IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT LEE ROBINSON **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

NUMBER 2010-TS-01120-COA

BRIEF OF APPELLANT

APPEAL

CIRCUIT COURT, BOLIVAR COUNTY, FIRST DISTRICT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for ROBERT LEE ROBINSON, Appellant herein 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 disqualification or recusal.

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Circuit Judge
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Hon. Brenda Mitchell
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

COURT RULES

STATEMENT OF THE ISSUES

I. Whether the Appellant was properly charged under Count I of the indictment against him for possession of I "ecstasy or methylenedioxymethamphetamine (MDNA)".

II. Whether the Appellant's trial counsel was ineffective in not objecting to the sentence handed down by the Court.

III. Whether appellant counsel is ineffective when he fails to raise issues directed by the defendant:

A. Objection to sentence;

B. Raising the illegality of the search; and

C. Failure to exhausts remedies so that Appellant could purse remedies in the Federal Courts.

STATEMENT OF THE CASE

On the 2nd day of March 2005, Petitioner was stopped by Mississippi Highway Patrolman, Dan Rawlinson, in Bolivar County, Mississippi, for speeding, 73 miles per hour in a 65 mile per hour zone. As a result of the traffic stop the Highway Patrol Officer, based on his alleged belief that he smelled "raw marijuana" coming from the passenger compartment of the vehicle, conducted a search of Petitioner's vehicle, discovering in the trunk of the vehicle four (4) different controlled substances. The probable cause for the search is one of the issues presented by Appellant.

On or about the 22nd day of March, 2006, a Bolivar County, Mississippi Second Judicial District Grand Jury returned a four (4) count indictment against Petitioner charging him with, four (4) counts of possession of controlled substances: Count I "ecstasy or methylenedioxy-methamphetamine (MDNA)"; Count II, Cocaine; Count III, Marijuana, and Count IV, Alprazolam (Excerpts pages 4,5).

Petitioner elected to proceed to trial in said charges. Trial was set to commence on the 12th day of May 2006, in the circuit Court of Bolivar County, Mississippi. On the 28th day of April 2006, Petitioner's trial counsel filed a Motion to Suppress the illegally obtained evidence (drugs) seized from the trunk of his vehicle, by State Trooper Dan Rawlinson. On the 4th day of May 2006, the Court entered an order denying Petitioner's Motion to Suppress (Excerpts page 8)

On the 10th day of May, 2006, two days prior to the commencement of trial, the State moved the Court to amend Petitioner's indictment to include the charges of habitual offender as provided in Section 99-19-81 of the Mississippi Code Annotated, as amended, and second and subsequent offender as provided in Section 41-29-147 of the Mississippi Code Annotated, as amended (excerpts page 14). On the 12th day of May 2006, the day trial commenced, the Court entered an order granting the State's Motion to Amend Indictment (Excerpts page 16).

Trial commenced and ended on the 12th day of May 2006, with the jury returning a verdict of guilty as charged in counts 1-4 of the indictment (Excerpts pages 19). Sentencing was postponed pending pre-sentencing investigation.

On the 28th day of July 2006, a sentencing hearing was held in the Circuit Court of Bolivar County, Mississippi, wherein the State presented its evidence to the Court regarding Petitioner's status as a prior convicted felon and second and subsequent offender. The Court found that Petitioner met the criteria to be sentenced as a habitual offender as provided in Section 99-19-81 of the Miss. Code, and second and subsequent offender as provided in Section 41-29-147 of the Mississippi Code of 1972 as amended. Thereby, however, in pronouncement of sentences the Court stated, "the Court's actions are pretty much guided by statute at this point in time. The only discretion that the court has in this matter really is I do have discretion with regard to imposing sentence under the second and subsequent offender statute. It states that I may double the sentences. It does not require that I double those sentences. However, with regard to the sentences to be imposed under the habitual portion of the indictment, the only discretion that the Court has is whether or not the sentences to be imposed will be run consecutive or concurrent. The statute requires that the Court impose the maximum sentence, the maximum fines, and that they be

