STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marion County

Thomas A Russo, Circuit Court Judge

GLENN PERNELL,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

SUPPLEMENTAL APPENDIX

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INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of General Sessions

Edward B Cottingham, Sr , Circuit Court Judge

Case No 2006-GS-33-297

The State, Respondent

v

Glenn Q Pernell Appellant

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITY

STATEMENT OF ISSUES ON APPEAL

I **DID THE TRIAL COURT ERR IN ALLOWING TESTIMONY AND EVIDENCE CONCERNING A DISTRIBUTION CHARGE, WHICH WAS NOT CALLED FOR TRIAL, AND WAS SAID EVIDENCE PREJUDICIAL TO APPELLANT?**

II **DID THE TRIAL COURT ERR IN ALLOWING TESTIMONY AND EVIDENCE CONCERNING APPELLANT'S SIMPLE POSSESSION OF MARIJUANA, AND WAS SAID EVIDENCE PREJUDICIAL TO APPELLANT?**

III **DID THE TRIAL COURT ERR IN PERMITTING TESTIMONY CONCERNING AN ALLEGED POSSESSION OF A FIREARM BY APPELLANT?**

IV **DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTIONS FOR A DIRECTED VERDICT, MOTION FOR A NEW TRIAL, AND POST TRIAL MOTIONS?**

V **DID THE TRIAL COURT ERR IN SENTENCING APPELLANT TO CONSECUTIVE TWENTY FIVE YEAR SENTENCES FOR DRUG VIOLATIONS THAT OCCURRED SIMULTANEOUSLY, AND IN FAILING TO GRANT APPELLANT'S MOTION TO RECONSIDER SENTENCE?**

STATEMENT OF THE CASE

Appellant was indicted by the Marion County Grand Jury for Trafficking in Cocaine 100-200 grams, Trafficking in Crack Cocaine 28-100 grams, Possession of Cocaine with Intent to Distribute within Close Proximity of a School and Possession of Crack Cocaine with Intent to Distribute within Close Proximity of a School The case was tried before a jury on Februarv 27 through March 1 2007, with the Honorable Edward B

Cottingham presiding The jury found Appellant guilty of both Trafficking charges, not guilty of the Proximity charges and he was sentenced to twenty-five (25) years confinement consecutive on each conviction A Motion for Reconsideration of Sentence was filed and served on March 7 2007 The Motion was denied by Order dated March 9 2007 A timely Notice of Appeal was filed and served on March 16, 2007, and this Appeal follows

FACTS

On August 2, 2006, at approximately 12 40 PM, Appellant allegedly sold a quantity of Crack Cocaine to a female confidential informant working for the Marion County Drug Unit (MCDU) A warrant for Appellant's arrest was obtained that day At approximately 5 55 PM that same day, Appellant was arrested at the Imperial Motel, Marion, SC, in the motel lobby Marijuana was found on Appellant in the motel lobby Appellant had driven his vehicle to the motel, and there were 2 passengers in the automobile, Jeffrey L Graves and Derrick L Platt Found on the driver's seat of the vehicle was a black bag containing cocaine, crack cocaine, and scales Appellant, Graves, and Platt were arrested and charged with Trafficking Cocaine and Trafficking Crack Cocaine Appellant was charged with Simple Possession of Marijuana Arrest Warrants for all charges, including the Distribution charge, were served on Appellant on August 3, 2006

The cases were called for trial on February 27, 2007 At the commencement of the trials, Appellant moved for a continuance on all charges due to a discovery request violation The Trial Court granted the motion and continued the Distribution case, but denied the motion as to the Trafficking charges and Proximity charges and allowed the State to proceed with trial on these charges The Trial Court further ruled, on the continuance request that the State would be entitled to put facts in evidence concerning the

Distribution case which occurred 5 hours earlier in the day

ARGUMENTS

I THE TRIAL COURT ERRED, IT IS RESPECTFULLY SUBMITTED, IN ALLOWING TESTIMONY AND EVIDENCE CONCERNING THE DISTRIBUTION CHARGE, AS SAID EVIDENCE WAS PREJUDICIAL TO APPELLANT

