

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2021-KA-00145-COA**

**FREDRICK LEE JENKINS A/K/A FREDRICK  
JENKINS**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT:	01/28/2021
TRIAL JUDGE:	HON. CELESTE EMBREY WILSON
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	BYRON RUSSELL MOBLEY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LAUREN GABRIELLE CANTRELL
DISTRICT ATTORNEY:	JOHN W. CHAMPION
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 07/19/2022
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE CARLTON, P.J., LAWRENCE AND McCARTY, JJ.**

**CARLTON, P.J., FOR THE COURT:**

¶1. Fredrick Lee Jenkins was found guilty of trafficking of a controlled substance (one kilogram or more of marijuana) with intent to sell in violation of Mississippi Code Annotated section 41-29-139(f) (Rev. 2018). The DeSoto County Circuit Court sentenced Jenkins to serve fifteen years in the custody of the Mississippi Department of Corrections (MDOC) followed by ten years of post-release supervision. Jenkins was also fined \$5,000. The court denied Jenkins's post-trial motion for judgment notwithstanding the verdict (JNOV) or a new trial.

¶2. On appeal, Jenkins asserts that the trial court erred in denying his motion to suppress

evidence because, according to Jenkins, the evidence was obtained from (1) search warrants that did not comply with Mississippi Rule of Criminal Procedure 4.3; and (2) subpoenas duces tecum that were issued without compliance with Rule 33. Finding no reversible error, we affirm.

### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

¶3. In June 2018, a DeSoto County grand jury indicted Jenkins for conspiracy to sell one kilogram or more of marijuana (Count I), trafficking of a controlled substance (one kilogram or more of marijuana) with intent to sell (Count II), and aggravated trafficking of a controlled substance (two hundred grams or more of tetrahydrocannabinol) with intent to sell (Count III). Jenkins was indicted as a second or subsequent drug offender in Counts II and III.

¶4. Subsequently, the trial court entered an “order on agreed motion to reduce charges,” reducing the charge of trafficking of a controlled substance with intent to sell as a recidivist under section 41-29-139(f) and Mississippi Code Annotated section 41-29-147 (Rev. 2018) (Count II), to trafficking of a controlled substance with intent to sell as a non-recidivist under section 41-29-139(f). Counts I and III were remanded to the files.

¶5. Before trial, Jenkins filed two motions to suppress evidence obtained from alleged insufficient search warrants and improper subpoenas duces tecum sought and issued in February 2018. Jenkins asserted that neither the search warrants nor the subpoenas complied with the Mississippi Rules of Criminal Procedure. Because Circuit Judge Celeste E. Wilson signed the search warrants and the orders granting the requests for the subpoenas duces

tecum, Jenkins moved for her recusal. Circuit Judge Wilson granted Jenkins's motion to recuse solely with respect to the hearing on Jenkins's motions to suppress. In her order, Circuit Judge Wilson directed that "the Clerk of the Court shall assign another Circuit Court Judge from this District for the limited purpose of hearing the Defendant's Motion[s] to Suppress Evidence."

¶6. The suppression hearing (only) was reassigned to Judge Gerald W. Chatham Sr. and was held on February 28, 2020. Two individuals testified at the suppression hearing: Circuit Judge Wilson and Agent Thomas Brea of the DeSoto County Sheriff's Office, Special Investigations Division, who had applied for the search warrants and requested the subpoenas. The trial court denied Jenkins's motions to suppress, specifically noting in its order that Jenkins "does not contest the existence of probable cause for the issuance of the warrants or subpoenas at issue."

¶7. The trial court found that the technical violations of Rule 4.3 in the search warrants did not justify suppression of the evidence obtained where they were executed within a reasonable amount of time; probable cause was uncontested; and Jenkins made no assertion that the violations were made intentionally or that he had been prejudiced by the errors. The trial court further found that the technical violations of Mississippi Rule of Criminal Procedure 33 with respect to the subpoenas did not render inadmissible the evidence produced pursuant to them. Details of the exhibits and testimony presented at the suppression hearing are discussed in context below.

