

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01162 COA**

BRAD HARRIS

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:	07/19/94
TRIAL JUDGE:	HON. JERRY OWEN TERRY SR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOSEPH GAUTIER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	CONO CARANNA
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	TRANSFER OF A CONTROLLED SUBSTANCE HABITUAL OFFENDER: SENTENCED TO 30 YRS IN THE CUSTODY OF THE MDOC, SAID SENTENCE BEING WITHOUT HOPE OF PAROLE OR PROBATION
DISPOSITION:	AFFIRMED - 1/13/98
MOTION FOR REHEARING FILED:	2/13/98
CERTIORARI FILED:	
MANDATE ISSUED:	4/28/98

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

KING, J., FOR THE COURT:

Brad Harris was convicted of the sale of a controlled substance within 1000 feet of a school in the Circuit Court of Harrison County and sentenced as an habitual offender to serve thirty years without probation or parole in the custody of the Mississippi Department of Corrections. Aggrieved by the conviction and sentence, Harris had appealed and assigned the following as error:

- 1. The trial court erroneously advised Harris during his plea hearing that he could receive an enhanced sentence under Miss. Code Ann. §§ 41-29-142 and 99-19-81 in violation of the double jeopardy clauses of the state and federal constitutions.**

2. The trial court erred in sentencing Harris to a thirty year sentence under Miss. Code Ann. §§ 41-29-142 and 99-19-81 in violation of the double jeopardy clauses of the state and federal constitutions.

3. The trial court erred in striking a black prospective juror who failed to complete his juror card.

4. The trial court erred in sentencing Harris as an habitual offender under Miss. Code Ann. § 99-19-81 (1972) without conducting a hearing.

5. The trial court erred in sentencing Harris to serve thirty years without pardon.

Finding no reversible error, we affirm.

Facts

On August 12, 1993, Detective Robert Cracchiola of the Gulfport Police Department's Narcotics Unit was working undercover with the Biloxi Police Department to make street level drug buys. While stopped in the Bayou Augusta Homes area of Biloxi, Detective Cracchiola was approached by an unknown man who inquired whether he was the police. Cracchiola responded that he was not. The man then asked Cracchiola what he wanted, to which he responded "a 20". The man then instructed Cracchiola to wait for him in a nearby parking bay. The man returned and sold Cracchiola a \$20 rock of cocaine. The unknown man who sold the drugs to Cracchiola was later identified as Harris.

On January 13, 1994, a Harrison County grand jury indicted Harris for the illegal transfer of cocaine to a undercover officer within 1000 feet of a school in violation of Miss. Code Ann. §§ 41-29-139(a) (1) and 41-29-142. A two time convicted felon, Harris was indicted as a habitual offender pursuant to Miss. Code Ann. §99-19-81.

I. DID THE TRIAL COURT ERRONEOUSLY ADVISE HARRIS DURING HIS PLEA HEARING THAT HE COULD RECEIVE AN ENHANCED SENTENCE UNDER MISS. CODE ANN. §§ 41-29-142 AND 99-19-81 IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS?

II. DID THE TRIAL COURT ERR IN SENTENCING HARRIS TO A THIRTY YEAR SENTENCE UNDER MISS. CODE ANN. §§41-29-142 AND 99-19-81 IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS?

Harris filed a petition to enter a plea of guilty after the State agreed to recommend a five year sentence without parole. At the plea hearing, the trial judge informed Harris of the minimum and maximum sentence he could receive in compliance with Rule 3.03(3)(B) of the Uniform Criminal Rules of Circuit Court Practice. Specifically, the trial judge informed Harris that if he pled guilty to the transfer of a controlled substance with 1000 feet of a school in violation of Miss. Code Ann. § 41-29-142 (1972), the maximum enhanced sentence was sixty years. The trial judge further informed Harris that as an habitual offender under Miss. Code Ann. § 99-19-81 (1972), he faced the maximum sentence of thirty years without parole or probation. Based on this information, Harris

declined to enter the plea.

Harris argues that the enhancement of his sentence for the sale of a controlled substance within 1000 feet of a school and as an habitual offender violates due process. Harris contends this Court should reverse and remand his conviction and sentence because (1) he relied on incorrect maximum sentence ranges when forming his decision to have a trial and (2) dual enhancement violated his double jeopardy protections. We disagree.

When a defendant wishes to plead guilty to the offense charged, the trial court must determine, *inter alia*, that the defendant understands the nature and consequences of the plea, and the maximum and minimum penalties provided by law. *See* § 3.03, **Uniform Criminal Rules of Circuit Court Practice**.

In the case at bar, the trial judge correctly informed Harris that he faced a maximum of sixty years without parole⁽¹⁾. Understanding that the trial judge was not bound by his plea agreement, Harris declined to enter the plea and was subsequently convicted and sentenced to thirty years without parole as a habitual offender. As stated, *supra*, Harris faced sixty years without parole or probation under both enhancement statutes.