At the commencement of trial, Appellant moved for a continuance based on a discovery request violation (R pp 11-17) The State had provided discovery materials concerning the trafficking and proximity charges which occurred 5 hours after the distribution charge, but had not provided the materials on the distribution charge These materials included an audio tape, a video tape, incident reports, drug test reports, and other related documents The trial court agreed to grant a continuance on Count 1 of the Indictment (the distribution charge) only, and allowed the State to proceed with Counts 2-5 of the Indictment (the trafficking and proximity charges) The trial court also made a preliminary ruling that the evidence that was not disclosed on Count 1 would be permitted to be introduced during the trial on Counts 2-5

Following this ruling, Appellant made a motion in limini to prevent the introduction of any evidence concerning the distribution charge What Appellant sought was not to prohibit the mention of a pending charge for which Appellant was being arrested, but any **evidence** and testimony of **what** occurred that resulted in the pending charge During an in camera hearing, just moments after this ruling, Agent Wallace

testified correctly that ' we had earlier that day we had done a controlled buy with a confidential informant A location was arranged where we knew the defendant Mr Pernell would be (R p 19) Appellant had no serious objection to testimony concerning the **existence** of the warrant for Appellant s arrest, but strenuously objected to the successful attempts by the State in having the informant testify about the distribution allegedly committed by Appellant, or other officers testify about the **facts** of the distribution

The first witness for the State, Lt David Neil Rouse, testified, " On that day we had a confidential informant which is what we call a C I to come to our office A C I stated that she could purchase cocaine crack cocaine from one Glen Pernell " (R p 28) Appellant objected to this testimony, stating, " again, I'm going to object specifically to this testimony it being irrelevant to the charges we're trying here today We may propose by stipulation to talk about a valid warrant, a valid arrest warrant for his arrest but we object to this testimony " (R p 28) The trial court overruled the objection, and attempted to provide a limiting instruction to the jury, stating, " And I would charge the jury that the basis of this testimony is the basis for the subsequent arrest and to be used for that only " (R p 28) Officer Rouse thereafter testified, in detail, concerning the facts of the distribution case (R pp 28-29) Agent Simon Brown testified that he obtained an arrest warrant for Appellant sometime after 2 00 PM that day, and that the warrant was available to serve on Appellant upon his arrival at the motel that afternoon (R p 67-68)

The State called Jennifer Warren Fleming to testify She was the confidential informant who allegedly purchased cocaine from Appellant earlier that day She testified

that on August 2, 2006 she went to Appellant s house, that he had a black bag with drugs in it that he was driving a white Crown Vic automobile, and when she began to testify that she made purchase of drugs, Appellant again objected Before the objection could be fully voiced, the trial court overruled the objection and again gave a curative instruction to the jury about the distribution charge and evidence (R pp 81-87)

Agent Joseph Brian Wallace was also called by the State He testified that on the morning of August 2, 2006, he assisted in conducting a controlled buy (referring to the distribution charge) Appellant again objected, and the trial court again gave a curative instruction to the jury (R p 169) During the remainder of this witness' testimony, the Respondent properly limited the testimony of his involvement to the events of that afternoon at the Imperial Motel, and did not testify any further about the facts of the distribution charge

At the conclusion of all testimony, Appellant made a motion for a new trial or for a mistrial based upon the highly prejudicial testimony elicited by the State and heard by the jury The trial court denied these motions (R p 192-193)

"In criminal cases, the appellate court sits to review errors of law only We are bound by the trial court's factual findings unless they are clearly erroneous The trial court's ruling admitting evidence, including prior bad act evidence, is reviewed under an abuse of discretion standard ' State v Wilson, 345 S C 1 545 S E 2d 827 (2001)

