IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN PHINIZEE **APPELLANT**

VS. **NO. 2016-CA-01230-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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INTRODUCTION

In this appeal from a denial of post-conviction relief, the defendant's psychological expert testified at a post-conviction evidentiary hearing John Phinizee's IQ placed him in the range of "mild intellectual disability" and that because of his intellectual disabilities Phinizee was unable to understand and assist in his defense in 2006 and was thus incompetent to stand trial.

The State's expert testified he was unable to form an opinion to a reasonable degree of psychological certainty as to whether Phinizee had sufficient ability to consult with his attorney in the preparation of his defense and could not provide an opinion as to Phinizee's competency at the time of his trial.

Phinizee's trial defense lawyer testified that after interviewing Phinizee on several occasions "I felt like that the man could communicate with me [a]nd that he knew what he was saying." (C.P. at 225)

> "Mr. Phinizee came alone to my recollection. He didn't need assistance walking. He didn't need assistance in conveying the gist of what he needed me to do. He didn't need assistance in conveying to me the facts surrounding it." (C.P. at 217)

After listening to the post-conviction testimony in 2016, the trial judge, the same judge who ten (10) years earlier had presided over the trial of Phinizee in 2006, found as a fact and concluded as a matter of law that "[a]t trial and at all previous and subsequent hearings, the Petitioner has appeared to be able to communicate with his attorney and understand the court proceedings against him." (C.P. at 336) Moreover, "[h]is former attorney testified that he had no trouble communicating with the Petitioner at any point through his representation." (C.P. at 336)

In this posture, the trial judge found as a fact and concluded as a matter of law that " . . . the Petitioner's counsel's performance was not deficient" "[b]ut even if it was, the Petitioner was not prejudiced by it." (C.P. at 339)

Post-conviction relief was denied on August 10, 2016, in a five (5) page order replete with findings of fact and conclusions of law. *See* appellee's exhibit A, attached.

STATEMENT OF THE CASE

JOHN PHINIZEE appeals from the denial of post-conviction relief following a court-ordered evidentiary hearing initiated in the Circuit Court of Lowndes County on August 30, 2013, and concluding on May 13, 2016, James T. Kitchens, Jr., circuit judge presiding.

Phinizee claims he is "mentally disabled" and his disability prevented him from assisting his lawyer at Phinizee's trial in 2006 for the sale of cocaine and two counts of possession of cocaine with intent to distribute.

Phinizee also claims his trial lawyer, who testified during the evidentiary hearing, was ineffective in the constitutional sense because he failed, *inter alia*, to conduct a reasonable pre-trial investigation into Phinizee's mental disabilities and related health issues.

Finally, Phinizee contends the trial judge committed plain error when he disregarded the opinion testimony of the defendant's expert and relied upon the court's personal observations of

Phinizee's mannerisms and demeanor, both at trial in 2006 and again in 2016 during the evidentiary hearing.

After listening to, considering and reviewing the expert opinions, the circuit judge opined:

> " * * * [T]he Court considered and reviewed the expert opinions provided in this case. The Court is not persuaded that the Petitioner was incompetent at the time of trial. Based on this review and the Court's own observations, the Court finds that the Petitioner was able to perceive and understand the nature of the proceedings, communicate with his attorney and the Court, recall relevant facts, and testify in his own defense, if needed. [citation omitted] Thus, [the] Court finds that the Petitioner was in fact competent to stand trial in 2006." (C.P. at 337)
>
> These findings were neither clearly erroneous nor manifestly wrong.

See **Kidd v. State,** No. 2015-CA-01182-COA decided November 8, 2016, slip opinion at 4-5 (¶¶ 8 and 10) [Not Yet Reported] where we find the following language:

> "The appropriate standard of review of [PCR] after an evidentiary hearing is the clearly erroneous standard." [citations omitted] However, when reviewing issues of law, this Court's proper standard of review is *de novo*. [citation omitted] The PCR movant has the burden of showing he is entitled to relief by a preponderance of the evidence. [citation omitted]
>
> * * * * * *
>
> In PCR cases, when reviewing evidentiary hearings, "[w]e will not set aside [a trial court's] finding unless it is clearly erroneous. Put otherwise, we will not vacate such a finding unless, although there is evidence to support it, we are on the entire evidence left with the definite and firm conviction that a mistake has been made." *Meeks v. State,* 781 So.2d 109, 111 (¶5) (Miss. 2001) (quoting *Rochell v. State,* 748 So.2d 103,109 (¶20) (Miss. 1999)).

Application of these standards to the facts in this case leads to the inescapable conclusion that the factual findings of Judge Kitchens were neither clearly erroneous nor manifestly wrong and his legal conclusions, reviewed *de novo,* fail, on the entire evidence, to leave the reviewing court with the definite and firm conviction that a mistake has been made.

STATEMENT OF FACTS

Following a trial by jury conducted on February 14-16, 2006, John Phinizee was convicted in the Circuit Court of Lowndes County of one count of the sale of cocaine (Count #1) and two counts of cocaine possession with the intent to distribute (Counts #2 and #3).

Phinizee was sentenced to thirty (30) years in the MDOC for the sale charged in count 1. He was sentenced to two (2) thirty (30) year concurrent terms for the possession with intent charged in counts 2 and 3, said sentences to be run consecutively to the sentence imposed for count 1.

Additional facts may be gleaned from the opinion issued by the Court of Appeals affirming Phinizee's conviction and sentence. *See* **Phinizee v. State**, 983 So.2d 322 (Ct. App. Miss. 2007), appellee's exhibit B, attached.

Counsel opposite has also articulated a fair and accurate summary of the facts required for a resolution of the issues he raises on appeal. (Brief of the Appellant at 2-14)

Phinizee seeks appellate review of the denial on August 10, 2016, of his motion for post-conviction relief filed in the Circuit Court of Lowndes County after the Supreme Court of Mississippi granted Phinizee's application for leave to file his motion in the trial court following a change in attorneys. (C.P. at 36)

The Court of Appeals had previously affirmed Phinizee's conviction and consecutive sentences on September 25, 2007. *See* **Phinizee v. State,** *supra*, 983 So.2d 322 (Ct. App. Miss. 2007), appellee's exhibit B, attached.)

The trial court, James T. Kitchens, Circuit Judge, presiding, conducted a court-ordered and bifurcated evidentiary hearing which began on August 30, 2013, and concluded on May 13, 2016, after the State of Mississippi was granted time to have Phinizee examined by its own experts.

The following chronology of events may be helpful.

Date of Offense: December 9, 2003

Indictment: May 3, 2004

Motion to Suppress Statement: April 19, 2005

Denial of Motion to Suppress: September 12, 2005

Trial: February 14-16, 2006

Conviction affirmed on direct appeal: September 25, 2007

Application to file for PCR: May 29, 2011

Application granted: August 31, 2011

Motion for Post-Conviction Relief: September 2, 2011

Dr. Brodsky's Mental Evaluation: May 15-16, 2013

Initial Evidentiary Hearing (Phase 1): August 30, 2013

State's Mental Evaluation: December 21, 2015

Followup Evidentiary Hearing (Phase 2): May 13, 2016

PCR Denied: August 10, 2016

Obviously, this case has been around in one form or another for quite some time.

Gary Goodwin, trial defense counsel, testified at great length on August 30, 2013, during phase 1 of the bifurcated evidentiary hearing. (C.P. at 212-278)

Dr. Stanley Brodsky, the defendant's expert, testified as well. (C.P. at 279-330)

Two (2) witnesses testified for the State during phase 2 of the hearing conducted on May 13, 2016.

Sergeant John Moore, a Mississippi Highway Parol Assistant for driver's services, produced Phinizee's driving records. Phinizee had a regular operator's license when he applied in

1984 for a Class D non-commercial Mississippi license. Phinizee passed the examination for a Class D, non-commercial driver's license by passing the rules test with a score of 90. (R. 10)

Since that time Phinizee's license has lapsed after several renewals. (R. 11)

Robert Storer, a forensic psychologist conducting criminal forensic evaluations in both Mississippi and Louisiana, testified as an expert on behalf of the State that he met with Phinizee individually on two separate occasions on December 11th and 22nd, 2015. "The examination took place over the course of many months." (R. 16)

Storer testified he did not think it " . . . possible retrospectively to say that somebody was competent [because] [t]hose things are contemporaneous and contextual and just can't be adequately said to have been present retrospectively." (R. 17)

After testifying that he had read Dr. Brodsky's report (R. 17-18), Dr. Storer summarized his own findings in a fifty-nine (59) page report. Those findings are quoted as follows:

> "Regarding Mr. Phinizee's competence, I am unable to form an opinion to a reasonable degree of psychological certainty as to whether or not [Phinizee] had sufficient ability leading up to and at the time of trial (February 14 & 15, 2006) to consult with his attorney with a reasonable degree of rational understanding in the preparation of his defense, and whether or not during the period leading up to and at the time of trial he had a rational as well as factual understanding of the nature and object of the legal proceedings against him."
>
> "Regarding Mr. Phinizee's mental state at the time of the offenses for which he has been convicted, it is my opinion to a reasonable degree of psychological certainty that he was not suffering from a mental disease or defect that could have interfered with his ability to know the difference between right and wrong in relation to the acts for which he was convicted."
>
> "I am unable to form an opinion to a reasonable degree of psychological certainty as to whether Mr. Phinizee had the ability to understand the questions indicated by his statement to police on December 9, 2003."
>
> "It is my opinion to a reasonable degree of psychological certainty that Mr. Phinizee did have some deficits in his capacity to knowingly and intelligently waive or assert his constitutional rights. Specifically, Mr. Phinizee's reading ability has been

> assessed as being at a third grade level and his Full Scale IQ in this evaluation was assessed to be 68."
> *See* State's Exhibit 3 at pages 55-56 of 59.
>
> Storer also noted in the "Discussion" section of his report the following:
>
> "A competence assessment is a functional assessment of present ability. One of the questions to be addressed by this evaluation was Mr. Phinizee's competence leading up to and at the time of his trial in 2006. Without a direct assessment of [Phinizee's] competence related abilities at the time in question, however, one cannot say to a reasonable degree of psychological certainty that Mr. Phinizee was competent. It may be possible to say that he was not competent, if there is documented evidence of competence related impairments, or if he had a condition that would preclude his being competent at that time.
>
> There was no formal assessment of Mr. Phinizee's competence leading up to and/or at the time of his trial. * * * " (Pages 55 and 56 of 59 Storer's report)

In denying post-conviction relief following the bifurcated evidentiary hearing, the trial judge issued a five (5) page order in which the court made specific findings of fact and reached correct conclusions of law. *See* appellee's exhibit A, attached.