¶8. Jenkins, represented by counsel, waived his right to a jury trial and agreed to a bench trial before Circuit Judge Wilson solely on Count II as a non-recidivist. The matter was tried upon an agreed stipulation of facts that incorporated by reference the transcript of the February 28, 2020 suppression hearing and all exhibits admitted into evidence at that hearing. No live witnesses were called at the bench trial.<sup>1</sup>

¶9. As set forth in the agreed stipulation of facts, since May 2017, agents with the DeSoto County Sheriff's Office, Special Investigations Division, had received information based on other arrests that Jenkins supplied marijuana to numerous individuals in the DeSoto County area.

¶10. On February 2, 2018, the agents received information from a K9 deputy in Kansas (Deputy Kalen Robinson) that in late January 2018, he had stopped a vehicle for a traffic offense and searched the vehicle. Deputy Robinson discovered \$68,000 in currency

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<sup>1</sup> Judge Westbrook writes in her special concurrence that although she “agree[s] with the disposition in the majority’s opinion,” she “believe[s] Circuit Judge Wilson should have recused herself from Jenkins’ subsequent criminal proceedings after she testified in the hearing regarding the suppression of evidence based on her allegedly insufficient warrants and improper subpoenas.” But as delineated above, after Judge Chatham issued his order on the motions to suppress, Jenkins waived a jury trial and agreed to a bench trial before Circuit Judge Wilson upon a stipulation of facts. Neither Circuit Judge Wilson nor a jury made any factual determinations, and the issues pertaining to the search warrants and the subpoenas duces tecum were decided by another judge, at Circuit Judge Wilson’s direction. And Jenkins raises no issue on appeal concerning any impropriety on Circuit Judge Wilson’s part in this case. We decline to address an issue that is neither before us nor warranted under the circumstances of this case. *Cf. In re Blake*, 912 So. 2d 907, 918 (¶40) (Miss. 2005) (refraining from granting prospective recusal and anticipating reviewing requests for recusal on a case-by-case basis).

concealed in the vehicle. He told the agents that the driver of the vehicle told him that he was returning from 6267 Choctaw Trail, Olive Branch, Mississippi, where he dropped off marijuana in exchange for the \$68,000. The driver informed Deputy Robinson that he delivered between seventy and eighty pounds of marijuana to the address in Olive Branch every two or three weeks.

¶11. Based on this information, the DeSoto County agents began surveillance at the 6267 Choctaw Trail, Olive Branch address, which was known to be Jenkins's residence. Agent Thomas Brea was involved in the investigation and surveillance and testified at the suppression hearing. He said that while surveilling the residence, agents observed a vehicle pull into the driveway of the residence, the driver exited the vehicle empty handed, and went into the residence. The driver exited the home forty minutes later carrying a large white box. The driver returned to his vehicle and left the property.

¶12. A deputy with the sheriff's office followed the vehicle and made a traffic stop after observing the driver make a traffic infraction. As the deputy approached the vehicle, he smelled "the strong odor of marijuana coming from inside[ the vehicle]." The deputy searched the vehicle based on that probable cause. The deputy found the large, white package that the driver acquired from Jenkins's home. Inside the package, the deputy discovered several vacuum-sealed bags containing marijuana. The driver of the vehicle (Justin Dearman) was brought back to the station, advised of his *Miranda*<sup>2</sup> rights, and waived

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

them. Dearman completed a voluntary statement, stating that he bought the marijuana from Jenkins. Dearman also said that while he was inside Jenkins's residence, he saw a large green tub in the garage that contained about five pounds of marijuana and two other brown bags containing about a pound of marijuana each. Additionally, Dearman said that Jenkins had recently received a new shipment of marijuana, but the courier lost the money during a traffic stop in Kansas.

¶13. Agent Thomas Brea left the surveillance team and prepared a search warrant for Jenkins's home and vehicles, together with a supporting affidavit in which he described four separate incidents over the six-month investigation of Jenkins connecting Jenkins to illegal drug activity.<sup>3</sup> The other agents remained at the scene.

