

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00317 COA**

**D'ANGELO ROCHELLE BROWN A/K/A
DEANGELO ROCHELLE BROWN A/K/A
DEANGLO ROCHELLE BROWN**

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:	2/19/96
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	SCOTT COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	EDMUND J. PHILLIPS, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEAN SMITH VAUGHAN
DISTRICT ATTORNEY:	KEN TURNER
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF POSSESSION OF COCAINE AND RESISTING ARREST. MOTION FOR NEW TRIAL DENIED.
DISPOSITION:	AFFIRMED - 1/13/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/23/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

THOMAS, P.J., FOR THE COURT:

DeAngelo Rochelle Brown appeals his conviction of possession of cocaine and resisting arrest raising the following issues as error:

**I. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL
ON THE GROUND THAT THE COURT HAD DENIED APPELLANT'S MOTION TO**

DISMISS FOR FAILURE TO CONDUCT AN INITIAL APPEARANCE WITHIN 48 HOURS OF ARREST.

II. THE RESIDUAL AMOUNT OF COCAINE IN THE APPELLANT'S POSSESSION WAS TOO SMALL FOR HIM TO HAVE KNOWN HE HAD IT; THUS THE STATE FAILED TO PROVE INTENTIONAL POSSESSION OF THE CONTROLLED SUBSTANCE.

III. THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

IV. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE ELEMENTS OF THE CRIME OF RESISTING ARREST OR IN THE ALTERNATIVE OF PERMITTING CONVICTION ON THIS CHARGE.

Finding no error, we affirm.

FACTS

On the night of Saturday, December 9, 1995, DeAngelo Rochelle Brown had an accident in his newly purchased used car. Officer Henry Minor arrived on the scene of a Lincoln car in a ditch near Morton, Mississippi, but no person was present. Soon thereafter, Brown, being driven by his father, arrived on the scene. Minor inquired about the car and asked what had happened. Brown told the officer that the Lincoln was his car and that another car had run him off the road into the ditch. Minor called a second officer, James Meyers, to the scene, and he arrived shortly thereafter. After asking if anyone was injured, Minor asked Brown for his driver's license. Brown refused. Minor asked for Brown's driver's license several more times, but Brown continued to refuse. Brown became abusive and cursed both officers. Brown tried to leave the scene, and the officers went after him and a struggle ensued. The officers arrested him for disorderly conduct, placing Brown in handcuffs in the patrol car.

Brown testified in his own behalf. He stated that a car drove him off the road that night. He then went to get his father and called a towing service to tow his car. Brown testified that his father drove him back to the scene where two officers were examining the accident and a wrecker was preparing to tow the car. Brown stayed to make sure that the car was not damaged by the tow truck. Brown stated that the officers asked him four times for his driver's license, but he did not have a driver's license, and he testified that the officers knew that. As he was walking away the officers grabbed him from behind and put handcuffs on him. During this time Brown stated that he was using profanities and struggling because he did not know what was wrong. Thereafter he was taken to the Morton Jail.

The officers testified that they searched Brown and discovered a plastic container in Brown's front pocket. This container had trace amounts of what the officers believed was cocaine residue. During the booking process, while Brown was still struggling and cursing the officers, a pipe fell from the sock on his right leg. This crack pipe also contained a residue of cocaine. Brown denied that he had possession of the plastic container found on his person. On cross-examination, the officers each admitted that he had not seen the pipe fall but had heard it clink when it hit the floor. At trial, an expert from the Meridian Crime Lab testified that the plastic container and pipe contained a residue

of cocaine.

When the officers attempted to put Brown in his jail cell, he continued to argue with the officers. Brown swung his arm back, and when trying to protect himself from being injured, Minor's arm was thrown against the jail bars. Minor's arm was injured by this confrontation. Brown admitted that he was trying to stay out of the cell, that he was resisting his arrest; however, he denied that he attempted to assault the officer.

Brown was charged with an assault on an officer and possession of cocaine. After deliberation, the jury returned a verdict of guilty of the possession of cocaine and resisting arrest.

ANALYSIS

I.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL ON THE GROUND THAT THE COURT HAD DENIED APPELLANT'S MOTION TO DISMISS FOR FAILURE TO CONDUCT AN INITIAL APPEARANCE WITHIN 48 HOURS OF ARREST.

Brown argues that a delay of more than eighty-four hours from the time of his warrantless arrest until the initial appearance denied him his rights guaranteed by the Fourth Amendment of the United States Constitution and Rule 6.03 of the Uniform Rules of Circuit and County Court Practice. Brown cites *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), which held that a "detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." He opines that because of this constitutional violation, his conviction should be reversed.

Brown was arrested on Saturday night, December 9, 1995, and had his initial appearance on Wednesday, December 13, 1995. This is obviously beyond the forty-eight hour requirement and the State concedes that Brown's Fourth Amendment rights were violated. The delay for the probable cause hearing must be reasonable. What makes the delay unreasonable is defined in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). The Mississippi Supreme Court has applied the *McLaughlin* test in *Thorson v. State*, 653 So. 2d 876, 886-87 (Miss. 1994). However, the State's reasons for the delay were not articulated in the record, and this Court cannot test the unreasonableness of the delay. On appeal this Court's review is limited by the facts on the record, thus we find that Brown made a prima facie showing of a violation of his Fourth Amendment rights. *See Mason v. State*, 440 So. 2d 318, 319 (Miss. 1983).