Appellee respectfully submits there is no compelling reason to plow anew ground that has already been adequately plowed by the circuit judge who, after hearing and evaluating the testimony, found as a fact and concluded as a matter of law Phinizee's testifying witnesses were less than persuasive with respect to a retrospective determination of competency based on an evaluation taking place seven (7) years after the fact.

Judge Kitchens, having presided over Phinizee's trial seven (7) years earlier in 2006, had the opportunity to observe Phinizee's demeanor and mannerism at that particular time while Dr. Brodsky did not enjoy the same advantage.

Appellee adopts and incorporates the rationale and reasons expressed by Judge Kitchens in his opinion/order which is both judicious and correct. Judge Kitchens handled this post-conviction matter with a great deal of wisdom and circumspection. His findings are neither clearly erroneous

nor manifestly wrong.

During the evidentiary hearing Dr. Storer, the State's psychological expert, testified he was unable to form an opinion to a reasonable degree of psychological certainty as to whether or not Phinizee had sufficient ability to consult with his attorney and understand the proceedings against him.

Gary Goodwin, Phinizee's trial lawyer, testified during the evidentiary hearing and made the following observations considered by Judge Kitchens in his decision-making:

> Q. [BY MR. THOMAS:] And this is why I asked you why didn't - - you took no steps to speak to his family prior to the date of trial.
>
> A. [BY MR. GOODWIN:] No, sir. Because, once again, I felt like that the man could communicate with me. And that he knew what he was doing. And that he knew what he was saying.
>
> Q. Well, let me ask you this, Mr. Goodwin. Are you finished?
>
> A. Let me say this. I saw no evidence. I saw no evidence in my mind that he lacked capacity to know and understand what he was doing or assisting me in the trial. Nor did I find that there was any evidence that he gave to me that would suggest to me that he didn't know what he was doing at the time that is set forth in the indictment that the events occurred. (C.P. at 225)

The relief requested by Phinizee in his petition and subsequent papers is vacation of his conviction in 2006 coupled " . . . with directions that the Appellant be granted a new trial." (Brief of the Appellant at 27) It seems to us that in requesting a new trial, Phinizee implicitly concedes he is competent to have one.

SUMMARY OF THE ARGUMENT

"The burden is upon [Phinizee] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief." **Bilbo v. State,** 881 So.2d 966, 968 (¶3) (Ct. App. Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev. 2000). *See also* **Kidd v. State,** *supra,* No.

2015-CA-01182-COA decided November 8, 2016, slip opinion at 4-5 (¶¶ 8 and 10) [Not Yet Reported].

The circuit judge was correct in finding that Phinizee has failed to do so here.

Whether Phinizee was competent to stand trial in 2006 is not the real issue in this appeal; rather, the paramount, *i.e.,* the dominant, issue is whether or not trial defense counsel was ineffective in the constitutional sense for failing to investigate Phinizee's intellectual disabilities and request a competency hearing in advance of trial. Counsel opposite observed at the beginning of the evidentiary hearing that "[t]his is not a hearing on whether Mr. Phinizee is competent" but "whether his attorney was incompetent at trial." (C.P. at 207)

First, Judge Kitchens was not hide bound to accept the testimony of Dr. Brodsky that Phinizee was incompetent to stand trial seven (7) years earlier. Retrospective competency-related determinations are not favored. *See* **Hollie v. State,** 174 So.3d 824, 831 (¶24) (Miss. 2015) citing **Coleman v. State,** 127 So.3d 161, 167 (Miss. 2013).

Second, Judge Kitchens applied the correct legal standards in finding as a fact and concluding as a matter of law that Mr. Goodwin's performance was neither deficient nor did any deficiency prejudice Phinizee.

Third, a trial judge sitting without a jury as the trier of fact has the sole authority for determining the credibility of the witnesses and the weight and worth of their testimony. **Estate of Crowell v. Estate of Trotter,** 151 So.3d 194 (Miss. 2014).

Judge Kitchens, as was his prerogative, simply found the defendant's evidence unpersuasive. It is not the office of a reviewing court to determine that Judge Kitchens, who had observed with his own eyes Phinizee at trial and heard with his own ears any statements made to the court by Phinizee at trial, was wrong.

The credibility of the witnesses and the weight and worth of their testimony, as well as the interpretation of the evidence when, as here, it is subject to more than one reasonable interpretation, are primarily for the trier of fact. **Trim v. Trim**, 33 So.3d 471 (Miss. 2010).

Phinizee's request for post-conviction relief was based almost exclusively on the ground that Goodwin had provided ineffective assistance of counsel because Goodwin had failed to investigate the mental status of his client. Goodwin testified he had no good reason to do so. (C.P. at 225)

> "Let me say this. I saw no evidence. I saw no evidence in my mind that he lacked capacity to know and understand what he was doing or assisting me in the trial. Nor did I find that there was any evidence that he gave to me that would suggest to me that he didn't know what he was doing at the time that is set forth in the indictment that the events occurred." (C.P. at 225)

Judge Kitchens observed that notwithstanding the expert opinion of Dr. Brodsky who examined Phinizee seven (7) years after the fact, the court was not persuaded that Phinizee was incompetent *at the time of trial* or that lawyer Goodwin's performance was deficient and prejudicial.

Judge Kitchens could have found Dr. Brodsky's testimony credible but unpersuasive, nevertheless, because retrospective determinations of competency-related matters are not favored. In addition, the record reflects Officer Swearingen *read* Phinizee his rights from the *Miranda* advisory (C.P. at 129), and Phinizee signed the advisory at the bottom and initialed the paragraphs on subsequent pages. According to Goodwin, "if the arrest is unlawful, the *Miranda* waiver is irrelevant." (C.P. at 233) Goodwin interviewed Phinizee "in-depth" "[o]n several occasions" and had no difficulty communicating with his client. (C.P. at 213-14)

It is enough to say the circuit judge, who had the opportunity to observe with his own eyes the "manner and demeanor" of Phinizee at trial in 2006 and hear with his own ears the tone and inflection of his voice, found Dr. Brodsky's testimony attesting to Phinizee's competency to stand trial unpersuasive.

An analogous scenario is a trial judge's fact-finding in his determination of the competency of a child witness. In the recent case of **Thomas v. State,** No. 2015-KA-00337-SCT decided February 18, 2016 [Not Yet Reported], we find the following language:

> * * * This Court gives deference to such findings, for the trial judge alone among the judiciary observed the manner and demeanor of the child and heard her testimony; **he "smelled the smoke of battle."** *See* **Rochell v. State,** 748 So.2d 103, 110 (Miss. 1999). [emphasis ours]

Phinizee claims the testimony of his witness would have produced a different result upon a new trial. This would appear to ignore the testimony of the State's expert who did not reach the same conclusion reached by Dr. Brodsky as well as the testimony of Goodwin himself who testified he had no trouble communicating with his client. (C.P. at 225)

Obviously, the testimony of Dr. Brodsky wouldn't produce a slam dunk in favor of Phinizee's competency either at his former trial or in a new trial.

"This court reviews the denial of post-conviction relief under an abuse of discretion standard." **Phillips v. State,** 856 So.2d 568, 570 (Ct. App. Miss. 2003). A trial court's dismissal of a motion for post-conviction relief will only be disturbed in cases "where the trial court's decision was clearly erroneous." **Crosby v. State,** 16 So.3d 74, 77 (¶5) (Ct. App. Miss. 2009).

That scenario simply does not exist here.

ARGUMENT

ISSUE NO. 1

THE TRIAL COURT DID NOT ERR IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT PHINIZEE WAS NOT SO INTELLECTUALLY DISABLED AS TO PRECLUDE HIM FROM ASSISTING HIS ATTORNEY AT TRIAL.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW REACHED BY JUDGE KITCHENS ARE NEITHER CLEARLY ERRONEOUS NOR MANIFESTLY WRONG.

ISSUE NO. 3

NO ERROR, PLAIN OR OTHERWISE, TOOK PLACE WHEN THE TRIAL JUDGE RELIED UPON, *INTER ALIA,* HIS OWN PERSONAL OBSERVATIONS OF THE DEFENDANT AT TRIAL.