¶14. While Agent Brea was preparing the search warrant, another agent witnessed a male at the residence throw a large, brown bag over the fence and into a neighbor's yard. A couple of minutes later, the agents remaining at the scene saw a dark-colored sedan (later identified as a 2013 Hyundai Sonata) pull in front of the residence, and a male matching

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<sup>3</sup> These incidents included (1) an arrest of individuals and seizure of several ounces of marijuana following a traffic stop in which one of the individuals arrested informed the officers that Jenkins was supplying large amounts of marijuana to many people; (2) an arrest of individuals and seizure of one-half pound of marijuana—the individuals told officers that Jenkins had sold them about one pound of marijuana and there were text message exchanges between them and Jenkins about the purchase of marijuana; (3) the information provided by the K9 deputy from Kansas who seized \$68,000 concealed inside a vehicle and was told by the driver that he was returning from Jenkins's home where he delivered seventy-eight pounds of marijuana every two to three weeks; and (4) the events occurring on February 2, 2018, when Jenkins's home was under surveillance—the same day Agent Brea sought the search warrant, as described above.

Jenkins's description got out of the vehicle and went into the house. Jenkins then came out of the residence carrying a couple of bags, ran to the same vehicle, put the bags inside the vehicle, and started walking back toward the home. But before Jenkins could re-enter the house, the agents detained him. The agents also stopped the Hyundai Sonata on a nearby street. The agents identified the driver of that vehicle as his wife Mary Stephanie Jenkins and detained her. Agents also stopped the vehicle Jenkins's son was driving as it left the area. The deputies conducted a protective sweep of the residence to ensure that there were no other people inside and awaited the search warrant.

¶15. Agent Brea returned to the residence with the search warrant signed by Circuit Judge Wilson, and the agents executed it on the residence and the vehicles. In the trunk of the Hyundai Sonata, agents found \$32,000. Agents found a package shipped from California that was addressed to "Walker Bowen" on the front porch of the residence. The package contained several individualized packets of marijuana. In the residence, the agents discovered several items of drug paraphernalia, including digital scales, a vacuum sealer, and vacuum seal bags. Agents also discovered a casserole dish that contained a butter mixture infused with tetrahydrocannabinol.

¶16. Marijuana in various quantities was also found throughout the house. Deputies discovered a hidden compartment concealed in a wall inside a bedroom of the residence. Forty-seven packages of marijuana and postal service packaging were recovered from the hidden compartment. Agents found a green tub containing marijuana in the attic of the

residence. Underneath the insulation in the attic, agents discovered eighteen more packages of marijuana. The Mississippi Forensics Laboratory tested the packages from the attic and found that they contained 10.35 kilograms of marijuana. The butter and tetrahydrocannabinol mixture was also tested and contained 418.59 grams.

¶17. The agents also collected cellular devices that were forensically analyzed pursuant to search warrants. Text messages from Jenkins's cell phone showed conversations with numerous individuals about the sale of marijuana. Pictures recovered from Jenkins's cell phone showed his son pushing packages of marijuana through a mesh screen into a green tub, like the one discovered at the residence.

¶18. Additionally, agents discovered Jenkins's bank cards and banking information at the residence. Agent Brea issued subpoenas duces tecum to Jenkins's banks and acquired the Jenkinses' bank account information.

¶19. Jenkins waived his *Miranda* rights and admitted to Agent Brea that "he had begun to use marijuana as a painkiller" at first. He also admitted that he later "began [selling] marijuana to friends for their pain" and making "edibles to sell to friends."

¶20. Upon considering the agreed stipulation of facts (incorporating by reference the February 28, 2020 suppression-hearing transcript and all exhibits admitted into evidence at that hearing), the trial court found Jenkins guilty of trafficking of a controlled substance with intent to sell as a non-recidivist under section 41-29-139(f), and the court sentenced Jenkins to serve fifteen years in the custody of the MDOC followed by ten years of post-release



supervision to be served as five years of reporting and five years of non-reporting supervision. Jenkins was also fined \$5,000 and ordered to pay all court costs and a lab fee of \$300 to the Mississippi Forensics Laboratory. Following the denial of his post-trial motion for JNOV or a new trial, Jenkins appealed.