The question then arises, what is the proper remedy for a Fourth Amendment violation of a speedy initial appearance? Brown argues that his conviction should be reversed, and it is important to note that Brown does not seek to suppress or exclude evidence obtained during his illegal detention. Nowhere does Brown support his proposition that he is due a reversal to cure his harm. Brown does not state that his illegal detention should vitiate the jury's verdict or argue that he was denied a fair trial due to the delay. In *Esparaza v. State*, 595 So. 2d 418, 423 (Miss. 1992), the Mississippi Supreme Court found that an "illegal . . . detention does not void a subsequent conviction." *Id.*

(citing *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)). Since Brown failed to demonstrate how his detention harmed him, we will deny him the relief he seeks.

II.

THE RESIDUAL AMOUNT OF COCAINE IN THE APPELLANT'S POSSESSION WAS TOO SMALL FOR HIM TO HAVE KNOWN HE HAD IT; THUS THE STATE FAILED TO PROVE INTENTIONAL POSSESSION OF THE CONTROLLED SUBSTANCE.

Brown was convicted of possession of residual amounts of cocaine on a small plastic container and on a pipe. The amount of cocaine on both containers was too small for the State Crime Lab to report. Brown complains that he was wrongly convicted of the crime of possessing cocaine because the State did not prove the element of "knowingly" possessing an illegal substance.

The State was charged with proving beyond a reasonable doubt that Brown had dominion and control over the illegal drugs and that he knew the illicit nature of the substance within his possession. **Miss. Code Ann. § 41-29-139(c)(1) (Rev. 1993)**. "[T]here must be sufficient facts to warrant a finding that the defendant was . . . intentionally and consciously in possession of [the substance]." ***Berry v. State*, 652 So. 2d 745, 748 (Miss. 1995)** (quoting *Curry v. State*, 249 So. 2d 414, 416 (Miss. 1971)). "Possession, no matter how fleeting, is sufficient to sustain a conviction." ***Berry*, 652 So. 2d at 751.**

Officer Minor searched Brown and found the small plastic container in his front pocket. Brown's argument that the residue was so minute that he could not have known that the substance in the container was cocaine was not reasonable and certainly was not believed by the jury. It does not stand to reason that Brown carried a container in his front pocket without knowing what was in this container.

Brown argues that the pipe was not in his possession, that possibly the pipe was already in the booking room and when the struggle ensued Brown merely kicked the pipe. Again this argument was not credible. Although both officers testified that they did not see the pipe actually fall from Brown's pant leg, they did hear it fall, and both testified that they did not see anything else on the floor. The jury could readily, as it obviously did, reach the conclusion that Brown was in physical possession and control of the plastic container and the crack pipe. Brown's second assignment of error has no merit.

III.

THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Brown states that the State failed to prove that he had knowledge of the presence of cocaine and the amount present was too small for the trial court to presume this knowledge. He opines that as a result he should be granted a new trial. This argument is really a reiteration of his second assignment of error.

A motion for a new trial challenges the weight of the evidence rather than its sufficiency. ***Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989)**. New trial decisions rest in the sound discretion of the trial court, and the lower court should not grant the motion except to prevent an unconscionable injustice.

Jones v. State, 635 So. 2d 884, 887 (Miss. 1994); *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). On review we accept as true all evidence favorable to the State, and we give the State the benefit of all reasonable inferences that may reasonably be drawn from the evidence. *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992). This Court will reverse such a ruling only for an abuse of discretion. *McClain*, 625 So. 2d at 781.

The jury's duty was to assess the credibility of Brown. Clearly, the jury's verdict was not against the overwhelming weight of the evidence, and the trial court properly denied the motion for new trial. This issue is without merit.

IV.

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE ELEMENTS OF THE CRIME OF RESISTING ARREST OR IN THE ALTERNATIVE OF PERMITTING CONVICTION ON THIS CHARGE.

In his final proposition Brown asserts that the trial judge erred because he failed to instruct the jury on the elements of the lesser offense of resisting arrest and that he erred because resisting arrest requires that an arrest be in progress and Brown was already under arrest when the alleged crime was committed.

First we will address Brown's proposition that the trial judge erred because he failed to instruct the jury on the elements of resisting arrest; however, it was Brown's instruction on resisting arrest which the judge gave the jury. This instruction, D-16, laid out the elements of the crime and followed the language of the statute, Mississippi Code Annotated § 97-9-73, verbatim. The Mississippi Supreme Court had held before the "an instruction is sufficient when it follows the language of the pertinent statute." *Sanders v. State*, 586 So. 2d 792, 796 (Miss. 1991) (citing *Crenshaw v. State*, 520 So. 2d 131 (Miss. 1988)). Therefore, this part of Brown's argument has no merit.