serve without eligibility for parole, reduction of sentence or suspension". Therefore, the Court imposed the following sentences: Count 1 possession of ecstasy, in an amount greater than 40 dosage units, the Court sentenced petitioner to serve a term of 30 years in the custody of the MDOC, pursuant to Section 99-1-81 of the Mississippi Code and a fine in the amount of one million dollars; Count II, Possession of cocaine, in an amount greater than .1 grams but less than 2 grams, the Court sentenced Petitioner to serve a term of 8 yeas in the custody of the MDOC, pursuant to section 99-19-81 of the Mississippi Code and a fine in the amount of One Hundred Thousand Dollars; Count III, Possession of marijuana, in the amount greater than 30 grams but less than 250 grams. The Court sentenced petitioner to serve a term of 3 years in the custody of the MDOC, pursuant to Section 99-19-81 of the Mississippi Code, and a fine in the amount of Six Thousand Dollars; Count IV, possession of alprazolam, in an amount less that 100 dosage units, the Court sentenced Petitioner to serve a term of 1 year in the custody of the MDOC, pursuant to Section 99-19-81 of the Mississippi Code, and a fine in the amount of One thousand Dollars (Excerpts pages 22-31)

Petitioner, aggrieved by the convictions and sentences imposed, retained Attorney Johnnie E. Walls, Jr. to pursue his State Appellate Court remedies. Attorney walls timely filed

Petitioner's Direct Appeal with the Mississippi Supreme Court and Court of Appeals. The Court assigned Petitioner's case to the Court of Appeals. Attorney Walls raised only two claims in Petitioner's direct appeal: 1) Whether the Trial Court Erred in Denying Petitioner's Motion for JNOV, and; 2) Whether the Trial Court Erred in Denying Petitioner's Motion for a New Trial. Counsel omitted two issues that Appellant wished to have raised. The issue of the Court denying Petitioner's Motion to Suppress the Evidence (drugs) seized from the trunk of the vehicle he was driving during the routine traffic stop on March 2, 2005, and; trial counsel's ineffective assistance, in his failure to object to the Court imposing the maximum sentence each crime carry, based on the Court's mistaken belief that it was without authority to impose sentences lesser than the maximum each crime carried, and pursuant to Section 99-19-81 of the Mississippi Code.

On the 30th day of October 2007, the Court of Appeals entered an order affirming Appellant's convictions and sentences, *Robinson v. State, 967 So. 2d 695 (Miss. App. 2007)*. Mr. Robinson's appellate counsel promptly advised him of the Court of Appeals decision in his case, and advised him that he would be timely pursuing a rehearing in the matter. However, counsel never pursued the re-hearing, or advised Robinson, in a timely manner, that he would not be pursuing the rehearing,

thereby giving the Appellant the opportunity to retain another attorney to pursue it or pursue it pro se.

Appellant then filed his petition with the Supreme Court requesting a post conviction relief hearing that was granted (Excerpts page 3). Mr. Robinson then retained counsel for the hearing. On April 6, 2010 his petition for relief was denied (Excerpts page 61-79).

SUMMARY OF THE ARGUMENT

I. Whether the Appellant was properly charged under Count I of the indictment against him for possession of I "ecstasy or methylenedioxymethamphetamine (MDNA)"

The Appellant was charged in Count One of the indictment with a crime that did not track the language of the statute. Since not every material fact and essential ingredient of the offense was alleged with precision and certainty the charge of that count of the indictment was fatally flawed.

II. Whether the Appellant's trial counsel was ineffective in not objecting to the sentence handed down by the Court.

The Appellant has alleged that the lower court could have given him a more lenient sentence and that his trial counsel was ineffective in not bringing this to the court's attention. To the extent that this Court might agree with Appellant his counsel was constitutionally ineffective because such an omission would constitute prejudice to the defendant.