### **STANDARD OF REVIEW**

¶21. “When reviewing a trial court’s denial of a motion to suppress, this Court adopts a mixed standard of review.” *Brown v. State*, 325 So. 3d 687, 690 (¶9) (Miss. Ct. App. 2021) (quoting *Gillett v. State*, 56 So. 3d 469, 482 (¶21) (Miss. 2010)), *cert. denied*, 326 So. 3d 465 (Miss. 2021). In this regard, “[d]eterminations of reasonable suspicion and probable cause are reviewed de novo.” *Id.* “However, we are bound by the trial judge’s findings as to the underlying ‘historical facts’ unless those findings are ‘clearly erroneous.’” *Id.* (quoting *Holloway v. State*, 282 So. 3d 537, 542 (¶13) (Miss. Ct. App. 2019)). We review a trial court’s decision with respect to discovery sanctions for an abuse of discretion. *Gray v. State*, 799 So. 2d 53, 60 (¶26) (Miss. 2001) (“This Court is limited on appeal to reversing a trial court’s decision regarding discovery violations only upon finding an abuse of discretion.”).

### **DISCUSSION**

#### **I. The Search Warrants**

¶22. Jenkins asserts that the search warrants to search his home and vehicles and bank records were invalid because they ignored certain requirements of Rule 4.3. He claims that the trial court therefore erred in denying his motion to suppress the evidence seized by the

agents acting pursuant to these search warrants. Jenkins does *not* assert that the search warrants were issued without probable cause, nor did he contest probable cause before the trial court, as the court specifically set forth in its order denying Jenkins's motions to suppress.

¶23. Rule 4.3 provides:

Every search warrant issued by the court shall:

(1) command the law enforcement officer to search, within a specified time not to exceed ten (10) days, the person(s) or place(s) named in the search warrant and to return the warrant and an inventory of the thing(s) seized to the court as designated in the warrant;

(2) designate the court to which the warrant and an inventory of the thing(s) seized shall be returned; and

(3) be signed and dated by the judge, showing the exact time and date and the name of the law enforcement officer to whom the warrant was delivered for execution.

MRCrP 4.3.

¶24. Jenkins specifically asserts that the search warrants in this case were invalid because they did not (1) “show[] the exact time” they were signed; (2) “the name of the law enforcement officer to whom the warrant was delivered for execution”[;] or (3) indicate that they must be executed “within a specified time not to exceed ten (10) days[.]” Based upon these insufficiencies, Jenkins asserts that the evidence seized by agents acting on the alleged invalid search warrants violated his Fourth Amendment right to be free from unreasonable searches and seizures. U.S. Const. amend. IV.

¶25. We recognize that the search warrants did not meet these requirements under Rule 4.3.<sup>4</sup> Nevertheless, under the circumstances of this case, we find no reversible error in the trial court’s denying Jenkins’s motion to suppress the evidence seized pursuant to these search warrants despite these deficiencies.

¶26. Regarding the “exact time” and ten-day execution requirements, this Court has recognized that “Rule 4.3 requires the warrant’s time and date be transfixed in an effort to ensure that the search warrant does not become stale or used as a coercive police tactic.” *Brown*, 325 So. 3d at 691 (¶14). We further recognized that “Rule 4.3 attempts to give force to prior Mississippi Supreme Court precedent prohibiting unlimited time for the execution of warrant once issued . . . . That requirement prohibits the potential for coercive police tactics as recognized by the Mississippi Supreme Court in *Taylor*.” *Id.* (citing *Taylor v. State*, 137 Miss. 217, 102 So. 267, 268 (1924)). In *Brown*, this Court found that Rule 4.3 deficiencies in a search warrant like those here did not render inadmissible the evidence obtained from the warrant where the underlying purpose of Rule 4.3’s timing requirements—to prevent coercive police tactics—was met. *Id.* at 691 (¶¶15-16). We find that this Court’s analysis in *Brown* supports our decision here.