Nearly ten (10) years after his trial by jury and conviction in 2006 for the sale and possession of cocaine, John Phinizee claims the trial judge was "clearly erroneous" and manifestly wrong in finding as a fact and concluding as a matter of law that

> "[a]t trial and at all previous and subsequent hearings, the Petitioner has appeared to be able to communicate with his attorney and understand the court proceedings against him. His former attorney testified that he had no trouble communicating with the Petitioner at any point throughout his representation. During the second part of the Petitioner's Post-Conviction Relief Hearing the State presented evidence and testimony that prior to trial and at trial, the Petitioner held both a regular operator's drivers' license and a commercial Class D drivers' license. This indicated that the Petitioner had the cognitive ability to pass both tests.
>
> In addition to this testimony, **the Court considered and reviewed the expert opinions provided in this case.** The Court is not persuaded that the Petitioner was incompetent at the time of trial. **Based on this review and the Court's own observations, the Court finds that the Petitioner was able to perceive and understand the nature of the proceedings, communicate with his attorney and the Court, recall relevant facts, and testify in his own defense, if needed. [citation omitted] Thus, [the] Court finds that the Petitioner was in fact competent to stand trial in 2006."** (C.P. at 336-37) [emphasis ours]

Phinizee argues with great vigor (1) the trial court erred in denying post-conviction relief because the record confirms his mental disabilities precluded him from assisting his attorney at trial; (2) Phinizee was prejudiced by his lawyer's deficient performance at trial, and (3) it was plain error for the trial judge to base his ruling on his own personal observations which are in direct contradiction to the opinion of Phinizee's expert.

We submit, on the other hand, the circuit judge was neither clearly erroneous nor manifestly wrong in denying post-conviction collateral relief sought on the basis of less than persuasive testimony of a psychological expert who reached his conclusion after two days of testing taking place

seven (7) years *after* Phinizee's trial and conviction.

We invite this Court to find that the circuit court did not abuse its judicial discretion when it held, implicitly if not directly, that Phinizee failed to meet his burden of proof. *Cf.* **Foxworth v. State,** 94 So.3d 359 (Ct. App. Miss. 2012).

In denying post-conviction relief following the court-ordered evidentiary hearing, Judge Kitchens "considered and reviewed the expert opinions provided in this case" as well as " . . . the Court's own observations." (R. 337) He, likewise, considered the testimony of Mr. Goodwin himself. Any suggestion that Judge Kitchens relied solely upon his personal observations in determining that Phinizee was competent to assist his attorney is misplaced. Phinizee's claims do not qualify as plain error.

Citing and relying upon **Martin v. State,** 871 So.2d 693, 697 (Miss. 2004), Judge Kitchens found as a fact and concluded as a matter of law that Phinizee " . . . was able to perceive and understand the nature of the proceedings, communicate with his attorney and the Court, recall relevant facts, and testify in his own defense, if needed." (C.P. at 337)

"The burden is upon [Phinizee] to prove by a preponderance of the evidence that he is entitled to the requested post-conviction relief." **Bilbo v. State,** *supra*, 881 So.2d 966, 968 (¶3) (Ct. App. Miss. 2004) citing Miss.Code Ann. §99-39-23(7) (Rev. 2000); **Kidd v. State,** *supra,* No. 2015-CA-01182-COA decided November 8, 2016, slip opinion at 4-5 (**¶¶** 8 and 10) [Not Yet Reported].

The following standard of review for an evidentiary hearing is also found in **Goodin v. State,** 102 So.3d 1102 (Miss. 2012), quoting from **Doss v. State,** 19 So.3d 690, 694 (Miss. 2009) (quoting **Loden v. State,** 971 So.2d 548, 572-73 (Miss. 2007):

> "When reviewing a lower court's decision to deny a petition for post[-]conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous." *Brown v. State,* 731 So.2d 595, 598 (Miss.

> 1999) (citing *Bank of Mississippi v. Southern Mem'l Park, Inc.,* 677 So.2d 186, 191 (Miss. 1996)) (emphasis added). In making that determination, "[t]his Court must examine the entire record and accept 'that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's finding of fact . . . .' " *Mullins v. Ratcliff,* 515 So.2d 1183, 1189 (Miss. 1987) (quoting *Cotton v. McConnell,* 435 So.2d 683, 685 (Miss. 1983)) **That includes deference to the circuit judge as the "sole authority for determining credibility of the witnesses."** *Mullins,* 515 So.2d at 1189 (citing *Hall v. State ex rel Waller,* 247 Miss. 896, 903, 157 So.2d 781, 784 (1963)). [emphasis supplied]

Judge Kitchens was not hide bound to accept the opinion of the defendant's psychological expert especially where, as here, the State's expert, in a comprehensive fifty-nine (59) page report, summarized his findings as follows:

> "Regarding Mr. Phinizee's competence, I am unable to form an opinion to a reasonable degree of psychological certainty as to whether or not [Phinizee] had sufficient ability leading up to and at the time of trial (February 14 & 15, 2006) to consult with his attorney with a reasonable degree of rational understanding in the preparation of his defense, and whether or not during the period leading up to and at the time of trial he had a rational as well as factual understanding of the nature and object of the legal proceedings against him.
>
> Regarding Mr. Phinizee's mental state at the time of the offenses for which he has been convicted, it is my opinion to a reasonable degree of psychological certainty that he was not suffering from a mental disease or defect that could have interfered with his ability to know the difference between right and wrong in relation to the acts for which he was convicted.
>
> I am unable to form an opinion to a reasonable degree of psychological certainty as to whether Mr. Phinizee had the ability to understand the questions indicated by his statement to police on December 9, 2003.
>
> It is my opinion to a reasonable degree of psychological certain that Mr. Phinizee did have some deficits in his capacity to knowingly and intelligently waive or assert his constitutional rights. Specifically, Mr. Phinizee's reading ability has been assessed as being at a third grade level and his Full Scale IQ in this evaluation was assessed to be 68."
>
> (*See* State's Exhibit 3, pp 55-56 of 59)

Why would there be any reason to conclude that had trial defense counsel requested a mental

examination at the time of Phinizee's trial the results would have been any more definitive than that reflected in Dr. Storer's report?

Expert testimony is ordinarily not conclusive, and this is true even where it is uncontradicted. **United States v. Collins,** 491 F.2d 1050 (5th Cir. (Miss.) 1974), cert denied 95 S.Ct. 104, 419 U.S. 857, 42 L.Ed.2d 90. It is in the fact-finder's discretion to accept or reject any expert testimony. **Woodham v. State,** 729 So.2d 158 (Miss. 2001), reh denied.

The circuit court, acting as the finder of fact, has the prerogative to accept or reject, in whole or in any part, the testimony of any witness, expert or lay. **Sellers v. State**, 183 So.3d 86 (Ct. App. Miss. 2015), reh denied, cert denied.

On the issue of sanity under the *M'Naghten* Rule the fact-finder has the discretion to accept or reject expert and lay testimony on the subject. **Ealey v. State,** 158 So.3d 283 (Miss. 2015); **Hogan v. State,** 89 So.3d 36 (Ct. App. Miss. 2011), reh denied, cert denied. Juries are not bound by an expert's testimony on an insanity defense and may accept or reject it in whole or in part. **White v State,** 542 So.2d 250 (Miss. 1989). By analogy the same logic holds true for competency-determination matters where the trier of fact is the trial judge.

We respectfully submit, contrary to Phinizee's position, the trial judge was neither clearly erroneous nor manifestly wrong in his decision making; rather, his findings of fact were supported by both substantial and credible evidence and his conclusions of law were both on time and on target.

Judge Kitchens did not abuse his judicial discretion in denying Phinizee's request for post-conviction relief for the following additional reasons:

(1) The opinion of the defendant's expert was a product of a mental evaluation conducted retrospectively on May 15-16, 2013, nearly seven (7) years after Phinizee's trial in 2006 at which time Phinizee's competency to stand trial was never an issue.

(2) Phinizee's mental deficiency was not brought home to Goodwin until the morning of trial. (C.P. at 224).

(3) Phinizee himself had retained Mr Goodwin for trial, i.e., Phinizee was a private client. (C.P. at 213-14, 246)

(4) The findings by Dr. Brodsky, the defendant's expert, point to a "*mild* intellectual disability" allegedly rendering him incompetent to stand trial and consult with his lawyer. [emphasis supplied] Mental weakness is not synonymous with incompetence.

(5) The State's expert, on the other hand, was unable to form an opinion in 2015 as to Phinizee's competency to stand trial in 2006.

(6) Phinizee's pre-statement constitutional rights were read to Phinizee by Swearingen (R. 65-66) thus nullifying the effect, if any, precipitated by Phinizee's observation that he was reading at the level of a 3rd grader, i.e., "the level of a kindergartner". (Brief of the Appellant at 22)

(7) The circuit judge, sitting without a jury, is the sole judge of the weight and credibility of the evidence. **Mullins v. Ratcliff,** 515 So.2d 1183, 1189 (Miss. 1987). *See also* **Estate of Crowell v. Estate of Trotter,** *supra,* 51 So.3d 194 (Miss. 2014) [A trial judge sitting in a bench trial as the trier of fact has the sole authority for determining the credibility of the witnesses."]

"In the end [the Supreme Court is] reviewing a finding of ultimate fact, one made by a trial court sitting without a jury." This Court does not reverse such findings of fact where they are supported by substantial and credible evidence. **Yarborough v. State,** 514 So.2d 1215, 1220 (Miss. 1987).

The personal observations made by Judge Kitchens both at trial in 2006 and later at the evidentiary hearing in 2013 constitute both substantial and credible evidence.

It was true in **Yarborough**, and it is equally true here, there is both substantial and credible

evidence in the record supporting the finding by Judge Kitchens that "[p]etitioner was able to perceive and understand the nature of the proceedings, communicate with his attorney and the Court, recall relevant facts, and testify in his own defense, if needed." (C.P. at 337)

Great deference must be given by a reviewing court to the trial court's personal observations of a defendant's demeanor and mannerism.

Judge Kitchen's findings of fact were neither clearly erroneous nor manifestly wrong. Accordingly, denial of post-conviction relief was not an abuse of judicial discretion.

We reiterate.