Harris asserts that dual enhancement of his sentence based on his habitual offender status and drug conviction violated double jeopardy. This argument is without merit for two reasons. First, the commitment order entered by the trial court specifically stated that Harris was sentenced under § 99-19-81. Secondly, in *Jones v. State*, 523 So. 2d 957 (Miss.1988), our supreme court held that application of both the habitual offender statute and enhanced penalties for a drug conviction was not violative of double jeopardy. *Id.* at 960. This Court will not review the imposition of a sentence unless it exceeds the limits prescribed by statute. *Reynolds v. State*, 585 So. 2d 753, 756 (Miss. 1991). Finding this assignment of error to be without merit, we affirm.

III. DID THE TRIAL COURT ERR IN STRIKING A BLACK PROSPECTIVE JUROR WHO FAILED TO COMPLETE HIS JUROR CARD?

In the case at bar, Harris alleges that the trial court erred when it allowed the State to use a peremptory strike against a black juror who failed to complete his juror questionnaire card. A defendant has the right to be tried by a petit jury which consists of jurors selected in a nondiscriminatory manner. Under *Batson*, the defendant must show (1) that he is a member of a cognizable racial group (2) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race and (3) that these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen on account of their race. *Batson* , 476 U.S. at 96-97. *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364 (1991), modified *Batson* to apply even when the accused and the challenged juror do not share the same race. In the case at bar, the trial judge found that Harris failed to prove purposeful discrimination by the State in its exercise of peremptory strikes. This Court has adopted the clearly erroneous standard of review of such findings. *Davis v. State*, 551 So. 2d 165, 171 (Miss. 1989); *Lockett v. State*, 517 So. 2d 1346, 1350 (Miss. 1987). These findings are entitled to great deference. *Davis*, 551 So. 2d at 171; *Batson*, 476 U.S. at 98 n. 21. The State offered legitimate, race neutral reasons for the strikes exercised against the black potential juror. During the initial review of the returned juror cards, the trial court

noticed that one card had not been completed. Sensing a potential problem, the trial court instructed a bailiff to locate the juror and have him complete the card. The incomplete juror card belonged to the black potential juror who is the subject of this *Batson* challenge. Finding that the trial judge did not abuse his discretion in granting the peremptory strike, we affirm.

IV. DID THE TRIAL COURT ERR IN SENTENCING HARRIS AS A HABITUAL OFFENDER UNDER § 99-19-81 WITHOUT A HEARING?

After the jury returned a verdict of guilty, the State offered certified copies of the commitment orders and judgments sentencing Harris to terms of more than one year on two prior felony convictions. Harris did not object to the admission of this evidence. Harris now asserts that the trial court failed to hold a hearing to determine his habitual offender status as mandated by law. *See Davis v. State*, 680 So. 2d 848 (Miss. 1996). This assertion is without merit.

All that is required in a hearing to determine a defendant's habitual offender status is (1) that the prosecution prove the prior offenses by competent evidence and (2) that the defendant be given a reasonable opportunity to challenge the prosecution's proof. *Keyes v. State*, 549 So. 2d 949 (Miss. 1989). In the instant case, the State offered certified copies of Harris's commitment orders and judgment. *See Moore v. State*, 631 So. 2d 805 (Miss. 1994) (certified copies of indictments and sentencing orders are sufficient to prove that defendant was a habitual offender under § 99-18-81). *See also Estelle v. State*, 558 So. 2d 834 (Miss. 1990). In response to the admission of his two prior burglary convictions, Harris simply stated that he committed the crimes because he was on drugs. The trial court had before it competent and unchallenged proof of Harris's prior felony convictions permitting it to sentence him as a habitual offender. Finding no error, we affirm.

IV. DID THE TRIAL COURT ERR IN SENTENCING HARRIS TO SERVE THIRTY YEARS WITHOUT PARDON?

The record developed during the sentencing hearing incorrectly states that Harris was sentenced to "thirty years without parole or pardon". The commitment order states that Harris was sentenced to "thirty years without hope of parole or probation". Harris urges this Court to reverse and remand his sentence because the trial court apparently misspoke as he pronounced Harris's sentence. The trial court's oral pronouncement of Harris's sentence is not formal evidence for purposes of execution or appeal. The order filed by the trial court reflects Harris's valid sentence. *See Temple v. State*, 671 So. 2d 58, 59 (Miss. 1996) (holding that a sentence is not valid unless a judgment is entered as of record). This assignment of error is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF TRANSFER OF A CONTROLLED SUBSTANCE WITHIN 1000 FEET OF A SCHOOL AND SENTENCE OF THIRTY YEARS AS A HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

BRIDGES, C.J., McMILLIN P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE,

AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.

1. § 41-29-142 allows a trial judge to double the maximum sentence for the transfer of a controlled substance if made within 1000 feet of a school and § 99-19-81 requires a trial judge to sentence a twice convicted felon to the maximum sentence without parole or probation.