In this case the trial court evidently permitted introduction of the evidence of the distribution under a common scheme or plan exception to State v Lyle, 125 S C 406, 118 S E 803 (1923) and Rule 404(b), SCRE, and that the trial court found that the probative

value of the distribution evidence Appellant s possession of a black bag containing drugs, from which he sold drugs and that he was driving a white Ford Crown Victoria automobile hours earlier that day outweighed any prejudice and was therefore relevant

In State v Tuffour, 364 S C 497, 613 S E 2d 814 (2005), a confidential informant was used to arrange a purchase of 5 ounces of crack cocaine The confidential informant had supposedly purchased drugs from Tuffour several times on numerous prior occasions During the sale, and after a prearranged signal by the CI, officers approached the vehicle occupied by Tuffour and another occupant, and crack cocaine was found in the vehicle Tuffour was indicted, tried, and convicted of Trafficking Crack Cocaine, 100-200 grams Tuffour appealed, claiming that the trial court's admission of prior sales of 5 ounces of crack cocaine to the same confidential informant, supposedly under a common scheme or plan exception to Lyle and Rule 404(b), SCRE, was error The State asserted that this evidence was necessary to prove that Tuffour would not have sold to the CI this time unless he had made previous purchases from Tuffour It must also have been the State's intent to have this evidence admitted, as it would tend to establish propensity, identity, and ownership

The Court of Appeals reversed the conviction, stating, " Tuffour was charged with a single count of trafficking His alleged prior drug dealings have no relevance whatsoever to the charged offense The crime here stands on its own and the methodology of prior sales is not relevant to prove this transaction ' Id 613 S E 2d at 817 The State in Tuffour could only be attempting to prove that the drugs found in the vehicle occupied by Tuffour belonged to Tuffour because HE was the one who sold drugs to this same confidential

10

informant on other occasions

As stated by the Court in footnote 5 of the Tuffour opinion there are situations where a prior bad act is admissible because it is relevant to the crime charged In State v Wilson, 345 S C 1, 545 S E 2d 827 (2001), evidence of a prior sale was permitted to prove intent where defendant was charged with possession of a controlled substance with intent to distribute The Court in Wilson determined that the prior distribution was relevant to the issue of intent in the trial on the possession with intent to distribute charge In this case, Appellant was also charged with 2 counts of possession with intent to distribute a controlled substance within close proximity of a school However, there is no evidence **whatsoever** in the record to tending to establish these charges Beginning with the testimony of the State's first witness, Lt Rouse, Appellant's presence at the Imperial Motel (½ mile from a school) was for the express purpose of meeting the female confidential informant there for a 'date' (R. p 54) The confidential informant herself testified that Appellant was meeting her at the motel to 'mess with me' (have sex) (R p 92-93) There was no evidence whatsoever to suggest that another drug sale was to occur There was no testimony or evidence to suggest that Appellant still had drugs or would bring them to the motel Therefore intent was not, and could not, be in issue on those charges, as the jury correctly found Appellant not guilty of those charges Any attempt by the Respondent to now suggest that the trial court was correct in allowing evidence of the distribution, to try and prove intent to distribute is wholly without foundation The prejudice in this testimony is manifest

II THE TRIAL COURT ERRED, IT IS RESPECTFULLY SUBMITTED, IN ALLOWING TESTIMONY AND EVIDENCE OF APPELLANT'S POSSESSION OF MARIJUANA

Deputy Shad Barfield was called to testify His only involvement on the afternoon of August 2, 2006, was to effect the arrest of Appellant His duty was to enter the motel office, and take Appellant into custody He was called to testify primarily about what he found on Appellant at arrest, and what Appellant threw just prior to arrest Before Deputy Barfield was called, an informal proffer was made by the State concerning this testimony (R pp 103-106) The trial court allowed the testimony, and Deputy Barfield testified that Appellant threw something just before he was arrested, and another small bag of green leafy substance was found in his pocket The Solicitor produced a bag, asked the officer if this was what he found, and he responded in the affirmative The trial court then gave the curative instruction (R pp 107-113) The trial court did prevent the jury from hearing that Appellant was charged with simple possession of marijuana, or the disposition of that charge