Second, Brown was charged with assault on a police officer when Brown was being put in his jail cell. Brown argues that since his arrest had been completed long before he was inserted into the cell, he could not have been guilty of resisting arrest at that time. Regardless of any merit to this argument, however, Brown is procedurally barred from raising this issue on appeal. Neither during the trial, nor in his motion for new trial did Brown put this issue before the trial judge for his consideration as error. In fact, it was Brown who asked for and received the instruction at trial. "We will not put the trial court in error on an issue not placed before it and we must deem this ground to have been waived." *Shavers v. State*, 455 So. 2d 1299, 1302 (Miss. 1984)(citation omitted). *See also Roundtree v. State*, 568 So. 2d 1173, 1177 (Miss. 1990); *Livingston v. State*, 525 So. 2d 1300, 1303 (Miss. 1988). Accordingly, Brown's last assignment of error will be overruled.

THE JUDGMENT OF THE SCOTT COUNTY CIRCUIT COURT OF CONVICTION ON COUNT II OF POSSESSION OF COCAINE AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF \$5,000 AND CONVICTION OF RESISTING ARREST AND SENTENCE OF FIVE MONTHS IN THE SCOTT COUNTY JAIL WITH SENTENCE TO RUN CONSECUTIVELY TO COUNT II IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO SCOTT COUNTY.

BRIDGES, C.J., McMILLIN, P.J., DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., CONCURS IN RESULT ONLY. COLEMAN, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, P.J., DIAZ, KING, PAYNE AND SOUTHWICK, JJ.

COLEMAN, J., CONCURRING:

I agree with the majority's resolution of all five of the issues which Brown presented in his appeal; therefore, I concur in the majority's affirmance of the trial court's judgment and sentences of Brown. I write separately to comment further on Brown's first issue, which is that the trial court erred when it denied his motion to dismiss the indictment because the State failed to conduct an initial appearance within forty-eight hours of his arrest. In its incisive review of this issue, the majority appropriately asks, "[W]hat is the proper remedy for a Fourth Amendment violation of a speedy initial appearance?" I would answer this question as did the United States Supreme Court in *Powell v. Nevada*, **511 U.S. 79 (1994)**; but the answer may be better understood by reviewing *Powell*.

In *County of Riverside v. McLaughlin*, **500 U.S. 44 (1991)**, the United States Supreme Court held that the Fourth Amendment required a state to conduct a judicial determination of whether probable cause existed for an arrest made without a warrant within forty-eight hours of the arrest. In *Powell*, a delay of four days occurred between the accused's arrest and a judicial determination of probable cause to arrest him. However, the Nevada Supreme Court *sua sponte* had declined to apply the *McLaughlin* forty-eight-hour deadline "because [Powell's] prosecution had commenced prior to the rendition of that decision." *Powell*, **511 U.S. at 84**. Thus, in *Powell*, the precise question before the United States Supreme Court was whether the *McLaughlin* forty-eight-hour rule must be applied retroactively as a "new rule." *Powell*, **511 U.S. at 84**. In *Griffith v. Kentucky*, **479 U.S. 328, (1991)**, the United States Supreme Court had held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." Pursuant to *Griffith*, the United States Supreme Court reversed the Nevada Supreme Court and remanded the case for further proceedings. *Powell*, **511 U.S. at 85**.

The *Powell* majority noted that the Nevada Supreme Court had "not yet closely considered the appropriate remedy for a delay in determining probable cause (*an issue not resolved by McLaughlin*)" *Id.* **at 84**. In other words, the Supreme Court's answer to the majority's question, "[W]hat is the proper remedy for a Fourth Amendment violation of a speedy initial appearance?" seems to be "There is none -- thus far anyway." Indeed, the majority's review of Brown's first issue in the case *sub judice* opines that Brown failed to demonstrate that he was "denied a fair trial due to the delay."

In the "real world" of routine criminal prosecutions, a violation of an established constitutional right, *i. e.*, a judicial determination of probable cause for a warrantless arrest within forty eight hours of the arrest, without a concomitant sanction seems to diminish, if not destroy, the value of that right. For example, the remedy for the violation of an accused's right to a speedy trial is the dismissal with prejudice of the charge which the State has brought against the accused. *See Bailey v. State*, **463 So.2d 1059, 1064 (Miss.1985)** (holding that "[w]hen a defendant's constitutional right to a speedy trial has been violated, the sole remedy is to reverse the conviction and dismiss the charges").

Our affirmance of Brown's convictions in the face of the State's admitted violation of the *McLaughlin* forty-eight-hour rule does not denigrate its value. Instead, as the majority opinion clearly states, the affirmance of Brown's convictions means only that he failed to demonstrate that his four-day detention before there was a judicial determination of whether there was probable cause to have arrested him without a warrant was at most "harmless constitutional error." *See Chapman v. California*, 386 U.S. 18, 22 (1967) (concluding that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction").

The point of this concurring opinion is that while there currently may be no established remedy for the State's violation of the "*McLaughlin* forty-eight-hour rule," the lack of such a remedy, or sanction, must not be allowed to diminish its efficacy.

MCMILLIN, P.J., DIAZ, KING, PAYNE AND SOUTHWICK, JJ., JOIN THIS SEPARATE OPINION.