

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00031 COA**

GILBERT PUGH A/K/A GILBERT TYRONE PUGH

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:	11/28/95
TRIAL JUDGE:	HON. MIKE SMITH
COURT FROM WHICH APPEALED:	PIKE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAVID H. STRONG, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	JERRY RUSHING
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	UNLAWFUL SALE OF COCAINE: SENTENCED AS A HABITUAL IN THE CUSTODY OF MDOC FOR & DURING THE SPACE OF 60 YRS. WITHOUT BENEFIT OF REDUCTION, SUSPENSION, PROBATION OR 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.

DIAZ, J., FOR THE COURT:

Gilbert Pugh was convicted of sale of cocaine and sentenced to sixty years as an habitual offender in the custody of the Mississippi Department of Corrections. He makes the following arguments on appeal: (1) that the trial court improperly held him in contempt of court in the jury's presence, (2) that the trial court committed reversible error by giving him a sentence disproportionate to the crime for which he was convicted, and (3) that the trial court erroneously punished him for demanding a trial. Finding all his issues without merit, we affirm.

FACTS

On April 28, 1995, Donna Davis, a confidential informant working with the McComb Police Department, prepared to purchase drugs in an undercover capacity. She was searched, equipped with a body wire, and given sixty dollars in cash with which to purchase the narcotics. Her car was also searched pursuant to standard police procedure, and a video camera was placed inside the automobile to record the events. As Ms. Davis reached the targeted area, a man identified as Gilbert Pugh approached her. Ms. Davis asked Pugh if anyone was selling drugs in the area. He told her to make the block, and when she returned, he handed her what has been identified as cocaine in exchange for sixty dollars. She then left the area and returned to the McComb Police Department. Pugh was subsequently arrested and charged with unlawful sale of cocaine.

DISCUSSION

I. DID THE TRIAL COURT IMPROPERLY HOLD PUGH IN CONTEMPT OF COURT IN THE JURY'S PRESENCE?

Donna Davis, the confidential informant, testified that the man who sold her cocaine was wearing a shirt unbuttoned to the waist which revealed the presence of tattoos on his chest and upper abdomen area. The State then asked the trial judge to allow Pugh to remove his shirt so that the jury might see if there were any tattoos as described by Ms. Davis. The trial judge granted the State's request; however, Pugh refused to remove his shirt. As a result, the trial judge sentenced Pugh to thirty days, "in addition to whatever," for the contempt he exhibited against the court in refusing to obey a direct order.

Pugh especially takes issue with the fact that the trial judge added the phrase "in addition to whatever" when sentencing him for contempt. He argues that the remark showed the jury that the trial judge had already determined Pugh's guilt and that the jury should follow suit. However, the record indicates that Pugh made no objection to the judge's remark. The supreme court has repeatedly stated that "[i]f no contemporaneous objection is made, the error, if any, is waived." *Blue v. State*, 674 So. 2d 1184, 1191 (Miss. 1996) (citations omitted). Accordingly, Pugh's failure to object at trial to the judge's remarks concerning his sentence for contempt bars this issue on appeal.

Although Pugh failed to object at trial to the judge's sentencing remarks, he did raise an objection as to the constitutionality of the court's forcing him to remove his shirt and expose his chest for the jury. He claims that by directing him to exhibit his chest to the jury and then penalizing him for not doing so, the trial court violated Pugh's right to be free from self-incrimination. However, a person's Fifth Amendment privilege against self-incrimination only proscribes the "compelled production of testimonial evidence." *Porter v. State*, 519 So. 2d 1230, 1232 (Miss. 1988) (citing *McCrary v. State*, 342 So. 2d 897, 899 (Miss. 1977)). This Court examines the decision of the lower court to determine whether the trial judge abused his discretion. *Herrington v. State*, 690 So. 2d 1132, 1138 (Miss. 1997). In the case under consideration, the trial judge properly overruled Pugh's self-incrimination objection by finding that requiring Pugh to remove his shirt and exhibit his tattoos was non-testimonial and was therefore not a constitutional violation. Accordingly, we find that the trial judge made an appropriate ruling on this issue and committed no abuse of discretion.

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY GIVING PUGH A SENTENCE DISPROPORTIONATE TO THE CRIME FOR WHICH HE WAS CONVICTED?

Pugh argues that his sixty-year sentence for selling sixty dollars worth of cocaine was disproportionate to the crime he committed, and furthermore that his sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment. It is important to note, however, that Pugh was previously convicted for the separate felony crimes of burglary and unlawful sale of cocaine, and therefore he qualifies both for enhanced sentencing as a repeat offender for the sale of cocaine and as an habitual offender for two prior felony convictions. **Miss. Code Ann. § 41-29-139 (Rev. 1993)** states the penalty for the unlawful sale of cocaine as imprisonment for "not more than thirty (30) years" while Mississippi's repeat offender statute for previous narcotics convictions provides in part: "any person convicted of a second or subsequent [drug] offense . . . may be imprisoned for a term up to *twice* the term otherwise authorized" **Miss. Code Ann. § 41-29-147 (Rev. 1993)** (emphasis added). Furthermore, Mississippi's habitual offender statute states:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony . . . and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution . . . *shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.*

Miss. Code Ann. § 99-19-81 (Rev. 1994) (emphasis added). Due to Pugh's repeat and habitual offender status, the trial judge in the case at bar was left with no discretion but to sentence Pugh to the maximum term of imprisonment. Clearly, the trial judge correctly followed the applicable statutes in sentencing Pugh to sixty years--twice the maximum thirty-year term--and making him ineligible for early release. Accordingly, Pugh's second assignment of error is without merit.

III. DID THE TRIAL JUDGE ERRONEOUSLY PUNISH PUGH FOR DEMANDING A TRIAL?

In his last assignment of error, Pugh complains that the trial judge gave him the stiff penalty of sixty years in prison as retaliation for Pugh exercising his constitutional right to a trial by jury. We simply reiterate our finding in proposition two that the trial judge in the case at bar correctly followed the pertinent statutes in sentencing Pugh to the maximum term of imprisonment. Therefore, we decline to hold the trial judge in error on this issue.

THE JUDGMENT OF THE PIKE COUNTY CIRCUIT COURT OF CONVICTION OF

UNLAWFUL SALE OF COCAINE AND ENHANCED SENTENCE OF SIXTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS AN HABITUAL OFFENDER WITHOUT BENEFIT OF REDUCTION, SUSPENSION, PROBATION, OR PAROLE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO PIKE COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.