III. Whether appellant counsel is ineffective when he fails to raise issues directed by the defendant:

A. Objection to sentence

B. Raising the illegality of the search

C. Failure to exhausts remedies so that Appellant could purse remedies in the Federal Courts.

The Appellant has alleged that the trial judge could have lawfully given a more lenient sentence but did not thinking he was not allowed to and that the fruits of an illegal search formed the basis of his prosecution. The illegality of the search was argued in the lower court however neither the sentence nor the legality of his search was raised by his appellate counsel. To the extent that Appellant is correct in his argument in this Petition for post conviction relief his counsel would have been deficient because such omissions did result in prejudice to the defendant.

The Appellant has the right to petition federal courts for reconsideration of federal constitutional issues that might have arisen during his trial and appellate proceedings. Failure to exhaust his state remedies would prejudice his ability to pursue any such remedies.

ARGUMENT

I. Whether the Appellant was properly charged under Count I of the indictment against him for possession of I "ecstasy or methylenedioxymethamphetamine (MDNA)"

Count I of the indictment against Appellant states in part "possession of a certain controlled substance, to-wit: ecstasy or Methylenedioxymeth-amphetamine (MDMA), a Schedule I controlled substance as listed in *Section 41-29-113 (c) (4) of the Mississippi Code of 1972 Annotated, as amended". Laws, 2001 Ch. 491 §1* in affect at the time Appellant was indicted Section (c) (4) reads "3, 4- Methylenedioxymethamphetamine (MDMA)

In *Copeland V. State, 423 So2d 1333 (Miss.1982)*, the Mississippi Supreme Court reversed the conviction of Copeland in an indictment that charged him with selling "a quantity of Methylenedioxy amphetamine, a controlled substance"*423 So. 2d 1336.* However, the statute read "3,4 Methylenedioxy amphetamine" at that time. The defendant Copeland relied upon *Brewer v. State, 351 So. 2d 535 (Miss.1977)* for the proposition that "every material fact and essential ingredient of the offense-every essential element of the offense-must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilt must be stated in the indictment". (*Copeland at 423 So. 2d 1336.* citing

Love v. State, 211 Miss. at 611, 52 So 2d at 472 (Miss. 1951), Brewer, 351 So. 2d at 536.

In Copeland the state asserted "that the omission of the numerals 3,4 was a matter of form and therefore amendable". The Court recognized the fact pattern in *Copeland* was identical to that found in *United States v. Huff, 512 F. 2d 66 (5th Cir. 1975)*. However, the first count in *Huff* did include the numerals "3,4" it was the second count that omitted the numerals. The court said:

> [t]he addition of the numbers "3,4" would have indeed saved this count, but we cannot regard this defect as a mere technicality, for the chemical and legal definition of these substances is itself technical and requires precision. In sum, the variance between non-criminal conduct, as alleged in Count II, and criminal conduct, which the government attempted to prove under Count II, rises above the level of form, however minute the omission may have been

423 So. 2d at 1336,1337. The Court in *Copeland* continued:

> In reaching its conclusion the Fifth Circuit noted that the federal statute, 21 U.S.C. Sec 812 Schedule 1(c)(1), Listed "3, 4 methylenedioxy amphetamine" but did not list "methylenedioxy , amphetamine". Moreover, there was testimony by the government chemist that "methylenedioxy amphetamine" is a different drug than the one listed in the statute.

423 So. 2d at 1337.

Appellant did not raise this issue in his post conviction motion nor did either of his two previous counsels raise it in the Court below or the previous appeal. However Appellant now

relies upon *Rule 28(a)(3) of the Mississippi Rules of Appellate* Procedure to urge the Court to notice this as a plain error, *Grubb v. State, 584 So. 2d 786, 789 (Miss. 1991)*. This error does impact a fundamental right of the Appellant, *Sanders v. State, 678 So. 2d 663, 670 (Miss. 1996)*.