The burden is on the defendant as petitioner to establish the facts by a preponderance of the evidence that he would be entitled to the relief he seeks. **Payton v. State,** 845 So.2d 713, 716 (¶8) (Ct. App. Miss. 2003) This Court is thus reviewing an ultimate finding of fact, made by the trial judge sitting without a jury. **Yarborough v. State,** *supra,* 514 so.2d 1215, 1220 (Miss. 1987). The standard of review after an evidentiary hearing in post-conviction relief cases is well settled: "We will not set aside such a finding unless it is clearly erroneous." **Reynolds v. State,** 521 So.2d 914, 918 (Miss. 1988). Even if there is evidence to support the defendant's claims, "we will not vacate such a finding unless after examining all of the evidence we are left with the definite and firm conviction that a mistake has been made." **Id.**

The case at bar presents a factual issue and Judge Kitchens applied the correct legal standard.

ISSUE NO. 2

THE TRIAL COURT DID NOT ERR IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT TRIAL COUNSEL'S PERFORMANCE, GIVEN THE TOTALITY OF THE CIRCUMSTANCES, WAS NEITHER DEFICIENT NOR DID ANY DEFICIENCY PREJUDICE THE DEFENDANT.

A claim of ineffective assistance of counsel presents a mixed question of law and fact.

Accordingly, a court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed *de novo*. **United States v. Thomas,** 724 F.3d 632 (5th Cir. (Miss) 2013), cert denied 134 S.Ct. 1040, 188 L.Ed.2d 123.

Phinizee claims he was prejudiced by the ineffective assistance of his trial attorney who failed " . . . to challenge Phinizee's December 2003 statement on the basis of Phinizee's mental disabilities." (Brief of the Appellant at 21)

According to Phinizee "[i]n this instance, Phinizee's mental disabilities and his isolation for 12 hours after arrest were valid defenses that should have been alleged in support of the suppression of his statement. (R. 21, 23) Therefore, claims Phinizee, there is a reasonable probability that the outcome of both the suppression motion and the trial would have been different." (Brief of the Appellant at 22)

Phinizee also contends trial counsel was ineffective because Phinizee's "intellectual disabilities and related mental disorders should have been raised in advance of trial through a motion to determine his competency to stand trial." (Brief of the Appellant a 16)

The decisions rejecting similar complaints are legion and dispositive of Phinizee's complaint. *See* **Parker v. State,** 30 So.3d 1222 (Miss. 2010); **Goff v. State,** 14 So.3d 625 (Miss. 2009); **Cochran v State,** 143 So.3d 643 (Ct. App. Miss. 2014); **Rodgers v. State,** 66 So.3d 736 (Ct. App. Miss. 2011); **Russell v. State,** 44 So.3d 431 (Ct. App. Miss. 2010); **Dickerson v. State,** 37 So.3d 651 (Ct. App. Miss. 2009).

We note with profound interest that trial defense counsel filed a motion to suppress the cocaine found inside Phinizee's truck and inside Bernard's Pool Hall. Included also as a target of suppression were Phinizee's oral statements given to law enforcement authorities in the wake of warnings read from a *Miranda* advisory that Phinizee signed at the bottom and initialed on

subsequent pages. *See* exhibit folder.

The Court of Appeals noted that the grounds for Mr. Goodwin's motion to suppress were three-fold: "(1) that the cocaine found in [Phinizee's] truck should have been suppressed as the product of a warrantless search, (2) that the warrant obtained to search Bernard's was not supported by probable cause, and (3) that any statements [Phinizee] gave to police are fruits of the poisonous tree" because his arrest was illegal. 983 So.2d at 326.

In denying post-conviction relief, Judge Kitchens, in response to Phinizee's claim that counsel was ineffective for failing to pursue suppression on the grounds of Phinizee's weak mindedness, correctly observed "[t]here would have been no need to argue that the statement was involuntary [because of weak mindedness] if the arrest was unlawful." (C.P. at 338) Mr. Goodwin himself opined: "Because if the arrest is unlawful, the *Miranda* waiver is irrelevant." (C.P. at 233) Judge Kitchens found trial counsel's pretrial strategy reasonable under the circumstances, and so also do we.

Phinizee, we submit, invites this Court to measure trial counsel's performance and trial strategy retrospectively with the refractive aid of back-focal lenses and 20/20 hindsight. The Supreme Court of Mississippi has, on a former day, observed that

> "[i]t is easy to be a Monday morning quarterback, and in retrospect to pick out defects and flaws in the way the game was played the preceding Saturday. The same is true in analyzing trial tactics and strategy of trial counsel, after the trial is over and the verdict in. **We all have 20/20 vision in hindsight; the difficulty is in having 20/20 vision in foresight."**

See **Berry v State,** 345 So.2d 613, 615 (Miss. 1977), quoting from **Rogers v. State,** 307 So.2d 551 552 (Miss. 1976) [emphasis ours].

This Court should decline to evaluate the propriety of trial counsel's actions with the aid of the refractive correction of hindsight. Even if there were some lapses of counsel, his overall

performance received constitutionally high marks. Phinizee's complaints fall within the amorphous zone known as "trial strategy" or "judgment calls."

There is no constitutional right to errorless counsel. **Cabello v. State,** 524 So.2d 313, 315 (Miss. 1988).

Nor is a defendant entitled to a "perfect trial." **Pilcher v. State,** 296 So.2d 682, 688 (Miss. 1974).

The following language articulated by the Court of Appeals in **Reynolds v. State,** 736 So.2d 500, 511 (Ct. App. Miss. 1999), ¶41, is *apropos* to the issue before the Court:

> "[T]here is no 'single, particular way to defend a client or to provide effective assistance.' " *Handley*, 574 So.2d at 684 (quoting *Cabello*, 524 So.2d at 317). Defense counsel is presumed competent. *Johnson v. State*, 476 So.2d 1195, 1204 (Miss. 1985). "There is no constitutional right then to errorless counsel . . . " *See Handley*, 574 So.2d at 683 (quoting *Cabello*, 524 So.2d at 315).* * * "

Also relevant here are the following observations made by Justice Cobb in **Jackson v. State,** 815 So.2d 1196, 1200 ¶8 (Miss. 2002):

> Our standard of review for a claim of ineffective assistance of counsel is a two part test: the defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. *Hiter v. State*, 660 So.2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id*. at 965. **With respect to the overall performance of the attorney, 'counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy' and cannot give rise to an ineffective assistance of counsel claim**. *Cole v. State*, 666 So.2d 767, 777 (Miss. 1995). [emphasis ours]

See also **Harris v. State,** 822 So.2d 1129 (Ct. App. Miss. 2002).

It is well settled that complaints concerning counsel's failure to file certain motions, call certain witnesses, ask certain questions, and make certain objections fall within the amorphous zone and ambit of trial strategy. **Murray v. Maggio,** 736 F.2d 279 (5th Cir. 1984). *See also* **Melton v.**

State, 201 So.3d 1085 (Ct. App. Miss. 2016) [The choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections is part of trial strategy and cannot give rise to an ineffective assistance of counsel claim]; **Jenkins v. State,** 202 So.3d 220 (Ct. App. Miss. 2016) [The choice of whether or not to file certain motions is part of trial strategy and does not give rise to an ineffective assistance of counsel claim].

A trial court has no duty to *sua sponte* second-guess decisions by defense counsel. **Pitchford v. State,** 45 So.3d 216 (Miss. 2010), reh denied.

Moreover, "[i]n order [t]o successfully prove [a claim of] ineffective counsel, the defendant must first prove that counsel had an obligation to object to the admittance of the evidence." **Williams v. State,** 819 So.2d 532, 537 (¶14) (Ct. App. Miss. 2001).

In order for an appellate court to reverse on the grounds of ineffective assistance of counsel, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." **Chamberlin v. State,** 55 So.3d 1046, 1050 (¶5) (Miss. 2010) (quoting **Mohr v. State,** 584 So.2d 426, 430 (Miss. 1991)).

That scenario cannot be said to exist here.

Judge Kitchens applied the correct legal standards in finding as a fact and concluding as a matter of law that counsel's performance was neither deficient nor did counsel's deficiency, if any, prejudice Phinizee. (C.P. at 38-39; appellee's exhibit A, attached)

The ground rules for ineffective assistance of counsel claims are also set forth with precision in **Ross v. State,** 954 So.2d 968, 1003-1004 (¶¶ 77-79) (Miss. 2007) as follows:

> * * * The touchstone for testing a claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Irby v State,* 893 So.2d 1042, 1049 (Miss. 2004) (citing *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

> The standard of review for a claim of ineffective assistance involves a two-pronged inquiry: the defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. *Id.* To establish deficient performance, a defendant must show that his attorney's representation fell below an objective standard of reasonableness. *Davis v. State,* 897 So.2d 960, 967 (Miss. 2004) (citing *Williams v. Taylor,* 529 U.S. 362, 390-91, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Id.* at 967 (citing Strickland, 466 U.S. at 688, 104 S.Ct. 2052). We will not find ineffective assistance where a defendant's underlying claim is without merit. *Id.* Similarly, multiple defaults that do not independently constitute error will not be aggregated to find reversible error. *Walker v. State,* 863 So.2d 1, 22 (Miss. 2003). Our review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Howard v. State,* 853 So.2d 781, 796 (Miss. 2003) (citing *Hiter v. State,* 660 So.2d 961, 965 (Miss. 1995). However, an attorney's lapse must be viewed in light of the nature and seriousness of the charges and the potential penalty. *State v. Tokman,* 564 So.2d 1339, 1343 (Miss 1990) (citing *Washington v. Watkins,* 655 F.2d 1346, 1356-57 (5th Cir. 1981)).

Ross was a death penalty case where a lapse of counsel is viewed with heightened scrutiny.

