IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-KP-0842-COA

LARRY PRESS WELLS — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF FOR APPELLANT

BY: Larry Wells

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APPELLANT'S REPLY BRIEF

The State of Mississippi has filed its brief in this case and has failed to refute Appellant's claims that:

I

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE PRESENTED.

Appellant would assert that the verdict of the jury was against the overwhelming weight of evidence. The state failed to prove that Wells was in possession of cocaine with intent to distribute. As the state's brief admits, Walker testified that he did not himself see Wells in possession of cocaine. Walker only overheard a conversation discussing smoking cocaine. (R. Vol. 3, pp. 175-193). Well's has not been charged with conspiracy. Wells was actually charged with possession with intent to distribute cocaine. The law requires that before this charge can be proven there must be proof of actual possession and a showing of some intent to distribute. If Walker only heard a conversation about smoking cocaine, where is the intent to distribute. Smoking cocaine is not distributing cocaine.

The evidence shows that when Guynes attempted to purchase cocaine from Appellant, Guynes got beat for $20.00 without receiving any cocaine. Clearly, Wells never passed or distributed cocaine. the evidence shows that when Appellant refused to deal with Guynes on the level needed to substantiate a charge, Guynes gave the take down order anyway with a crime of possession with intent to take place. the testimony shows that Appellant refused to play. Appellant had no intent to give Guynes anything. Appellant's only intent appears from the record to have been to take Guyner's money. Guynes got mad and jumped to the conclusion to give a take down signal before any crime had been committed.

According to the testimony, Larry Wells did have cocaine in his possession but the proof and testimony brings out that Wells had or convoyed no intent to distribute the substance. When Guynes attempted to persuade Wells to do so he refused..

When seeking to prove intent to sell, transfer or deliver, the state must establish more than a mere suspicion of intent. McCray v. State, 486 So.2d 1247, 1251 (Miss. 1986).

The only evidence of Wells intent to distribute cocaine is the word of Officer Guynes who is heard on the audio recording practically begging Wells to give him the cocaine when Wells was not doing so but had put the cocaine in the pipe to smoke it Officer Guynes was attempting to get Wells to give him the drugs so that he could establish transfer and distributing. Despite Officer Guynes attempts to convince Wells to pass him the pipe, Wells never did. As the trial court stated, Appellant had a good argument. (Tr. 202). A direct verdict on the issue should have been granted. Appellant would assert that the record is not sufficient to support his conviction for possession of cocaine with intent to distribute. Our Supreme Court has consistently held that:

> When reviewing a challenge to the sufficiency of the evidence, (an appellate court) will reverse and render only if the facts and inferences "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty. . . ." Brown v. State, 1030 (¶25) (Miss. 2007) (quoting Bush v. State, 843 (¶16) (Miss. 2005). The evidence will be deemed sufficient if "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded (jurors) n the exercise of impartial judgment might reach different conclusions on every element of the offense ..." Brown, 965 So.2d at 1030 (¶25) (quoting Bush, 895 So.2d at 843 (¶16). The relevant question is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. "Brown, 965 So.2d at 1030 (quoting Bush, 895 So.2d at 843 (¶16). This Curt considered the evidence in the light most favorable to the State. Bush, 895 So.2d at 843 (¶16). The State receives the benefit of all favorable inferences that may reasonable be drawn from the evidence. Wilson v. State, 363 (Miss. 2006) (citing Hawthorne v. State, 22 (Miss. 2003).

Proof of possession with an intent to distribute or sell should not be based solely upon surmise or suspicion. There must be evidentiary facts which will rationally produce in the minds of jurors a certainty, a conviction beyond reasonable doubt that the defendant did in actual fact intend to distribute or sell the cocaine, not that he might have such intent. It must be evidence in which a reasonable jury can sink its teeth. Miller v. State 634 So.2d 127, 129 (Miss. 1994) (quoting Stringfield v. State, 588 So.2d 438, 440 (Miss. 1991).