Appellant requests that the Court would reverse his conviction for the possession of Methylenedioxymethamphetamine (MDMA) on the basis that the crime alleged was not a crime under the laws of the State of Mississippi at the time of his conviction. *Flowers v. State, No. 2009-KA-00387-SCT, May 27, 2010.*

II. Whether the Appellant's trial counsel was ineffective in not objecting to the sentence handed down by the Court.

The Appellant in his initial petition prepared by him stated:

> It is Petitioner's contentions that, after the Court had pronounced sentencing and then ask 'anything else for the defense.[?] Defense counsel should have objected to the Court imposing the maximum sentences each charge carried, based solely on the Court's mistaken belief that the Court had no other alternative but to impose the maxim sentences, pursuant to Miss. Code Ann. 99-19-81

Appellant cited *Solem v. Helm, 463 U. S. 277, 290, 103 S. Ct. 3001, 77 L. Ed 2d 637 (1983)* and *Clowers v. State, 522 So. 2d 762 (Miss. 1988)*. In the *Clowers* the Mississippi Supreme Court stated:

> The fact that the trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Notwithstanding Sec. 99-19-81, the trial court has authority to review a particular sentence in light of constitutional principles of proportionality as expressed in *Solem v. Helm*. That authority is a function of the Supremacy Clause. *U. S. Const. Art. VI, cl. 2; Bolton v. City of Greenville, 253 Miss. 656, 666, 178 So. 2d 667,672 (1965)*. Here, the trial court properly invoked and exercised that authority as it reduced Clower's sentence.

at page 765. Clowers was a habitual offender who had forged a $250.00 check. Clowers had appealed and the State had cross-appealed Clowers only having been sentence to five years.

The Mississippi Court of Appeals revisited this issue in *Davis v. State, 17 So. 3d 1149 (Miss. App. 2009)*. The Court referred to the "three-part test for an Eighth Amendment disproportionality analysis: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (III) the sentences imposed for commission of the same crime in other jurisdictions" citing *Nichols, v. State 826 So. 2d at 1290 (¶ 11) (Miss. 2002)* citing *Solem, 463 at 290-92)*.

The Court in *Davis v. State* observed further that the *Solem v. Helm* opinion was overruled in *Harmelin v. Michigan, 501 U. S. 957, 965, 111 S. ct. 2680, 115 L. Ed. 2d 836 (1991)* to the extent that *Solem* held there was any proportionality guarantee in the Eight Amendment.

In the case sub judice, the Appellant was arrested in a vehicle not proven to be owned by him and convicted for drugs found in the trunk in a container not proven to be his (record p. 133 line 26, page 134). The 30-year sentence of the Appellant is based upon constructive possession and he should have been entitled to a proportionality analysis.

III. Whether appellant's appellate counsel was ineffective in failing to raise issues directed by the defendant:

C. Objection to sentence

Appellant relies upon the argument immediately above to argue that his appellate attorney should have raised the proportionality of his sentence on the direct appeal

D. Raising the illegality of the search

At the pretrial suppression hearing held May 4, 2006 trooper Jacob Lott, canine officer, testified that his dog alerted to the driver's side and passenger side of the vehicle, (T 6, lines 17-20). There was no testimony indicating that the dog alerted to the trunk of the vehicle (T. 8, lines 1,2). There were no drugs found anywhere else in the vehicle (T. 8 lines 15).

Trooper Dan Rawlinson was the second witness at the hearing. He testified to giving Mr. Robinson a ticket for

speeding,[1](T, 15, line 11-14). The officer then acknowledged that Appellant was not charged with anything for which he would be taken into custody (T. 16, line 11-14). The officer testified to smelling marijuana and searching the interior of the vehicle with consent but found no drugs. There was no consent to search the trunk of the vehicle (T.13, lines 23-27).

The trial court later upheld the validity of the search finding that the officer had probable cause. The lower court observed, "[h]owever, under the automobile exception, police may conduct a warrantless search of an automobile and any containers therein if they have probable cause to believe that it contains contraband or evidence of crime". Citing *Millsap v. State, 767 So.2d 286, 292 (¶19) Miss. Ct. App 2000)*. Citing *California v. Acevedo, 500 U. S. 565, 576, 111 S. Ct. 1982, 114 L. Ed 2d 619 (1991)*.

