

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00314 COA**

ZION GARRETT, JR.

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:	02/21/96
TRIAL JUDGE:	HON. JANNIE M. LEWIS
COURT FROM WHICH APPEALED:	HOLMES COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOHN MICHAEL GILMORE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR.
DISTRICT ATTORNEY:	MARK BOUTWELL
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	POSSESSION OF COCAINE: SENTENCED TO 3 YEARS AT MDOC. DEFENDANT IS TO PAY A \$1000 FINE, \$425 TO THE CRIME LAB, COURT COSTS OF \$205.50, AND \$500 IN ATTORNEY'S FEES.
DISPOSITION:	REVERSED AND REMANDED - 2/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

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

KING, J., FOR THE COURT:

Zion Garrett, Jr. was convicted of possession of cocaine in the Circuit Court of Holmes County and sentenced to serve three years in the custody of the Mississippi Department of Corrections. Garrett was fined \$1000 and ordered to pay court costs, crime lab fees, and attorney fees. Aggrieved by the conviction and sentence, Garrett has appealed and assigned the following as error:

- 1. The trial court erred in refusing to hear evidence on Garrett's motion to suppress;**
- 2. The trial court erred in denying Garrett's right to confront witnesses;**
- 3. The trial court erred in allowing the State to call witnesses not on the witness list; and,**
- 4. The trial court erred in allowing records of cocaine testing into evidence.**

As we hold hereafter, Garrett's first assignment of error is well taken and this matter is reversed and remanded for a new trial with directions to the trial court to conduct the requested suppression hearing. As we believe Garrett's first assignment of error warrants reversal, we do not address the merits of the remaining errors assigned on this appeal.

Facts

On April 25, 1995, Lexington Police Chief Joiner directed Officer Leslie Greer to arrest the appellant, Zion Garrett, Jr. ,for possession of a controlled substance. Officer Greer and fellow officers secured Garrett's arrest without a warrant that same day. After placing Garrett under arrest, the officer's performed a protective search of Garrett for weapons. Officer Greer removed a pill bottle from Garrett's pocket which contained thirty rocks of crack cocaine.

On September 22, 1995, a Holmes County grand jury indicted Garrett for possession of a Schedule II controlled substance, to-wit: cocaine in violation of Miss. Code Ann. §41-26-139(c)(1) (Rev. 1993). On January 30, 1996, Garrett filed a motion to suppress the introduction of all evidence obtained as a result of his illegal arrest.

On February 21, 1996, the day of trial without conducting a hearing, the trial court denied Garrett's motion to suppress on the ground that Garrett did not provide the State at least five days to respond. Garrett argued that the motion was timely filed and should be addressed on its substantive grounds. The State indicated it was unaware of any five day requirement and conceded that Garrett was entitled to have a determination on the substance of his motion to suppress.

Garrett also filed several other pre-trial motions. Garrett moved in limine to prohibit the State from offering evidence of the testimony of any person not included on the witness list provided during discovery. The trial judge granted the motion to exclude Officer Holden as a witness, but denied it as to Alan Cole, a forensic scientist with the Mississippi Crime Lab. The trial court granted Garrett's motions in limine to prohibit the State from (1) offering evidence other crimes charged but not convicted, (2) offering evidence of any witness not qualified as an expert, and (3) offering evidence of any illegal drug not authenticated as a Schedule II controlled substance.

In its case-in-chief, the State offered the testimony of Officers Greer and Charles Ledbetter, and Alan Cole of the Mississippi Crime Lab.

Officer Greer testified that he was following a directive from Chief Joiner when he arrested Garrett. Officer Greer further testified that after placing Garrett under arrest he performed a protective search for weapons. Officer Greer stated that Garrett's pant pocket contained a pill bottle with a substance Greer believed to be crack cocaine.

Officer Ledbetter testified that he performed the field test on the substance and it tested positive for cocaine.

Alan Cole testified that he did not examine the substance contained in the pill bottle, but that another forensic scientist, Leah Heath, examined the substance and it tested positive for cocaine. Garrett objected to Alan Cole's testimony on the ground that the Best Evidence Rule required the forensic scientist who actually analyzed the substance testify as to the results. The trial court overruled the objection and ruled that Cole's testimony was proper under the business records exception.

The trial court denied Garrett's motion for a directed verdict at the close of the State's case-in-chief. The jury convicted Garrett of possession of cocaine.

DID THE TRIAL COURT ERR IN NOT GRANTING A HEARING ON GARRETT'S MOTION TO SUPPRESS?

Garrett asserts that the trial court improperly failed to hold a hearing on his motion to suppress, therefore allowing the State to offer in evidence drugs illegally obtained during his arrest. In *Henry v. State*, 174 So. 2d 348 (Miss. 1965), our Supreme Court held that a hearing is required in advance of trial on a motion to suppress illegally obtained evidence. The trial court declined to rule on the substance of Garrett's motion to suppress. The trial court stated as its reason for this action, that Garrett had failed to give the State five days notice to defend the motion to suppress. Because of this failure, the trial court stated the motion was untimely, and indicated that it would be subject to a procedural bar.

This Court finds no requirement that the State be accorded five days notice to defend a motion to suppress.

The State acknowledged (1) an unawareness of a five day requirement and (2) that Garrett was entitled to a suppression hearing. Having acknowledged this entitlement, the State suggests that this is harmless error and should be overlooked. We disagree.

The right to a trial untainted by illegally obtained evidence is a fundamental right guaranteed by the 4th amendment of the U.S. Constitution and Article 3, § 23 of the Mississippi Constitution. When asserted at anytime prior to the introduction of the questioned evidence it is not waived and the defendant is entitled to a suppression hearing. *Henry*, 174 So. 2d at 352.

We hold that the trial court's failure to conduct a suppression hearing was error and reverse and remand this case for a new trial.

Because this matter is hereby reversed and remanded, we find it unnecessary to address the issue of whether Garrett's arrest was lawful.

THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR A NEW TRIAL. ALL COSTS OF THIS APPEAL ARE TAXED TO HOLMES COUNTY.

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