IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00631 COA

MARCUS MAZIE **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	05/23/95
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	COPIAH COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PATSY ANN BUSH
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	ALEXANDER C. MARTIN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	UNLAWFUL SALE OF COCAINE WITHIN 1500 FEET OF A CHURCH BY A HABITUAL CRIMINAL: SENTENCED TO SERVE 60 YRS IN THE CUSTODY OF THE MDOC WITHOUT PAROLE
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE BRIDGES, C.J., DIAZ, AND COLEMAN, JJ.

BRIDGES, C.J., FOR THE COURT:

Marcus Mazie was indicted, tried, and convicted of the crime of sale of cocaine within 1500 feet of a church or school. He was sentenced to serve the maximum term of sixty years in the custody of the Mississippi Department of Corrections without the possibility of parole. He presents the following issues on appeal:

I. THE TRIAL COURT ERRED IN FAILING TO QUASH THE INDICTMENT AGAINST THE APPELLANT.

II. THE SENTENCE OF THE COURT IS CRUEL AND UNUSUAL PUNISHMENT AND IS DISPROPORTIONAL TO THE CRIME FOR WHICH APPELLANT WAS FOUND GUILTY.

III. THE ACCUSED WAS PUNISHED FOR DEMANDING A TRIAL.

Finding no error, we affirm.

FACTS

In early 1995, the City of Hazlehurst, Mississippi organized a drug task force to crack down on the illegal sale of drugs in the area. Local police and sheriff units cooperated with the Mississippi Bureau of Narcotics with the aid of federal grant money and local funds. On February 16, 1995, local officers fitted a confidential informant with a body wire and transmitter and sent her to make a buy. The confidential informant, Shenedia Mitchell, bought a twenty dollar rock of crack cocaine from Marcus Mazie. The buy was videotaped and audio taped. Mazie sold the crack cocaine within 1500 feet of a church, thus exposing him to enhanced penalty under Section 41-29-142 of the Mississippi Code (Rev. 1993).

At trial, the officers involved testified to the procedures they used in making the buy with the aid of the confidential informant. The confidential informant was searched thoroughly by a female officer both before and after the buy. After being fitted with a wire and sent to make a buy, the confidential informant was followed by an officer in a vehicle with a video camera. The buy was recorded on video and audio tape. After the buy was complete, the confidential informant delivered the crack cocaine and the remaining purchase money to the officers. After being fully searched again, the confidential informant was free to go.

The crack cocaine was labeled and sent to the Mississippi Crime Lab. An expert from the crime lab testified that the substance the confidential informant bought from Mazie was indeed crack cocaine. Shenedia, the confidential informant, testified that she bought the rock of crack cocaine from Mazie. He retrieved it from his house, then pulled it out of his pocket to sell to her. These events were recorded on videotape and played for the jury.

After presenting six witnesses, the State rested. Mazie moved for a directed verdict, which was overruled. The defense rested without presenting any witnesses. The jurors retired to deliberate and returned a verdict of guilty. Because of his status as a habitual offender and because of the enhanced sentencing allowed for the sale of cocaine within 1500 feet of a church or school, Mazie was sentenced to serve the maximum term of sixty years in the custody of the Mississippi Department of Corrections without parole.

I. THE TRIAL COURT ERRED IN FAILING TO QUASH THE INDICTMENT AGAINST THE APPELLANT.

The original indictment charging Mazie with the sale of cocaine within 1500 feet of a church did not name the confidential informant or specify the name of the church. However, Mazie was given the name of the confidential informant as well as the name of the church in pre-trial discovery. Nonetheless, on the first day of trial, Mazie asked the trial court to quash the indictment because it was vague, ambiguous, and did not protect him against double jeopardy, even though he admitted that he was informed of the confidential informant's identity and the name of the church. The State asked to amend the indictment to include the name of the church, and Mazie objected, claiming that the amendment was one of substance. The trial court allowed the amendment.