This Court, a reviewing tribunal, must determine whether or not Judge Kitchens, based upon the "totality of the circumstances," was clearly erroneous in finding as a fact and concluding as a matter of law that Phinizee was not denied the effective assistance of counsel. **Carr v. State,** 873 So.2d 991, 1003 (¶27) (Miss. 2004) citing **Carney v. State,** 525 So.2d 776, 780 (Miss. 1988) ["(T)he Court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances."]

It was true in **Carr,** *supra,* and it is equally true here, that Phinizee " . . . has failed to prove that his trial counsel was ineffective." *Id.,* 873 So.2d at 1004.

CONCLUSION

Phinizee has requested oral argument.

We decline to join Phinizee's request and respectfully submit argument will serve no useful purpose. We invite his Court to decline appellant's request.

Argument can only be sought for the purpose of re-evaluating the credibility of the present testifying witnesses and the weight and worth of their testimony. Judge Kitchens observed Phinizee personally in 2006 and again in 2013 (C.P. at 210), and his observations are entitled to, and should be given, great deference.

There is no compelling reason for a reviewing court to reevaluate and reconsider testimony the circuit judge, as *sole* evaluator, has already evaluated, considered and rejected. Indeed that is not the function of a reviewing court. A reviewing court is not in the business of resolving credibility issues where, as here, the testimony, at best, is less than persuasive.

No new facts or points of law could be added during argument that have not been fully developed in the official record and briefs of counsel.

Appellee respectfully submits this case is devoid of any claims requiring a new trial or vacation of Phinizee's convictions and sentence.

Accordingly, the judgment entered in the lower court denying Phinizee's motion for post-conviction collateral relief should be forthwith affirmed.

Respectfully submitted,

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BY: /s/ Billy L. Gore
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IN THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI
IN VACATION, 2016

JOHN PHINIZEE — PETITIONER

VERSUS — CAUSE NO. 2011-0081-CV1 K

STATE OF MISSISSIPPI — RESPONDENT

ORDER

Came on to be considered this day the above styled and numbered post-conviction matter; and the Court, after having reviewed the record of proceedings in the trial court, the original trial transcript, the sentencing order, the pleadings herein, and having held a hearing, as mandated by the Supreme Court of Mississippi, on this matter on both August 30, 2013, and May 13, 2016, is of the opinion that Petitioner's Motion for Post-Conviction Collateral Relief is without merit and not well taken.

Facts/Procedural History

On February 15, 2006, the Petitioner, John Phinizee, was convicted in this Court of one count of the sale of cocaine and two counts of possession of cocaine with the intent to distribute. The Court sentenced the Petitioner to a term of thirty (30) years in the Mississippi Department of Corrections ("MDOC") and pay a fine in the amount of $5,000.00 for the sale of cocaine charge. The Court then sentenced the Petitioner to a term of thirty (30) years in MDOC and a fine of $5,000.00 for the first count of possession of cocaine with intent to distribute and a term of thirty (30) years in MDOC and a fine of $5,000.00 for the second count of possession of cocaine with intent to distribute. The two possession sentences were to run concurrent. The sale sentence and the possession sentences were to run consecutively. The Petitioner filed a Motion for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial as well as a Motion to Reconsider regarding the sentence that the Court imposed. The Court held a hearing on both motions on April 25, 2006, and subsequently denied both motions.

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The Petitioner retained new counsel and appealed his case to the Supreme Court of Mississippi. The Court of Appeals affirmed the Petitioner's conviction, and the Supreme Court denied his Motion for Rehearing and his Petition for Writ of Certiorari. The Supreme Court, however, granted the Petitioner's Motion for Leave to Proceed in Trial Court after which the Petitioner filed his Petition for Post-Conviction Relief. The case was set for hearing on August 30, 2013, but the Petitioner did not disclose his expert until July 29, 2013. The State then filed a Motion for Mental Evaluation and Treatment and to Continue for Additional Testimony in order to have a psychologist at the Mississippi State Hospital evaluate the Petitioner. Due to scheduling conflicts, the Court held the first part of the hearing on August 30, 2013, and continued the case pending the Mississippi State Hospital's Mental Evaluation. Following his mental evaluation, the Court heard the remainder of the testimony from the State's witnesses on May 13, 2016. The prevailing issues are whether the Petitioner was competent to stand trial and whether the Petitioner's counsel was ineffective in his representation at trial. After holding a hearing on two previous days of court, reviewing the pleadings, trial transcript, and the expert opinions in this case, the Court finds the following.

Whether the Petitioner was competent to stand trial

In order to be deemed mentally competent to stand trial, a defendant must have "the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and . . . a rational as well as factual understanding of the proceedings against him." *Coleman v. State*, 127 So. 3d 161, 164 (Miss. 2013). The Court has the discretion to determine whether it "has reasonable ground to believe that the defendant is incompetent to stand trial." URCCC Rule 9.06.

At trial and at all previous and subsequent hearings, the Petitioner has appeared to be able to communicate with his attorney and understand the court proceedings against him. His former attorney testified that he had no trouble communicating with the Petitioner at any point throughout his representation. During the second part of the Petitioner's Post-Conviction Relief Hearing, the State presented evidence and testimony that prior to trial and at trial, the Petitioner held both a regular

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operator's drivers' license and a commercial Class D drivers' license. This indicates that the Petitioner had the cognitive ability to pass both tests.

In addition to this testimony, the Court considered and reviewed the expert opinions provided in this case. The Court is not persuaded that the Petitioner was incompetent at the time of trial. Based on this review and the Court's own observations, the Court finds that the Petitioner was able to perceive and understand the nature of the proceedings, communicate with his attorney and the Court, recall relevant facts, and testify in his own defense, if needed. *Martin v. State*, 871 So. 2d 693, 697 (Miss. 2004). Thus, Court finds that the Petitioner was in fact competent to stand trial in 2006.

Whether the Petitioner was denied effective assistance of counsel

The Supreme Court of the United States has held that, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to meet his burden under the *Strickland* test, the Petitioner must show that 1) his counsel's performance was deficient and 2) this deficiency prejudiced his defense. *Id.*

To satisfy the first prong of the *Strickland* test, the defendant must prove that "counsel's performance fell below an objective standard of reasonableness" such that "the challenged action 'might be considered sound trial strategy.'" *Wilson v. State,* 81 So.3d 1067, 1074 (Miss.2012) (citing *Strickland,* 466 U.S. at 687). "Judicial scrutiny of counsel's performance must be highly deferential." *Wilson,* 81 So.3d at 1075 (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052); *Holland v. State*, 878 So. 2d 1, 5 (Miss. 2004).

If the first prong of *Strickland* is met, the Court must then consider whether counsel's deficient performance resulted in prejudice to the defendant. This requires a determination of "whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.' " *Havard,* 988 So.2d at 329 (quoting *Mohr v. State,* 584 So.2d 426, 430 (Miss.1991)). The Supreme Court of Mississippi has established that the question of "what is reasonable

rests within the discretion of the trial judge because the judge sees the evidence first hand and observes the demeanor and behavior of the defendant." *Russell v. State*, 44 So. 3d 431, 437 (Miss. Ct. App. 2010).

1. ***Was Petitioner's counsel deficient in his performance at trial?***

The Petitioner argues that his trial counsel, Gary Goodwin, was ineffective because he failed to refer to the Petitioner's mental intelligence and failed to conduct a reasonable pre-trial investigation to discover the lack of mental intelligence.

Mr. Goodwin testified that he met with the Petitioner on numerous occasions and that he felt like the Petitioner could communicate with him and that the Petitioner knew what he was doing and saying. In addition, he said that the he saw no evidence that the Petitioner lacked capacity to know what he was doing or to assist him in trial. Therefore, he saw no need in doing an investigation into the Petitioner's lack of intelligence. However, Mr. Goodwin did file a motion to suppress the Petitioner's statement to police for an unlawful arrest. There was argument that he should have also tried to suppress the statement based on issues of voluntariness, because the statement would have been fruit of the poisonous tree and suppressed had the arrest been unlawful. There would have been no need to argue that the statement was involuntary if the arrest was unlawful. So, questioning the failure to bring up voluntariness in the motion to suppress is without merit.

There is no indication from the trial transcript that Mr. Goodwin failed in some regard in his representation of the Petitioner. Mr. Goodwin cross examined each witness that the State called and questioned the Petitioner's wife on direct examination about the ability to read, his ability to write, and his abilities following his aneurysm in 1985. While he did not provide mitigation at sentencing, he did file a Motion to Reconsider the Sentence. At the hearing for the Motion to Reconsider, he called several witnesses to try and persuade the Court to lessen the Petitioner's sentence. Thus, there is no indication that the Petitioner's counsel's performance was deficient such that it might not be considered sound trial strategy.

2. ***Was Petitioner prejudiced by his counsel's performance?***

Petitioner argues that his trial counsel's failure to conduct adequate pre-trial investigation and failure to reference the Petitioner's competency and mental intelligence at the suppression hearing and in mitigation at trial prejudiced him so that the results of the proceedings against him would have been different. As stated above, the Petitioner's counsel's performance was not deficient.

But even if it was, the Petitioner was not prejudiced by it. The Petitioner's attorney adequately assessed the Petitioner's mental condition in his numerous meetings with him. In addition, he filed timely motions on behalf of the Petitioner, argued those motions before the Court, and represented him to the best of his abilities throughout the trial itself. Accordingly, no prejudice occurred as a result of the counsel's representation of the Petitioner.

Conclusion

Based on the evidentiary hearings and thoroughly reviewing the Petitioner's claims as well as the relevant case law, the Court finds that the Petitioner is not entitled to post-conviction relief.

IT IS THEREFORE ORDERED, that this petition be, and the same is hereby denied. The Circuit Clerk is directed to send a copy of this Order to all parties, including the clerk of the Mississippi Supreme Court.