¶27. In *Brown*, the judge who signed and dated the search warrant found sufficient probable cause for the warrant but failed to specify the time the warrant was issued as

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<sup>4</sup> The search warrants and subpoenas at issue in this case were issued in February 2018. We observe that the Mississippi Rules of Criminal Procedure had just recently been made effective as of July 2017.

required by Rule 4.3. *Id.* at 689 (¶7). The trial court denied the defendant’s motion to suppress the evidence obtained from the alleged invalid search warrant. *Id.* On appeal, the defendant asserted that “the search warrant was invalid because it did not specify the time the warrant was issued or the name of the law enforcement officer to whom the warrant was delivered,” *id.* at 690 (¶10), and thus “any evidence seized from that invalid search warrant violated his Fourth Amendment right[s].” *Id.* This Court affirmed the trial court’s denial of the defendant’s motion to suppress, finding that the deficiencies in the search warrant were harmless to the defendant. *Id.* at 691 (¶14).

¶28. As to the timing factors, the Court found that “[b]ecause the officer executed the warrant within mere hours of its issuance, the laudable goals of execution of the warrant within ten days were met. Although the warrant technically violated Rule 4.3, the search and seizure actions by the government in this case were in conformance with the Constitution.” *Id.* at 691 (¶15). Accordingly, as to these timing issues, we found “that the warrant’s failure to provide the exact time was harmless error because the warrant was clearly executed within hours of issuance and within the mandated ten-day time frame.” *Id.*

¶29. Regarding “the warrant’s failure to include the name of the designated officer,” the Court also found this “was harmless error because the record is clear that Officer Ray was the officer who requested and received the warrant.” *Id.* We concluded by recognizing that in that case “the goals of Rule of 4.3 were met, and to hold the search warrant in this case invalid would, without doubt, put form over substance.” *Id.*

¶30. We reach the same conclusion based upon the similar circumstances in the case before us. At the suppression hearing, Agent Brea testified about his request for the search warrant for Jenkins's home and vehicles. As discussed above, Agent Brea and other agents were surveilling Jenkins's residence in Olive Branch, Mississippi, on the afternoon of February 2, 2018. They witnessed a car park in the driveway, the driver exit the vehicle empty-handed, go into Jenkins's residence for forty minutes, exit the home with a large, white box, and drive away. Following a traffic stop of that vehicle, the agents learned from the driver (Dearman) that the box contained packets of marijuana and Dearman informed the agents of Jenkins's illegal drug activity.

¶31. After obtaining Dearman's statement at about 3 p.m. that afternoon at the DeSoto County Sheriff's Office, Agent Brea then prepared his affidavit and request for a search warrant. He testified that at about 4 p.m. the same day, he submitted a signed affidavit to Circuit Judge Wilson in Hernando, Mississippi, attesting to the underlying facts and circumstances that formed his probable cause to suspect that Jenkins was involved in illegal drug activity and requested a search warrant for Jenkins's residence and vehicles. Circuit Judge Wilson initialed each page of the search warrant and signed it at that time. Agent Brea immediately left Hernando to return to Jenkins's home in Olive Branch<sup>5</sup> and the agents executed the search warrant signed by Circuit Judge Wilson on the residence and the

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<sup>5</sup> As a matter of public record, Hernando is approximately twenty miles from Olive Branch.

vehicles.

¶32. Regarding the search warrants for the Jenkinses' bank records, Agent Brea testified that the search warrants were signed by Circuit Judge Wilson on February 3, 2018, and he executed them—gave them to the banks—on February 5.

¶33. Agent Brea also testified that he acted in good faith in all his actions in connection with Jenkins's investigation; he attempted to comply with what he believed were the rules and the law in existence at the time; and he would not intentionally violate those rules or the applicable law.

¶34. Circuit Judge Wilson, the same judge who signed the search warrants, also testified at the suppression hearing. Circuit Judge Wilson could not recall Jenkins's case given the volume of search warrants that had been before her before and after these search warrants were signed. When shown the search warrants, she acknowledged that the search warrants did not specify the time of issuance and she could not recall what time Agent Brea requested them. She agreed that the court was bound by the law and the Mississippi Rules of Criminal Procedure. As a matter of routine, she followed the applicable law and would not intentionally violate it.