At first blush the lower court's reading of *Millsap* is reasonable. However, Appellant would urge upon this Court that the language of the court there should be read carefully and in relationship to the facts of that case. In the *Millsap* case the drug dog specifically alerted to the trunk (¶ 4) at 767 So. 2d 288. The Court in the Millsap opinion cited *United States v. Seal, 987 F. 2d 1102, 1106 (5th Cir 1993)* for the proposition

[1] At the post conviction hearing, Appellant denied ever receiving a ticket and none appears in the record (4/6/2010 hearing page 41, lines 14-17).

that "[a] dog sniff does not constitute a search or seizure under the Fourth Amendment." The court continued:

> Furthermore, "once an officer obtains probable cause to search a vehicle, then probable cause exists to search all compartments of the vehicle and all containers" therein. [*Seals supra and California v. Acevedo supra*] Thus, if officers have probable cause to believe that contraband is in only one part of a car, then they are limited to that area. If, on the other hand, officers have probable cause to believe that contraband is located somewhere in a car, but they don't know exactly where, then they can search the entire vehicle. [Emphasis added by Appellant]

(¶ 22) 767 So. 2d 292.

The interpretation of this case would appear to be consistent with the Court's prior rulings. In *Hurlburt v. State, 803 So. 2d 1277 (Miss. App. 2002)* the search of a truck trailer was at issue. The Court there stated that "[O]nce consent was given and the dog sensed the presence of an illegal substance, the officers had probable cause to search the area of the trailer to which the dog alerted," *(¶ 16) at 803 So. 2d 1277.*

In the case before the Court the prosecution seems to be arguing the reverse of the reasoning in *Millsap*. That is we had probable cause to search the portions of the vehicle upon which the dog alerted therefore we have the authority to search portions to which the dog did not alert. The logical extent of this argument, it is submitted, would be to forget the dogs and just search all vehicles, trucks and cars, headed down a

highway. This is clearly not the law as is also expressed by the court's opinion in *Shelton v. State, 2009-KA-00694-COA (MSCA):*

> '[E]ven without reasonable, articulable suspicion, the performance of a dog sniff of the outside of a vehicle by a trained canine during a routine, valid traffic stop is not a violation of one's Fourth Amendment rights against unreasonable searches and seizures.' *Jarajmillo v. State, 950 So. 2d 1104, 1107 (¶7) (Miss. Ct. App. 2007).* The drug detecting dog's positive alerts created probable cause of Deputy Sanders to search the trunk of the rental car. *McNeal v. State, 617 So.2d 999 (Miss. 1993)*
>
> .

(¶15). It should be noted that the arresting officer in the Shelton case had a drug-detecting dog with him in his car and the defendant there was not detained to await the canine.

A criminal defendant with charges of the nature faced by Appellant has a right to counsel as granted by the State and Federal constitutions (Amendment 6). *Gideon v. Wainwright, 372 U. S. 335, 23 S. Ct 792, 91 L. Ed 2d 799 (1963); Argersinger v. Hamlin, 497 U. S. 25, 92 C. Ct. 2006, 32 L. Ed. 2d 530 (1972).*

Appellant here was appointed an attorney and later had retained counsel for his appeal. In 1984 the United States Supreme Court handed down a decision in the case of *Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).* This decision set forth the standards to be applied to judge the effectiveness of counsel. This test is a two pronged

one adopted by this Court in *Alexander v. State, 605 So. 2d 1170, 1173 (Miss. 1992)* and several other cases. *Strickland* requires (1) the showing of the deficiency of counsel's performance and (2) that it was sufficient to constitute prejudice to the defendant. The burden of demonstrating that both prongs have been met falls upon the defendant. *Leatherwood v. State,473 So. 2d 964,968 (Miss. 1984), reversed in part, affirmed in part 539 So. 2d 1378 (Miss. 1989).* There is a strong but rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. *McQuarter v. State, 574 So. 2d 685, 687 (Miss. 1990).* Appellant here must also show that there is a reasonable probability that but for this counsels actions he would have received a different result in his appeal to the Mississippi Supreme Court/Court of Appeals, *Nicolaou v. State, 612 So, 2d 1080, 1086 (Miss. 1992).*