It is well-settled in Mississippi that an indictment may be amended by the trial court if the amendment is one of form, but not substance. ***Medina v. State,* 688 So. 2d 727, 730 (Miss. 1996).** "[A] mendments may not be 'material to the merits of the case' and the defendant must not be prejudiced in 'his defense on the merits.'" ***Holmes v. State,* 660 So. 2d 1225, 1226 (Miss. 1995)** (quoting Miss. Code Ann. § 99-17-13 (1994)). The Mississippi Supreme Court has developed a test to determine prejudice:

> The test of whether an accused is prejudiced by the amendment of an indictment or information has been said to be whether or not a defense under the indictment or information as it originally stood would be equally available after the amendment is made and whether or not any evidence [the] accused might have would be equally applicable to the indictment or information in the one form as in the other; if the answer is in the affirmative, the amendment is one of form and not of substance.

***Medina,* 688 So. 2d at 730** (quoting *Griffin v. State*, 540 So. 2d 17, 21 (Miss. 1989)). In Mazie's case, his defense and the evidence available to him were no different after the amendment to the indictment. He knew who the confidential informant was, and he knew what church within 1500 feet of which he sold cocaine.

It is true that the identity of the confidential informant must be disclosed to the defense when the confidential informant has been involved in or has witnessed the crime. ***Gowdy v. State*, 592 So. 2d 29, 34 (Miss. 1991).** However, "the identity of a person to whom the contraband is delivered is not essential to an indictment for a 'sale'. . . ." ***Jenkins v. State,* 308 So. 2d 95, 96 (Miss. 1975).** There is no dispute that in the present case the State disclosed the identity of the confidential informant to Mazie. Additionally, Mazie knew the name of the church even before the amendment to the indictment. In his argument, Mazie fails to prove any prejudice resulting from the trial court's refusal to quash the indictment or from the resulting amendment. This issue is meritless.

II. THE SENTENCE OF THE COURT IS CRUEL AND UNUSUAL PUNISHMENT AND IS DISPROPORTIONAL TO THE CRIME FOR WHICH APPELLANT WAS FOUND GUILTY.

Mazie was sentenced to serve a term of sixty years in the custody of the Mississippi Department of Corrections. The maximum sentence for the sale of cocaine is thirty years in the custody of the Mississippi Department of Corrections. **Miss. Code Ann. § 41-29-139 (a)(1)(b)(1) (Rev. 1993).** Additionally, § 41-29-142 of the Mississippi Code authorizes a sentence twice that allowed by § 41-29-139 if the controlled substance is sold within 1500 of a school, public park, or church. In Mazie's

case, twice the maximum penalty for the sale of cocaine was sixty years, and the trial court in its discretion sentenced him thus. Mazie contends that his sentence was disproportional to the crime committed and therefore resulted in cruel and unusual punishment.

"The imposition of a sentence is within the discretion of the trial court, and this Court will not review the sentence, if it is within the limits prescribed by statute." ***Reynolds v. State*, 585 So. 2d 753, 756 (Miss. 1991)** (citations omitted). Nonetheless, the Mississippi Supreme Court has stated that "where a sentence is 'grossly disproportionate' to the crime committed, the sentence is subject to attack on the ground it violates the Eighth Amendment prohibition of cruel and unusual punishment." ***Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993).** Mazie argues that the test put forth by the United States Supreme Court in ***Solem v. Helm*, 463 U.S. 277 (1983)**, and adopted by our state supreme court in ***Wallace v. State*, 607 So. 2d 1184, 1188 (Miss. 1992)**, is applicable here. The *Solem* test includes three elements for evaluating proportionality:

> (1) the gravity of the offense and the harshness of the penalty;
>
> (2) comparison of the sentence with sentences imposed on other criminals in the same jurisdiction; and
>
> (3) comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case.