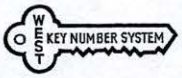
SO ORDERED, this the 10th day of August, 2016.

James T. Kitchens J.
CIRCUIT JUDGE

FILED
AUG 10 2016
Teresa Barksdale
Circuit Clerk

THE APPELLANTS/CROSS–APPELLEES.

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, BARNES, ISHEE AND CARLTON, JJ., CONCUR.



John PHINIZEE a/k/a John L. Phinizee, Jr., Appellant

v.

STATE of Mississippi, Appellee.

No. 2006–KA–00846–COA.

Court of Appeals of Mississippi.

Sept. 25, 2007.

Rehearing Denied Feb. 19, 2008.

Background: Defendant was convicted in the Circuit Court, Lowndes County, James T. Kitchens, Jr., J., of sale of cocaine and two counts of possession of cocaine with intent to distribute. He appealed.

Holdings: The Court of Appeals, Carlton, J., held that:

(1) warrantless search of interior of defendant's truck by law enforcement officer was a valid search incident to defendant's arrest for sale of cocaine;

(2) substantial evidence in affidavit supported judge's determination of probable cause to issue warrant to search pool hall for drug evidence;

(3) total sentence of 60 years in custody was not grossly disproportionate to offenses; and

(4) trial court acted within its discretion when it admitted evidence of defendant's prior drug transactions under other-acts rule to show defendant's intent to distribute.

Affirmed.

1. Searches and Seizures ⇐24

A fundamental principle of the Fourth Amendment's protection against unreasonable searches and seizures is that a warrant is generally required before a search or seizure may take place; however, the rule against warrantless searches and seizures is not absolute. U.S.C.A. Const. Amend. 4.

2. Arrest ⇐71.1(5)

Warrantless search of an automobile incident to arrest is proper where police officers have made a lawful custodial arrest of the occupant of the automobile. U.S.C.A. Const.Amend. 4.

3. Arrest ⇐71.1(6)

A search incident to arrest justifies the contemporaneous warrantless search of the arrestee and the area within the arrestee's immediate control. U.S.C.A. Const.Amend. 4.

4. Arrest ⇐71.1(5)

Warrantless search of interior of defendant's truck by law enforcement officer was a valid search incident to defendant's arrest for sale of cocaine, even though defendant was no longer in his truck when search was conducted, given that defendant's arrest was lawful. U.S.C.A. Const. Amend. 4.

5. Controlled Substances ⇐112

Probable cause existed that defendant's truck was evidence of crime or that it contained contraband, and thus law enforcement officer was justified in conducting a warrantless search of truck's interior, where officer witnessed defendant sell cocaine out of his truck. U.S.C.A. Const. Amend. 4.

6. Controlled Substances ⇐117

Warrantless search of interior of defendant's truck was justified as an inventory search; defendant, who had been driving truck, was lawfully arrested for sale of cocaine, and truck was later towed. U.S.C.A. Const.Amend. 4.

7. Controlled Substances ⇐148(4)

Substantial evidence in affidavit supported judge's determination of probable cause to issue warrant to search pool hall for drug evidence, even though affidavit contained information from unnamed informants; affiant officer personally observed drug transaction between defendant and drug buyer and subsequently took drug buyer's statement that she regularly purchased cocaine from pool hall, that information supported prior anonymous statements that defendant kept and sold cocaine at pool hall, and, although somewhat removed in time, an undercover buy of cocaine was previously made from pool call by narcotics unit. U.S.C.A. Const.Amend. 4.

8. Searches and Seizures ⇐113.1

A search warrant is validly issued when based upon probable cause. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures ⇐113.1

Probable cause to issue a search warrant is determined by assessing the totality of the circumstances. U.S.C.A. Const. Amend. 4.

10. Searches and Seizures ⇐113.1

Probable cause to issue a search warrant exists where it is based on information reasonably leading an officer to believe that then and there contraband or evidence material to a criminal investigation would be found. U.S.C.A. Const. Amend. 4.

11. Searches and Seizures ⇐191

On appeal, the issuance of a search warrant will not be reversed where substantial evidence supports the magistrate's determination that probable cause existed. U.S.C.A. Const.Amend. 4.

12. Sentencing and Punishment ⇐1490

Total sentence of 60 years in custody for sale of cocaine and two counts of possession of cocaine with intent to distribute, which included a consecutive term of 30 years, was not grossly disproportionate to offenses and, thus, did not constitute cruel and unusual punishment under the Eighth Amendment, even though defendant was a first offender; drug offenses were serious, defendant was sentenced well within statutory 90-year limit, and trial court stated that gas station at which defendant sold cocaine was within walking distance of a school, and opined that drug problems in part of county at issue were due "in no small part" to defendant. U.S.C.A. Const. Amend. 8; West's A.M.C. § 41–29–139(b)(1).

13. Sentencing and Punishment ⇐31

Sentencing is within the sole discretion of the trial court.

14. Sentencing and Punishment ⇐34

As a general rule, a sentence will not be disturbed on appeal if the sentence imposed is within the statutorily proscribed limits.

15. Sentencing and Punishment ⇐1482

An appellate court will apply the *Solem* three-pronged test for sentence proportionality under the Eighth Amendment only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality. U.S.C.A. Const.Amend. 8.

16. Criminal Law ⇐371(1)

Trial court acted within its discretion at trial for sale of cocaine and possession of cocaine with intent to distribute when it admitted evidence of defendant's prior drug transactions under other-acts rule to show defendant's intent to distribute; intent was a necessary element of possession of cocaine with intent to distribute, trial court conducted a balancing test and determined that probative value of evidence substantially outweighed danger of any prejudice, and trial court gave a proper limiting instruction to jury. Rules of Evid., Rules 403, 404(b).

17. Criminal Law ⇐371(1), 673(5)

Other-acts evidence of prior drug sales is admissible to prove intent to distribute where the trial court conducts a probativeness-prejudice balancing test and gives a limiting instruction. Rules of Evid., Rules 403, 404(b).

18. Criminal Law ⇐369.2(2), 371(1)

Evidence of prior bad acts is admissible to tell the complete story so as not to confuse the jury; it is also admissible to show intent, however, and the "complete story exception" and the "intent exception" are separate and distinct permissible uses of prior bad act evidence. Rules of Evid., Rule 404(b).

John David Weddle, Tupelo, attorney for appellant.

Stephanie Breland Wood, attorney for appellee.

Before KING, C.J., CHANDLER and CARLTON, JJ.

CARLTON, J., for the Court.

¶ 1. John Phinizee was convicted by a Lowndes County Circuit Court jury of one count of the sale of cocaine and two counts of possession of cocaine with intent to distribute. The trial court sentenced Phinizee to serve a term of thirty years in the custody of the Mississippi Department of Corrections for each count with the sentences in counts two and three to run concurrently and the sentence in count one to run consecutively with the sentences in counts two and three for a total of sixty years to serve. He was also ordered to pay a fine of $5,000 for each count. On appeal, Phinizee challenges the denial of his motion to suppress evidence, argues that his sentence is excessive, and asserts that the trial court erred in admitting testimony of prior bad acts. We find no error and affirm.

FACTS

¶ 2. Phinizee owned and operated Bernard's Pool Hall (Bernard's or the pool hall) in Crawford, Mississippi. His December 9, 2003, arrest was the product of an ongoing investigation which began in 1999. The circumstances leading up to his arrest are as follows.

¶ 3. In April 1999, an officer of the Lowndes County Narcotics Unit (LCNU) made an undercover purchase of forty dollars worth of cocaine from Bernard's Pool Hall. No arrest was made at the time.

¶ 4. In July 2001, officers of the LCNU received a letter from a concerned citizen stating that a man by the name of John was selling drugs from Bernard's. Again, in April 2002, Officer Larry Swearingen of the LCNU received a letter from a concerned citizen stating that Phinizee was selling cocaine and marijuana from Bernard's. Shortly thereafter, Officer Swearingen talked with Phinizee at Bernard's but no arrest was made at the time.

¶ 5. In October of 2003, Georgia Whitmore's husband came to Officer Swearin-

gen's office and stated that his wife was regularly purchasing crack cocaine from Phinizee at Bernard's Pool Hall and sometimes at one of the Citco stations in Columbus, Mississippi. He stated further that his wife had been buying from Phinizee for a long time and was addicted to cocaine.

¶ 6. On December 8, 2003, Whitmore's husband called Officer Swearingen and informed him that Whitmore planned to meet Phinizee to buy cocaine the next day between 7:00 a.m. and 9:00 a.m. at one of two Citco stations, located either on Highway 45 North or at the intersection of Military Road and Martin Luther King Drive. Whitmore's husband supplied the tag number of Phinizee's vehicle, which he described as a black extended-cab Chevrolet truck. Whitmore's husband also stated that his wife would be driving a maroon 2000 Prism. Officer Swearingen then ran the tag number and confirmed that the truck was registered to Phinizee and his wife.

¶ 7. The following day, Officer Swearingen conducted surveillance of the Citco station at the intersection of Military Road and Martin Luther King Drive. During the hours suggested, he observed Whitmore arrive at the gas station, park her car, and make a call from a pay phone located directly behind a barbeque pit near the gas station.[1] After completing the phone call, Whitmore got back in her car and drove around to the front of the barbeque pit. A few minutes later, Phinizee arrived at the gas station in a black Chevrolet truck. Officer Swearingen then observed Phinzee and Whitmore exit their respective vehicles and make an exchange which he believed to be a drug transaction. Whitmore then left the gas station and was pulled over a short distance therefrom at approximately 8:45 a.m. Whitmore was searched and a Trophy chewing tobacco pouch containing cocaine was found in her brassiere. Upon her arrest, she gave a written signed statement that she had purchased cocaine from Phinizee for a couple of years, and that she had in fact just bought cocaine from him that morning. She also stated that she had purchased cocaine from Phinizee at least a hundred times at Bernard's over the past few years.

