD DISCRETIONARY POWER IN IMPOSING THE MAXIMUM SENTENCE OF FIFTEEN YEARS.

II.

WHETHER OR NOT THE FIFTEEN YEAR SENTENCE CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT VIOLATIONAL OF THE APPELLANT'S CONSTITUTIONAL RIGHTS.

SUMMARY OF ARGUMENT

It is the appellant's position that the sentence was excessive on two grounds: The first ground is that the trial court violated his broad discretion in failing to take into consideration the mitigating factors. At the time of the commission of the crime, the appellant had no criminal record and was only 19 years. During his testimony he showed extreme remorse for his involvement in the crime. He never denied that he was guilty of robbery and testified to the effect that he was in fact guilty of robbery. In this regard, obviously his testimony was believable as a jury returned a verdict of simple robbery. In addition, based upon the facts of the case an inference of disproportionality was warranted. Once an inference of disproportionality is shown from the record, sentences from other jurisdiction are compared to the sentence of the appellant. In this comparison, it is appellant's position that the sentence imposed upon the appellant was grossly disproportionate based upon the fact that a defendant in another jurisdiction received a probative sentence for the same charge. White v. State, 742 So.2d 1126 (Miss. 1999); Presley v. State, 474 So. 2d 612 (Miss. 1985); Clowers v. State; 522 So. 2d 762 (Miss.

1988); Waddell v. State, 999 So. 2d 375 (Miss. App. 2008); Hampton v. State, 724 So.2d 449 (Miss.App. 1998).

ARGUMENT

I.

THE TRIAL COURT ABUSED HIS BROAD DISCRETIONARY POWER IN IMPOSING THE MAXIMUM SENTENCE OF FIFTEEN YEARS.

In White v. State, 742 So.2d 1126 (Miss. 1999) the appellant respectfully submits that the language defining judicial discretion is the applicable criteria in order for this Court to make a proper judgment on the merits of appellant's claim. As the Court stated on pg. 1137 & 1138:

> "Judicial discretion is defined as a "sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable in circumstances and law, and which is directed by the reasoning conscience of the trial judge to just result." Black's Law Dictionary 848 (6th ed. 1990) (citing State v. Grant, **519 P.2d 261**, 265 (Wash. 1974)). Rather than implying bad faith or an intentional wrong on the part of the trial judge, an abuse of discretion is viewed as a strict legal term that is "clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing." Black's Law Dictionary 10 (6th ed. 1990).
>
> Any attempt at more concrete or concise definition of discretion would be futile. Likewise, the phrase "abuse of discretion" does not lend itself to a definitive or precise meaning. This ambiguity is necessary to allow judges enough room to exercise their own sound judgment in the cases coming before them. A more narrow definition of the term would constrict a judge's ability to do what a judge is supposed to do – make sound judgments on the issues before the court within the boundaries of the laws of this State, the Mississippi Constitution and the United States Constitution. This is an awesome responsibility and it places a great deal of power in the hands of our trial judges. This power and responsibility should not be taken lightly in any case.
>
> The discharge of judicial duties requires consideration, deliberation and thoughtful use of the broad discretion given judges under the laws of this State.
>
> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in

discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866, 6 L.Ed. 204, 234 (1824)."

Moreover, the Court further stated on pg. 1138:

"The Legislature wisely provided such a broad range of sentences to allow trial judges, using their discretion, to issue appropriate sentences in each individual case. It is incumbent upon those trial judges to use this power wisely."

Finally, the Court concluded in holding that a sixty year sentence was excessive as stated on pg. 1138:

"What is clear from the record, however, is the trial judge did not exercise any discretion in sentencing White to sixty years – the maximum term allowed by statute"

In Presley v. State, 474 So. 2d 612 (Miss. 1985), the Court remanded the matter back to the trial court for re-sentencing. The Court stated on pg. 621:

"We have carefully examined the record in this case. A pre-sentence hearing was conducted pursuant to Rules 6.02-6.04, Uniform Criminal Rules of Circuit Court Practice, and it was conceded that appellant is an habitual offender as defined by the statute. However, we are of the opinion that an adequate pre-sentencing hearing was not held, although the trial judge is not to be faulted in the matter, since he afforded every opportunity to appellant and his counsel to present mitigating evidence at that hearing. We do not retreat from the holding of our decisions in the cases cited above, but we recognize that there are cases, even when the appellant and his attorney fail to prepare and complete a sentencing record, where the trial court must consider all facets, background and record in a sentencing hearing in order that a just and proper sentence may be imposed. This is such a case. We are of the opinion that this cause should be remanded in order that the lower court may consider and pass upon, all matters relevant to the sentence of appellant. It should require counsel for appellant to present any mitigating circumstances at the re-sentencing hearing (surely, there must be some)."

In the instant case, the record is clear that the only reason for the Court imposing the maximum sentence was due to the fact that he thought that the type of crime for which the appellant committed was terrible. This comment was in response to a request for a lighter sentence because the appellant had no prior criminal record. Notwithstanding this request, the Court never alluded to any mitigating facts in the record as to the appellant's state of mind at the time the crime was committed, his youthful age of 19, his total lack of any kind of criminal record and his completely remorseful attitude concerning his participation in the crime.

Therefore appellant respectfully submits that the trial judge did not exercise any discretion in sentencing the appellant to 15 years.

II.

THE FIFTEEN YEAR SENTENCE CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS

In Waddell v. State, 999 So. 2d 375 (Miss. App. 2008), the Court of Appeals set forth the applicable criteria in determining whether or not an inference of gross disproportionality is evident in the record when comparing the crime committed to the sentence imposed. On page 378 the court stated:

"In his third issue on appeal, Waddell argues that the trial court exceeded reasonable discretion in sentencing him compared to the sentences received by his co-defendants. Waddell concedes that, in light of *Harmelin v. Michigan*, **501 U.S. 957**, **965-66**, **111 S.Ct. 2680**, 115 L.Ed.2d 836 (1991), the Eighth Amendment does not contain a proportionality guarantee. However, Waddell states that because of his involvement in the crime and other mitigating factors as stated supra his sentence was disproportionate to those received by his co-defendants.

Pursuant to limitations set forth in *Harmelin*, the three-pronged analysis as dictated in *Solem v.Helm*, **463 U.S. 277**, **292**, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), will not apply unless there is an inference of gross disproportionality when comparing the crime committed to the

sentence imposed. *Hoops v. State*, **681 So.2d 521**, **538** (Miss. 1996). Two of Waddell's co-defendants received twenty-year sentences, with ten years suspended, ten years to serve, and five years of post-release supervision. In determining Waddell's sentence, the trial court noted that Waddell admitted to committing the armed robbery, and Waddell admitted to shooting into the victim's car. As the sentence was within the statutorily prescribed limits, we cannot find any inference of gross disproportionality in Waddell's sentence. This issue is without merit."

In the instant case, the appellant submits that based upon the mitigating facts in the record that "inference of disproportionality" is warranted.

In applying the disproportionality of appellant's sentence, as compared to other sentences in other jurisdictions for the same charges, the case of Hampton v. State, 724 So. 2d 449 (1998), is on point and is applicable to the instant case. In Hampton, as in the instant case, the defendant was convicted of robbery and received an eight year suspended sentence and five years probation plus a $1,000 fine and court costs.

Based upon the disproportionality review the maximum sentence of 15 years received by the appellant was obviously disproportionate to the suspended sentence on the same charge imposed upon the defendant Hampton.

Therefore, appellant respectfully submits the sentence constituted cruel and unusual punishment.

CONCLUSION

The appellant respectfully prays that the Court remand this case back to the trial court for re-sentencing and that it grant any and all such further relief that it deems appropriate.

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CERTIFICATE OF SERVICE

I, Robert Chamoun, hereby certify that I mailed or faxed a copy of the foregoing Certificate of Compliance to the following on this the 25th day of January 25, 2010

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CERTIFICATE OF SERVICE

I, Robert Chamoun, hereby certify that I mailed a copy of the foregoing Brief to the following on this the 17th day of February 2010.

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