The record here clearly shows that the Appellant was stopped in a non-custodial traffic stop for speeding. The officer testified to smelling marijuana and requested consent to search the vehicle. Consent was granted to search the passenger compartment but no drugs were found. Consent was denied to the search of the trunk. Defendant was detained at the site until a drug dog was brought to the scene. The dog alerted to both the passenger and driver sides of the vehicle but not to the trunk.

A further search revealed no controlled substance in the passenger compartment of the vehicle.

Without any indication from the drug dog that contraband existed in the trunk a further search was made producing the items for which Appellant was charged and convicted. The extended detention of Appellant for this search and the search of an area of his vehicle not indicated by a drug-detecting canine is an illegal search and seizure (United States Constitution, Amendment 4) and the fruits thereof are of the "poisonous tree" and should have been suppressed, Trejo v. State, 2008-KA-02133-COA (MSCA)(¶7).

The matter of the legality of the search was not raised on appeal. This is the basis for the claim of ineffectiveness raised by Appellant (Hearing of 4/6/2010, page 24, lines 1-7).

C. Failure to exhausts remedies so that Appellant could purse remedies in the Federal Courts.

Appellant in his Petition for Post-Conviction Collateral Relief alleged as one of his grounds for relief that:

> Petitioner's appellate counsel … failed to exhaust Petitioner's State appellate Court remedies as retained to do. An act that resulted in denial of Petitioner's right, after direct appeal, to seek Further State Judicial review (Motion for rehearing and Writ of Certiorari) in his conviction. Also, Federal judicial review (Petition for Writ of Habeas Corpus).

Petition at page 3, Ground "D".

The point of Appellant's argument relates to 29 U. S. C. 2241 and related sections dealing with habeas corpus in the federal court system. The allegation was that Appellant's counsel was directed to seek final review from the Mississippi Supreme Court so that he could file a federal court petition. See *Davis v. State, 954 So. 2d 530 (¶4)(Miss. App. 2007)*. Whether or not this Court would have concluded that the two-prong test adopted in *Alexander v. State* would have caused this Court to reverse the ruling in *Robinson v. State,* it is clear that Appellant was prejudiced to the extent that he could not pursue remedies in federal court.

CONCLUSION

Because of the failure of the State to properly charge Appellant in Count One of the indictment and the other allegations of Appellant Petition for Post Conviction Collateral Relief the prayer of his petition should be granted and his convictions should be reversed. Should any of the convictions other than Count One be upheld this case should be remanded for re-sentencing pursuant to *Ellis v. State, 520 So. 2d 595 (Miss. 1988)*. The State "has being given one fair opportunity to offer whatever proof it could assemble", *DeBussi v. State, 453 So. 2d 1030, 1033 (Miss. 1984) citing Burks v. United States, 437 U. S. 1, 15-16, 985 S. Ct. 2141, 2149, 57 L. Ed 2d 1 (1978)*. Furthermore, the State should therefore be prohibited from introducing any new evidence to support conviction for the crime, if any, attempted to be alleged in Count One of the indictment. Furthermore, the State should therefore be prohibited from introducing any new evidence to establish Appellants status as a habitual offender, to do otherwise would be a violation of the Mississippi Constitution of 1890, Article 3, Section 22 and United States Constitution Amendment Five.

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CERTIFICATE OF SERVICE

I, James D. Minor, Sr., certify that on Decembeer 1, 2010 2010, I mailed a true and correct copy of Appellant's Brief and Excerpts to the following persons at the following addresses by United States Mail postage prepaid.

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This the 1st day of December 2010.

James D. Minor, Sr.