In the instance case there was no such evidentiary facts to support proof of intent to distribute. The proof was lacking and the verdict by jury was therefore against the overwhelming weight of the evidence.

This case should be reversed and remanded to the trial court and new trial ordered. In the alternative this court should find that the trial court should have found tat the evidence constituted an offense of possession or petty larceny.

The State has failed to refute the evidence on the basis of this claim. Officer Walker's testimony supports this point were Walker stated He never saw Wells with cocaine nor saw him

pass or attempt to pass such substance. The State's case is based upon a verdict which was inconsistent with the evidence.

This Court should reject the State argument and reverse and render the conviction and sentence.

II

THE AMENDMENT TO THE INDICTMENT WAS IMPROPER

Contrary to the State argument, the amendment to the indictment was improper. How many times may the State be allowed to amend the indictment. The State never addressed the second Bite of the Apple claim. The claim here is that the amendment made by the State was tantamount to an indictment and was required to meet the Standard of Rule 11.03 (1) which it did not. The amendment did not set out the date of judgment of the prior convictions which it alleged against Wells. The rule requires that this be set out with specifics. The State's brief has not refuted this claim and this count should grant relief on this claim.

III

THE AMENDMENT ON SECOND AND SUBSEQUENT DRUG OFFENSE

The amendment on the second an subsequent drug offender charge is faulty in the same manner as the amendment argued in the preceding claims. Rule 11.03 (1) requires that specific allegations of the date of judgment be set out by the indictment and in this instance such information was not there. The amendment states that Wells had been previously convicted on a certain date but never specifically stated that Well's had a judgment entered against him on that date or any other noted or specified as being the date of judgment.

The state's argument fails to refute this claim to any degree. The state asserts that Appellant did not state any authority on the second bite of the apple argument but such assertion by the state is incorrect. The brief for Appellant quotes law on the second bite of the apple claim. This court should reject the state's argument and should grant the requested relief on this claim.

IV

THE TRIAL COURT ERRED IN ALLOWING THE AMENDMENT

The State argues that there was no error in allowing the amendment of the indictment to allow the State to double the sentence. The State asserts that there is no limitation as to how many amendments the state may seek. The State admits that Lewis finds that a post conviction prisoner is to have only one bite of the apple and that Debussi applies to double bites of the apple on the double jeopardy context. How then can it be a rational argument that the state asserts it can bite as many bites in amending the indictment as it chooses. This argument appears to be one sided. The State messed up and attempted to amend its way out of a situation which was doomed when the set up man signaled for a take down prior to allowing the drugs to be seen or passed. It would appear to be improper to furnish money to a person, send him to purchase cocaine and then seek to charge him with possession with intent to distribute when the individual takes the money, does what you say with it and refuses to give up the drugs when he returns. It would seem that the State's actions clearly entrapped Wells into committing the crime by furnishing him the money he needed to start the ball rolling. The State can no more furnish the tools to commit a crime to a defendant and arrest him when the offense is not completed than it can charge him for possession with intent when he offered to share cocaine with the informant who had sent him to purchase it in the first place. The State's actions are illegal and the brief

filed in this appeal attempts to salvage a case which was doomed from the start. This court should reject the state's actions and should reverse and remand the conviction to the trial court.

V.

SPEEDY TRIAL

The claim presented by Appellant on the issue of speedy trial is a genuine claim which the state has not refuted and should be granted. This Court should reject the State's argument that no speedy trial claim exists. Clearly, Wells met all the standards and the State's argument should be rejected and relief granted on this claim.

VI.

THE SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Appellant asserts that a sixty (60) year sentence without parole for possessing essentially a small amount of cocaine for his very own use[1] is unconstitutionally 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; 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

[1] As previously pointed out, the state failed to prove intent. Wells never passed the substance to the police and the testimony of the police was manufactured without any evidentiary support in order to implicate Wells in an intent to distribute.

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).

(1) 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.

Well's criminal record, as evidenced by what is included in the record, was not nearly as bad as McGruder's. Well's prior offenses were sale of marihuana and possession of methamphetamine and possession of methamphetamine precursors.