¶ 8. At approximately 10:30 a.m., Officer Swearingen and Officer Joey Brackin returned to the Citco station to arrest Phinizee. A few minutes after they arrived, Phinizee pulled into the parking lot and was arrested as he exited his vehicle. Officer Swearingen testified that he looked into Phinizee's truck and was able to see numerous Trophy chewing tobacco pouches identical to the one taken from Whitmore's bra. He then searched the interior of the truck and found cocaine inside one of the tobacco pouches. Phinizee's vehicle was towed and he was taken to the sheriff's office for processing.

¶ 9. After these events transpired, Officer Swearingen submitted an affidavit for a search warrant of Bernard's Pool Hall. Officer Swearingen signed the "Underlying Facts and Circumstances" sheet which was attached to his affidavit submitted to Justice Court Judge Chauncey Green. Judge Green issued the requested search warrant and Phinizee accompanied Officer Swearingen to his place of business. The ensuing search of the pool hall yielded marijuana and cocaine. Once back at the station, Phinizee admitted that he had been selling drugs from Bernard's Pool Hall and gave a signed written statement

1. According to Officer Swearingen's testimony, the barbeque pit is located beside the Citco station and provides barbeque which is sold in the gas station. Phinizee did not work in the gas station, but ran the barbeque pit.

to that effect after signing a waiver of rights.

¶ 10. Prior to trial, Phinizee's counsel filed a motion to suppress the cocaine found in his truck, the cocaine found in Bernard's Pool Hall, and all written and oral statements made by him at the sheriff's office. He claimed that this evidence was the fruit of an illegal search and seizure. A suppression hearing was held in which only Officer Swearingen testified. The trial court found that (1) probable cause existed to arrest Phinizee without a warrant, (2) the search of Phinizee's vehicle was incident to a lawful arrest, (3) the search of Phinizee's vehicle was justified based on probable cause, (4) the search of Phinizee's vehicle was also subject to an inventory search based on the vehicle being towed, (5) Phinizee waived his *Miranda* rights and his statements were freely, voluntarily and knowingly given without any promises, threats, or coercion, and (6) the search of Bernard's Pool Hall was based on probable cause as well as a valid search warrant. Accordingly, the trial court denied Phinizee's motion to suppress.

DISCUSSION

1. *Motion to Suppress*

¶ 11. Phinizee argues that the circuit court committed reversible error by denying his motion to suppress evidence obtained in violation of his Fourth Amendment rights. Phinizee's argument under this assignment of error is three-fold: (1) that the cocaine found in his truck should have been suppressed as the product of a warrantless search, (2) that the warrant obtained to search Bernard's was not supported by probable cause, and (3) that any statements he gave to police are fruits of the poisonous tree.

[1] ¶ 12. The Fourth Amendment protects individuals against unreasonable searches and seizures.[2] A fundamental principle of the Fourth Amendment's protection is that a warrant is generally required before a search or seizure may take place. *McNeal v. State*, 617 So.2d 999, 1005 (Miss.1993) (citing *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973)). However, the rule against warrantless searches and seizures is not absolute. Mississippi law recognizes numerous exceptions to the warrant requirement. *Graves v. State*, 708 So.2d 858, 862–63(22) (Miss.1997). As to the search of Phinizee's truck, the State argues that the search falls squarely within three exceptions to the warrant requirement, namely, search incident to arrest, probable cause, and inventory search. We agree.

[2, 3] ¶ 13. The warrantless search of an automobile incident to arrest is proper where the police have made a lawful custodial arrest of the occupant of the automobile. *Townsend v. State*, 681 So.2d 497, 501 (Miss.1996) (citing *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)). A search incident to arrest justifies the contemporaneous warrantless search of the arrestee and the area within the arrestee's immediate control. *Chimel v. California*, 395 U.S. 752, 764, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The United States Supreme Court has further explained that the scope of a search incident to arrest extends to the entire

2. Fourth Amendment to the U.S. Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. *See also* Miss. Const. art. 3, § 23 (1890).

passenger compartment of the automobile as well as any containers found therein. *Belton*, 453 U.S. at 460–61, 101 S.Ct. 2860 (1981); *see also Sanders v. State*, 403 So.2d 1288, 1290–91 (Miss.1981).

[4] ¶ 14. In the instant case, it is beyond dispute that Phinizee was lawfully arrested based on probable cause that he had sold cocaine. Our inquiry thus turns on the permissible scope of the search of Phinizee's automobile. Phinizee contends that the search of his truck was impermissible because he was no longer in his vehicle when Officer Swearingen searched the interior of his truck.

¶ 15. We reject Phinizee's contention that the search of his truck was impermissible because he was no longer in the vehicle himself. *See Belton*, 453 U.S. at 462–63, 101 S.Ct. 2860 (upholding the search of an automobile after the arrestee had been placed in the squad car); *Sanders*, 403 So.2d at 1290–91 (upholding search of automobile where arrestee no longer in vehicle). In *Sanders*, our supreme court relied heavily on *Belton*, in finding that the search and seizure of two purses—one containing a gun—was permissible incident to the arrest of the passenger of the vehicle. *Sanders*, 403 So.2d at 1290–91. In *Sanders* the police received information from an informant that Sanders was involved in the robbery of a jewelry store. *Id.* Acting on this information, the police arrested Sanders when she parked her vehicle in the parking lot of a lounge where police officers were waiting. *Id.* As Sanders exited her vehicle, the police seized two purses from the front seat; one purse contained the gun used in the robbery. *Id.* In affirming the lower court's denial of Sanders' motion to suppress evidence, the court found that the purses and the pistol were properly seized as the result of a lawful custodial arrest. *Id.*

[5, 6] ¶ 16. In accordance with *Belton* and *Sanders*, we find the search and seizure of Phinizee's truck and the cocaine contained therein were proper as incident to a lawful custodial arrest. Phinizee was lawfully arrested based on probable cause and the cocaine found inside his vehicle was clearly within the permissible scope of the search, i.e., a container located in the passenger compartment of the vehicle.[3]

[7] ¶ 17. Phinizee next argues that all evidence found at Bernard's should have been suppressed because the warrant obtained was not supported by probable cause but instead based upon misleading and anonymous information. Phinizee argues that where the information constituting the underlying facts and circumstances is furnished by an informant, there is a need to show the party supplying the information was a credible person. *Foley v. State*, 348 So.2d 1034, 1036 (Miss.1977). The State asserts that probable cause existed in the instant case because police officers independently corroborated many of the details given by the confidential informants. *Roebuck v. State*, 915 So.2d 1132, 1137(¶ 15) (Miss.Ct.App.2005).

3. We also find the search of Phinizee's truck and the seizure of the cocaine permissible as an inventory search and based on probable cause that the vehicle contained contraband. Officer Swearingen witnessed Phinizee sell cocaine to Ms. Whitmore out of his truck, thus probable cause existed that Phinizee's vehicle was evidence of crime or that it contained contraband. *See Franklin v. State*, 587 So.2d 905, 907 (Miss.1991) (warrantless search and seizure of automobile proper where police had information that vehicle was used in a shoplifting incident; probable cause existed that the vehicle itself was evidence of crime or contained contraband). The search and seizure of Phinizee's truck was also proper as an inventory search. *Id.* (warrantless search and seizure of automobile made on-the-scene is proper where vehicle is impounded and wrecker is en route).

[8–11] ¶ 18. A search warrant is validly issued when based upon probable cause. *Zinn v. City of Ocean Springs,* 928 So.2d 915, 920(¶ 11) (Miss.Ct.App.2006). Under Mississippi law, probable cause is determined by assessing the "totality of the circumstances." *Rooks v. State,* 529 So.2d 546, 554 (citing *Illinois v. Gates,* 462 U.S. 213, 230–31, 103 S.Ct. 2317, 76 L.Ed.2d 527(1983)). Probable cause exists where it is based on "[i]nformation reasonably leading an officer to believe that then and there contraband or evidence material to a criminal investigation would be found." *Rooks,* 529 So.2d at 555. On appeal, the issuance of a warrant will not be reversed where substantial evidence supports the magistrate's determination that probable cause existed. *McNeal v. State,* 617 So.2d 999, 1007 (Miss.1993).

¶ 19. In the instant case, Officer Swearingen submitted underlying facts and circumstances to support the issuance of the warrant. The information consisted of (1) the April 1999 undercover purchase of cocaine at the pool hall, (2) the July 2001 and April 2002 letters from concerned citizens stating that Phinizee was selling drugs from the pool hall, (3) the October 2003 conversation that Officer Swearingen had with Whitmore's husband, (4) the December 8, 2003, phone call between Whitmore's husband and Officer Swearingen, (5) Officer Swearingen's personal observation of the December 9 drug transaction between Phinizee and Whitmore, (6) Whitmore's statement admitting that she purchased cocaine from Phinizee earlier that morning at the Citco station and that she had purchased cocaine from Phinizee at the pool hall at least one hundred times over the past few years, and (7) the cocaine found in Phinizee's truck earlier that day.