¶35. In sum, like the officer in *Brown*, Agent Brea and the other agents executed the search warrant for Jenkins's house and vehicles within hours of its issuance. The ten-day goal for execution was certainly met. Likewise, Agent Brea testified that the search warrants for the Jenkinses' bank records were issued and served on the banks' legal departments within ten

days of their issuance. Even though the search warrants technically violated Rule 4.3's requirements, we find that the searches and seizures by agents of the sheriff's office here were in conformity with the federal and State Constitutions. The failure to include the exact time of issuance or the ten-day return period was harmless error because all three of the warrants were issued and executed within the mandated ten-day requirement. *Brown*, 325 So. 3d at 691 (¶14).

¶36. We further find that the failure to include the name of the designated officer in the search warrants, as required by Rule 4.3, was also harmless. The record plainly shows that Agent Brea drafted the warrants and supporting affidavits and “was the [agent] who requested and received the warrant[s].” *Id.* at 691 (¶15). The protections of the Fourth Amendment were met, “and to hold the search warrant[s] in this case invalid would, without doubt, put form over substance.” *Id.*

¶37. Jenkins makes a second assertion with respect to the search warrants for his bank records. He asserts that they were invalid because they were not returned until March 5, 2018—thirty days after issuance. According to Jenkins, the trial court erred in denying his motion to suppress the bank records for this additional reason.

¶38. Rule 4.3, however, does not require the return to be filed within a certain period. Further, Rule 4.4, governing “Return of Papers to Court,” only requires that the search warrant be returned “promptly.” MRCrP 4.4(b). As the trial court observed at the suppression hearing, it may take telephone companies and banks anywhere from ninety to

120 days to respond to search warrants and subpoenas for records, effectively making “the ten-day requirement obsolete and impossible to be observed.” We agree and find that Jenkins’s assertion on this point is without merit. *See Brown v. State*, 534 So. 2d 1019, 1023-24 (Miss. 1988) (finding that “[t]he return and inventory of a search warrant subsequent to its execution is a ministerial act[,]” so an officer’s failure “to make a return of a search warrant properly issued and served will not invalidate the search warrant, or a search and seizure made thereunder, even where the statute requires the return within a certain time”); *Kerns v. State*, 923 So. 2d 210, 215 (¶11) (Miss. Ct. App. 2005) (finding that “the failure to timely file a return for a search warrant did not invalidate the valid search warrant”), *rev’d in part on other grounds*, 923 So. 2d 196, 201 (¶¶15-16) (Miss. 2005).

¶39. Lastly, like the trial court, we also find it relevant that Jenkins does not contest probable cause with respect to the search warrants,<sup>6</sup> nor does Jenkins assert that he was prejudiced in any way because of the Rule 4.3 mistakes. And both Circuit Judge Wilson and Agent Brea testified that they would not intentionally ignore or violate the applicable rules and law. Accordingly, for the reasons stated, we find no violation of Jenkins’s Fourth

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<sup>6</sup> Even if Jenkins had raised the probable cause issue on appeal, the record does not contain Agent Brea’s affidavit supporting his requests for the bank records search warrants. The issue is therefore waived as to those warrants. *Scott v. State*, 24 So. 3d 1039, 1041 (¶9) (Miss. Ct. App. 2010) (“This Court may only act on the record presented to it.”). Regarding the search warrant for Jenkins’s home and vehicles, as detailed above, we find that Agent Brea provided ample information in his affidavit connecting Jenkins to illegal drug activity and supporting a probable cause determination. Accordingly, “[Jenkins’s] Fourth Amendment rights were not violated because there was probable cause for the warrant.” *See Brown*, 325 So. 3d at 691 (¶16).



Amendment rights and no reversible error in the trial court's denying Jenkins's motion to suppress the evidence obtained from the search warrants for his home and vehicles and for the Jenkinses's bank records. We find this assignment of error is without merit.