Wallace*, 607 So. 2d at 1188** (quoting *Solem*, 463 U.S. at 291). However, in ***Hoops v. State*, 681 So. 2d 521, 538 (Miss. 1996)**, our supreme court recognized that *Solem* has been partially overruled by ***Harmelin v. Michigan*, 501 U.S. 957, 965-66 (1991).** "In light of *Harmelin*, it appears that *Solem*is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality.'" ***Hoops*, 681 So. 2d at 538** (quoting *Smallwood v. Johnson*, 73 F.3d 1343, 1346 n.4 (5th Cir. 1992) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 965-66 (1991)). Mazie claims that the harshness of his sentence far outweighs the severity of his crime. In his brief, Mazie contends that he is merely a petty criminal involved in petty drug sales. We are hardly convinced that the sale of crack cocaine by a habitual offender is a petty crime. In fact, our case law and statutes both demonstrate that the sale of cocaine is a serious crime deserving severe penalties. In ***Stromas v. State*, 618 So. 2d 116, 123 (Miss. 1993),** the Mississippi Supreme Court upheld a sixty year enhanced penalty for the sale of cocaine, stating that "[d]rug offenses are very serious, and the public has expressed grave concern with the drug problem." The supreme court held that the *Solem* test was not applicable because the "sentence was within statutory guidelines, and because this State's legislature, as a matter of public policy, has called for stiff penalties for drug offender[s]. . . ." ***Id. We do not find that a threshold comparison of Mazie's crime to the statutory punishment leads to an inference of gross disproportionality.

We are aware that Mazie faces sixty years in the penitentiary without the possibility of parole. He is deserving of this sentence, and the sentence is appropriate because of his status as a habitual offender. Even if we were to apply the *Solem* test to determine whether Mazie's sentence is disproportionate, we are without proper record evidence to do so. While Mazie includes in his brief a

list of other drug offenders and their sentences in Copiah and surrounding counties, the record is devoid of such evidence. In ***Wallace,* 607 So.2d at 1189,** the supreme court declined to consider the last two prongs of the *Solem* test because like Mazie, Wallace did not introduce his list of sentences into evidence, and the supreme court "ha[d] no way to verify its accuracy." The supreme court held that Wallace's list of sentences in his brief were useless to the court, stating:

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us in the record, certified by law; otherwise, we cannot know them.

***Wallace,* 607 So. 2d at 1189** (quoting *Mason v. State*, 440 So. 2d 318, 319 (Miss. 1983)). Mazie has placed nothing in the record for us to consider. Neither has he proved his contention that his sixty year sentence amounts to cruel and unusual punishment. We affirm.

III. THE ACCUSED WAS PUNISHED FOR DEMANDING A TRIAL.

It is Mazie's contention that he was punished for refusing a plea bargain offered by the State and therefore received an exaggerated sentence for going to trial. Mazie was offered a plea bargain and sentence of fifteen years. He refused the offer three days before the trial but changed his mind the day of trial and tried to get the fifteen years. The State explained to the trial court that the plea bargain was made on the condition that it was accepted three days prior to trial. Mazie refused it. When he tried to accept it on the day of trial, it had been withdrawn. The trial court stated that it did not have any knowledge of a plea bargain, and that it doubted it would have accepted it anyway.

Mazie does not complain that it was error for him not to be allowed to accept the plea bargain after refusing it; he claims that it is clear from the proceedings that he was punished for demanding a trial. However, Mazie does not support his argument with relevant case law or meaningful argument. When a defendant fails to make a clear argument or cite meaningful authority, this Court need not consider his issue. ***Coleman v. State,* 697 So.2d 777,787 (Miss. 1997).** Mazie's issues on appeal are without merit, and we affirm.

THE JUDGMENT OF THE COPIAH COUNTY CIRCUIT COURT OF UNLAWFUL SALE OF COCAINE WITHIN 1500 FEET OF A CHURCH AND SENTENCE OF SIXTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS A HABITUAL OFFENDER IS AFFIRMED. COSTS OF THIS APPEAL ASSESSED TO COPIAH COUNTY.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.