> (1) 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. Larry Wells has no hope for parole, due to being sentenced as an habitual offender and a second and subsequent drug offender.
>
> In ***Bell v. State,*** 769 So.2d 247, (1[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, in 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 1115.

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 ***Solemn*** was conducted. *Id.* at 1116.

In the present case, Larry Wells was convicted of possession of a small amount of cocaine where the only credible evidence demonstrates that Wells was using the cocaine for himself. . Yet, without commenting on the apparent harshness of the sentence, the court sentenced Larry Wells, in accordance with Miss. Code Ann. §99-19-81 and Miss. Code Ann. §41-29-147, to sixty (60) years mandatory imprisonment, without the possibility of parole, which is a sentence tantamount to a sentence of life imprisonment.

Applying the ***Solem*** test here, it is clear that the gravity of possession such a small amount of cocaine is petty. A ***Solem*** analysis leads to the legally sound conclusion that Wells sentence is patently unconstitutionally disproportionate to his offense and should be vacated. If the Court does not reverse the conviction altogether, at a minimum, Wells case should be remanded for resentencing, with him present, to include a proportionality hearing is required by ***Bell,*** *supra.*

This claim is clear and precise. The State has not defeated the claim where the State failed to demonstrate that Wells actually engaged in possession with intent after taking

money from the police and being instructed to use it to purchase cocaine and being back. This case represents a mockery of justice carried out by the State.

This court should refuse to participate and should reverse and remand the conviction to the trial court.

VII.

THE TAPE RECORDING ACTUALLY SUBSTANTIATES APPELLANT'S CLAIMS

The tape recording between Guyner's and Appellant clearly demonstrates that Appellant only discussed smoking cocaine with Guynes, not selling it. It would not seem possible that Appellant could sell Guynes cocaine which already belonged to him to start with since Guyner's money purchased the drugs.[2] The tape actually proves that Guynes gave Appellant the money to purchase the cocaine, sent him to purchase the cocaine, and refused to smoke the cocaine, and refused to smoke the cocaine with Wells after Wells returned. Guynes wanted the cocaine for evidence if he could get Woods to pass it to him. Guynes actually put the cocaine in Wood's possession by furnishing him the money to purchase it with and the instructions of what he wanted. The tape proves this evidence which damages the state's position. While Appellant's attorney argued that it should not be admitted, its legal effect exonerates Wells of the crime.

This court should reject the State's argument and reverse on this ground.

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[2] Appellant Wells is a drug user, not a drug dealer. Actually the brief for Appellant inadvertently argues that "Well's criminal record, as evidenced by what is included in the record, was not nearly as bad as McGruder's. Well's prior offenses were sale of marihuana and possession of methamphetamine and possession of methamphetamine precursors." (Brief for Appellant, pp. 35) This argument was made on the basis of a case which was used by Appellant and the actual facts of Wells record will demonstrate that he have never been convicted of no charge involving the sales of drugs. Wells is a drug user who was hoodwinked by the state to purchase drugs for police where Wells, as a user, wanted to use the drugs. Wells initial brief is hereby amended to show that the language set out above was inadvertently contained therein in reply to an argument made from a case used by Wells in his brief.

VII.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant would assert that for the reason set forth in this reply and the brief for Appellant, he was subjected to ineffective assistance of counsel. The brief for Appellant is clear and precise on this issue and makes this claim on both prongs of the Strickland case. This Court should grant the relief requested. For the reasons and authority cited herein, Appellant Wells submits that his conviction and sentence should be reversed rendered. In the alternative, Appellant Wells conviction and sentence should be reversed to the trial court with instructions that a new trial be granted consistent with the laws of the State of Mississippi.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Larry Wells, have this date served a true and correct copy of the above and foregoing Reply Brief for Appellant, by United States Postal Service, first class postage prepaid, upon:

Honorable Jim Hood
Attorney General
P. O. Box 220
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This, the 21st day of June 2010

Respectfully submitted,

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