## **II. The Subpoenas Duces Tecum**

¶40. Jenkins also asserts that the trial court erred in denying his motion to suppress the Jenkinses' bank records because the subpoenas duces tecum to the banks for these records were obtained without compliance with Mississippi Rule of Criminal Procedure 33. Among other requirements, Rule 33 provides that “[a] hearing on a motion for the issuance of a subpoena duces tecum shall be set at the time the motion is filed and served. The hearing shall be set no earlier than ten (10) days after filing and service of the motion,” MRCrP 33(c)(2), the motion must be accompanied by a supporting affidavit, MRCrP 33(c)(3), and the documents requested must be “returnable to . . . and produced before, the court.” MRCrP 33(4). To be sure, the record reflects, and the trial court found, that these requirements were not met. Nevertheless, for the reasons addressed below, we find no reversible error in the trial court's denying Jenkins's motion to suppress the Jenkinses' bank records due to improperly obtained subpoenas duces tecum.

¶41. Rule 33(d) provides that “[v]iolation of this Rule *may* provide a basis for sanctions.” (Emphasis added). Thus, the plain language of this rule shows that whether to impose sanctions under Rule 33 (such as exclusion of the produced information) is a discretionary determination to be made by the trial court. As the Mississippi Supreme Court has

recognized, “[t]he trial court has considerable discretion in matters pertaining to discovery, and its exercise of discretion will not be set aside in the absence of an abuse of that discretion.” *Gray*, 799 So. 2d at 60 (¶26). Further, “[t]his Court will reverse . . . only if the admission or exclusion of evidence causes a party to suffer prejudice and harm or some adverse [e]ffect of a party’s substantial rights.” *Yates v. State*, 919 So. 2d 1122, 1127 (¶24) (Miss. Ct. App. 2005). We find no showing that Jenkins was prejudiced by the Rule 33 noncompliance and no abuse of discretion on the trial court’s part in denying Jenkins’s motion to suppress the bank records obtained pursuant to the subject subpoenas.<sup>7</sup>

¶42. In *Yates*, for example, this Court found no error in the trial court’s denial of the defendant’s motion to exclude phone records acquired without compliance with Rule 33’s predecessor (URCCC 2.01) where, among other reasons, the defendant was not prejudiced by the use of the records at trial because he already knew about them. *Id.* at 1127-28 (¶26).

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<sup>7</sup> We recognize that Rule 33(a) provides that “[t]his rule shall not apply to proceedings before a grand jury.” The State asserts that this exception applies because Agent Brea requested the subpoenas to BancorpSouth and Regions Bank on February 3, 2018—over four months before Jenkins was indicted on June 13, 2018. But in its order denying the motions to suppress, the trial court specifically found “that the subpoena[s] [were] not issued in conjunction with proceedings before a grand jury.” Based upon our own review, we likewise find no indication that the subpoenas were requested or issued in connection with a grand jury proceeding. *Cf.* Miss. Code Ann. § 13-5-63 (Rev. 2019) (“The foreman of the grand jury shall have power to order subpoenas for all witnesses desired to be produced, and he shall also have power to swear all witnesses.”); Miss. Code Ann. § 99-9-23 (Rev. 2020) (“Any district attorney or conservator of the peace may apply to the clerk of the circuit court in vacation for writs of subpoena for any witness to attend before the grand jury.”); MRCrP 13.3(b). We therefore do not base our decision on the grand jury proceedings exception to Rule 33.

In this case, Jenkins can show no prejudice at all because the trial court never considered the bank records in determining his guilt. The trial court's decision was based solely on the agreed stipulation of facts, incorporating by reference the February 28, 2020 suppression-hearing transcript and all exhibits admitted into evidence at that hearing. The record reflects that the bank records requested and obtained through the subpoenas were never entered into evidence at the suppression hearing; there was no testimony about the substance of the bank records at the suppression hearing; and there was no information about the substance of the bank records in the agreed stipulation of facts considered by the trial court before determining Jenkins's guilt. Jenkins suffered no prejudice from the technically improper subpoenas.