¶ 20. We find substantial evidence in the affidavit to support the justice court judge's finding of probable cause to issue a warrant for the search of Bernard's. We reject Phinizee's contention that the warrant was based on misleading and unreliable anonymous informants. While the affidavit does contain information from unnamed informants it also contains information based on personal observations of police officers involved in the case which corroborates the information received from anonymous sources. Under the totality of the circumstances, we find sufficient evidence to support a finding that cocaine would be found in the pool hall. Officer Swearingen personally observed the drug transaction between Phinizee and Ms. Whitmore and subsequently took her statement that she regularly purchases cocaine from Bernard's. This information supports the prior anonymous statements that Phinizee kept and sold cocaine at the pool hall. Also, although somewhat removed in time, an undercover buy of cocaine was previously made from the pool hall by the LCNU. Taken together, this information provides a reasonable basis to believe that the pool hall is the base of operation for Phinizee's cocaine sales. We, therefore, find there was substantial evidence to support the justice court judge's determination that probable cause existed to issue a warrant for the search of Bernard's Pool Hall. Having found no illegality in the search and seizure of Phinizee's truck and Bernard's Pool Hall, we quickly dispose of Phinizee's final claim that the statements he made to police after his arrest are fruits of the poisonous tree. As no evidence was obtained in violation of Phinizee's Fourth Amendment rights, there exists no poisonous tree from which Phinizee may claim any fruits have been derived. This issue is without merit.

2. Excessive Sentence

[12] ¶ 21. Phinizee argues that his sixty-year sentence was disproportionate to

the crimes committed and constitutes cruel and unusual punishment under the Eighth Amendment. Phinizee concedes that the time ordered to serve in this case is within the statutory term proscribed by statute, but argues that his sentence is grossly disproportionate to the crime charged. *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Phinizee asserts that the *Solem* test is applicable and argues that his sentence of sixty years to serve is inconsistent with sentences imposed in other jurisdictions. The State argues that the sentence is within the statutory guidelines and there is no showing of gross disproportionality and, therefore, Phinizee's sentence is not excessive. *Stromas v. State*, 618 So.2d 116, 122–24 (Miss. 1993).

[13–15] ¶ 22. Sentencing is within the sole discretion of the trial court. *Gibson v. State*, 731 So.2d 1087, 1097(¶ 28) (Miss. 1998) (quoting *Hoops v. State*, 681 So.2d 521, 537 (Miss.1996)). As a general rule, a sentence will not be disturbed on appeal if the sentence imposed is within the statutorily proscribed limits. *Id.* (quoting *Hoops*, 681 So.2d at 538). This Court will apply the three-pronged test set forth in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) [4] only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of "gross disproportionality." *Id.*

¶ 23. Phinizee was convicted of one count for the sale of cocaine pursuant to Mississippi Code Annotated section 41–29–139 (Rev.2005), which proscribes a maximum sentence of thirty years imprisonment and a fine not to exceed $1,000,000. Miss.Code Ann. § 41–29–139(b)(1). He was also convicted of two counts of possession with intent to distribute under section 41–29–139 which also carries a maximum sentence of thirty years imprisonment and a fine not to exceed $1,000,000. Miss.Code Ann. § 41–29–139(b)(1). Phinizee was sentenced to serve a term of thirty years in the Mississippi Department of Corrections and ordered to pay a fine of $5,000 for each of the three counts. The sentences in counts two and three were to run concurrently and the sentence in count one to run consecutively with the sentences in counts two and three for a total of sixty years in the custody of the Mississippi Department of Corrections. Although the sentence Phinizee received seems somewhat harsh in light of the fact that he was a first offender, we do not find that it is grossly disproportionate to the crimes committed. As our supreme court stated in *Stromas*, "[d]rug offenses are very serious, and the public has expressed grave concern with the drug problem. The legislature has responded in kind with stiff penalties for drug offenders. It is the legislature's prerogative, and not this Court's, to set the length of sentences." *Stromas*, 618 So.2d at 123. Phinizee faced a possible sentence of ninety years, thirty on each count. Thus, Phinizee's sentence was well within the statutorily proscribed limits. In denying Phinizee's motion to reduce his sentence, the trial judge noted that Phinizee had sold to Ms. Whitmore over a hundred times. He also stated that the gas station at which Phinizee sold cocaine to Ms. Whitmore is within walking distance of Lee Middle School. Finally, the trial judge stated that "[w]e have, over the years, had a number of drug problems in

4. The three-factor *Solem* test is as follows:
(a) gravity of the offense and the harshness of the penalty;
(b) sentences imposed on other criminals in the same jurisdiction; and
(c) sentences imposed for the commission of the same crime in different jurisdictions.
Id. (citing *Solem*, 463 U.S. at 292, 103 S.Ct. 3001 (1983)).

that part of the county. And I think, in no small part, due to Mr. Phinizee." Given the deference afforded to the trial judge's imposition of Phinizee's sentence, we cannot say that his sentence was grossly disproportionate to the crimes committed. This issue is without merit.

3. Prior Bad Acts Testimony

[16] ¶ 24. Phinizee argues that the trial court erred when it allowed Ms. Whitmore to testify regarding prior drug transactions between her and Phinizee. Specifically, he attacks Ms. Whitmore's testimony that she had purchased cocaine from Phinizee on numerous occasions over the years leading up to the December 9, 2003, transaction and that she regularly purchased cocaine from Phinizee at Bernard's Pool Hall.

[17] ¶ 25. We review the admission or exclusion of evidence under an abuse of discretion standard of review. *Jones v. State*, 904 So.2d 149, 152(¶ 7) (Miss.2005). The admissibility of evidence of prior bad acts is controlled by Mississippi Rule of Evidence 404(b).[5] Under Rule 404(b), evidence of prior bad acts is generally inadmissible; however, it is well-settled that evidence of prior drug sales is admissible to prove intent to distribute where the court conducts a M.R.E. 403 balancing test and gives a limiting instruction. *Smith v. State*, 839 So.2d 489, 494–95(¶ 7) (Miss. 2003) (citing *Swington v. State*, 742 So.2d 1106, 1111(13) (Miss.1999)).

¶ 26. Phinizee asserts that, in order for Ms. Whitmore's testimony to have been admissible, the State should have been required to show that the prior bad acts were "inter-connected" to the alleged acts for which he was on trial. *Neal v. State*, 451 So.2d 743, 759 (Miss.1984) (evidence of prior bad acts admissible to present a clear coherent story to the jury). We disagree.

[18] ¶ 27. Phinizee's reliance on *Neal* is misplaced. Evidence of prior bad acts is admissible to "[t]ell the complete story so as not to confuse the jury." *Palmer v. State*, 939 So.2d 792, 795(¶ 9) (Miss.2006). However, the "complete story exception," relied on in *Neal*, is one of several permissible purposes for which evidence of prior bad acts may be used. Our case law makes clear that the admission of prior bad acts is also permissible to show intent. The "complete story exception" and the "intent exception" are separate and distinct permissible uses of prior bad act evidence. As discussed below, we find that Ms. Whitmore's testimony was properly admitted to show intent.

¶ 28. In admitting Ms. Whitmore's testimony concerning her prior transactions with Phinizee for the limited purpose of showing intent, the trial court conducted a 403 balancing test and determined that the probative value of the tendered evidence substantially outweighed the danger of any prejudice because two of the charges were possession with intent to distribute, of which intent is an essential element. *See Carter v. State*, 953 So.2d 224, 229–30 (¶¶ 11–17) (Miss.2007) (where a necessary element of the crime charged is intent, evidence of prior bad acts is admissible to show intent). Also, the court gave a proper limiting instruction to the jury.

5. Mississippi Rule of Evidence 404(b) provides:

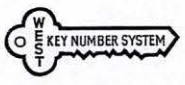
> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

M.R.E. 404(b).

¶ 29. Phinizee's intent was a necessary element of his conviction, and the trial judge allowed Ms. Whitmore's testimony for the limited purpose of showing intent to distribute. The trial judge conducted a 403 balancing test and gave the jury a proper limiting instruction. Accordingly, we find that the trial judge did not abuse his discretion in admitting the evidence of prior bad acts under Rule 404(b). This issue is without merit.

¶ 30. **THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I, SALE OF COCAINE AND SENTENCE OF THIRTY YEARS AND PAY A FINE OF $5,000; COUNTS II AND III, POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE AND SENTENCE OF THIRTY YEARS AND PAY A FINE OF $5,000 ON EACH COUNT ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SENTENCE IN COUNT I TO RUN CONSECUTIVELY TO SENTENCES IN COUNTS II AND III, AND SENTENCES IN COUNTS II AND III TO RUN CONCURRENTLY TO EACH OTHER FOR A TOTAL OF SIXTY YEARS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, BARNES, ISHEE AND ROBERTS, JJ., CONCUR.



Lorenzo HULL, Appellant

v.

STATE of Mississippi, Appellee.

No. 2007-CP-00186-COA.

Court of Appeals of Mississippi.

Dec. 11, 2007.

Rehearing Denied May 27, 2008.

Background: Defendant, whose eight-year sentence for possession of cocaine was reinstated after he violated terms of his post-release supervision, filed motion for post-conviction relief. The Circuit Court, Warren County, Frank G. Vollor, J., summarily denied relief. Defendant appealed.

Holding: The Court of Appeals, Roberts, J., held that defendant's guilty plea to possession of cocaine was freely, voluntarily, and intelligently entered.

Affirmed.

1. Criminal Law ⇐1134.90

A trial court's denial of post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous.

2. Criminal Law ⇐1139

When reviewing issues of law, an appellate court's proper standard of review on appeal of denial of postconviction relief is de novo.

3. Criminal Law ⇐1783

Defendant failed to show with "specificity and detail" how his counsel was ineffective due to counsel's alleged involvement in prior investigation of defendant, and thus, defendant failed to meet his burden of proof for establishing ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

CERTIFICATE OF SERVICE

I, BILLY L. GORE, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Blewett William Thomas, Esq.
264 Blewett Rd.
Columbus, MS 39701

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Honorable James T. Kitchens, Jr.
Circuit Court Judge
P.O. Box 1387
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Honorable Scott Colom
District Attorney
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This the 25th day of September, 2017.

/s/ Billy L. Gore
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