¶43. Nor do we find any other basis for finding that the trial court abused its discretion in denying Jenkins's motion to suppress. The record reflects, and the trial court specifically found, that the banks did not object to the subpoenas, and the bank records were produced. Thus there is no indication that the recipients of the subpoenas were inconvenienced or harassed in the process of obtaining the requested information. Nor was there any intentional violation of Rule 33 by either Agent Brea, who requested the subpoenas, or Circuit Judge Wilson, who ordered the issuance of the subpoenas, as we have noted above. Accordingly, we find this assignment of error without merit.

### **CONCLUSION**

¶44. For the reasons stated, we find no reversible error in the trial court's denying Jenkins's

motions to suppress the evidence obtained through the search warrants for his home and vehicles and for the Jenkinses' bank records or through the subpoenas duces tecum for the Jenkinses' bank records. Accordingly, Jenkins's conviction and sentence is affirmed.

¶45. **AFFIRMED.**

**BARNES, C.J., WILSON, P.J., GREENLEE, LAWRENCE, McCARTY, SMITH AND EMFINGER, JJ., CONCUR. WESTBROOKS, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY McDONALD, J. McDONALD, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION.**

**WESTBROOKS, J., SPECIALLY CONCURRING:**

¶46. I agree with the disposition in the majority's opinion because Jenkins waived his right to a jury trial and agreed to a bench trial before Circuit Judge Wilson. But I write separately to address my concerns with Circuit Judge Wilson's failure to recuse herself from Jenkins' entire criminal case. When Circuit Judge Wilson testified at the hearing on Jenkins' motion to suppress evidence from allegedly insufficient search warrants and improper subpoenas that she signed, Circuit Judge Wilson placed herself in a situation where a "reasonable person" knowing all the circumstances would harbor doubts about her impartiality in the case moving forward. The best practice would have been to recuse herself from the remainder of the proceeding, thus removing Jenkins' option to have a bench trial before her.

¶47. "This Court presumes that a trial judge is qualified and unbiased." *Brown v. State*, 829 So. 2d 93, 99 (¶10) (Miss. 2002). But "[w]here one actively engages in any way in the prosecution and conviction of one accused of a crime, he is disqualified from sitting as a

judge in any matter which involves that conviction.” *Banana v. State*, 638 So. 2d 1329, 1330 (Miss. 1994) (citing *Moore v. State*, 573 So. 2d 688, 689 (Miss. 1990)). The objective test for recusal states that “[a] judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.” *Jenkins v. State*, 570 So. 2d 1191, 1192 (Miss. 1990) (citing *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss. 1986)). “When a judge is not disqualified under the constitutional or statutory provisions, the decision is left up to each individual judge.” *Brown*, 829 So. 2d at 99 (¶10) (citing *Taylor v. State*, 789 So. 2d 787, 797 (¶43) (Miss. 2001); *Buchanan v. Buchanan*, 587 So. 2d 892, 895 (Miss. 1991)).

¶48. Here, because Circuit Judge Wilson was a witness during the motion-to-suppress hearings and was required to defend the sufficiency of the warrants and subpoenas that she had signed, it seems clear that a reasonable person might harbor doubts regarding Circuit Judge Wilson’s impartiality in the remainder of the case. Canon 3 of the Mississippi Code of Judicial Conduct specifically states that judges should recuse themselves in scenarios where “the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]” Miss. Code Jud. Conduct Canon 3(E)(1)(a). While Circuit Judge Wilson may have believed that this was not such a scenario, the Supreme Court reminds us that “Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough.” *Collins v. Dixie Transp. Inc.*, 543 So. 2d 160, 166 (Miss. 1989). Even *the appearance of*

impropriety must be avoided. *Id.* at 167. I believe that protecting the integrity of the judicial process is paramount, and we should strive to remove even the appearance of a trial that could call such integrity into question. For these reasons, I believe Circuit Judge Wilson should have recused herself from Jenkins' subsequent criminal proceedings after she testified in the hearing regarding the suppression of evidence based on her allegedly insufficient warrants and improper subpoenas.

**McDONALD, J., JOINS THIS OPINION.**