Appellant was being tried on charges of trafficking cocaine and crack cocaine, and possession with intent to distribute both substances within close proximity of a school The proximity charges were before the court with no evidence whatsoever, as discussed above in Argument I The prejudice in this testimony is manifest

Specifically Appellant was charged with possessing 100-200 grams of cocaine, and possessing 28-100 grams of crack cocaine Proof of possession requires no proof of intent,

distribution, or involvement with other drugs Allowing the evidence of simple possession of marijuana could ONLY be for the sole purpose of attacking Appellant's character, and as such it was error to allow this testimony

III THE TRIAL COURT ERRED, IT IS RESPECTFULLY SUBMITTED, IN PERMITTING HERESAY TESTIMONY CONCERNING THE ALLEGED POSSESSION OF A FIREARM BY APPELLANT

Lt David Neil Rouse, the State's first witness, testified about the events that afternoon at the Imperial Motel He observed Appellant's vehicle park near the motel office He then testified, "The windows were tinted in the vehicle You could not see the other passengers in the vehicle Based on the information that we had through our investigation, that there could possibly be a pistol in the vehicle, it was my " At that point, Appellant objected on relevance The trial court responded, " No, sir I conclude I will let the jury consider whether or not it's relevant " (R p 32) It had to be brought out, during cross examination of this witness, that no gun was found on Appellant, in the vehicle, or on passengers in the vehicle

In and of itself, this testimony might not have been highly prejudicial to Appellant But, considering the other instances of prejudicial testimony already having been heard by the jury, or soon to be heard, the jury could soon characterize Appellant as a 'gun toting, crack cocaine selling, marijuana possessing defendant Prejudice from these witness' testimony all police officers, is manifest

IV THE TRIAL COURT ERRED, IT IS RESPECTFULLY SUBMITTED, IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL AND MOTION FOR A MISTRIAL

The jury in this trial heard evidence concerning Appellant's distribution of crack cocaine, his possession of marijuana, and testimony concerning information from police sources that Appellant was armed with a pistol The trial court gave curative instructions to the jury, concerning the distribution evidence, when it came from the witness stand as follows, "And I would charge the jury that this testimony is the basis for the subsequent arrest warrant" (R p 28), "Let the record reflect that I am permitting first let me say that this defendant is not charged in these proceedings with any cause of action relating to the first incident I am permitting this testimony only as to how it may or may not bear on the further events occurring at the Crown (sic) Motel some hours earlier But I specifically charge the jury that he is not being tried for any alleged sale at that time' (R pp 86-87), and, "I, again, have told the jury that this defendant stands does not stand trial for those earlier activities I am permitting this testimony only as it relates to subsequent events" (R p 169) The trial court instructed the jury, after hearing testimony of marijuana possession, "I charge you that I am admitting this testimony regarding alleged marijuana only as to the fruits of this alleged search I specifically charge you that this defendant is not being tried for possession of marijuana' (R p 113) The trial court did not give any curative instruction following testimony concerning Appellant's possession of a pistol

The decision to grant or deny a mistrial is within the sound discretion of the trial

judge and will be overturned on appeal absent an abuse of discretion amounting to an error of law State v Crim, 327 S C 254, 489 S E 2d 478 (1997) While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced State v Simpson, 325 S C 37, 279 S E 2d 57 (1996) Prejudice, from this testimony, cannot be denied or ignored and the jury was not free to ignore such testimony in determining guilt of the Appellant on the trafficking charges

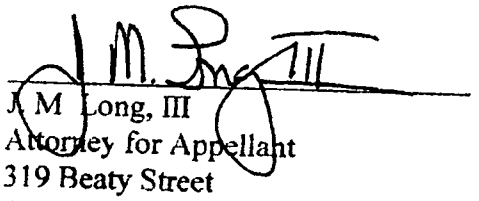
V THE TRIAL COURT ERRED, IT IS RESPECTFULLY SUBMITTED, IN SENTENCING APPELLANT TO CONSECUTIVE TWENTY FIVE YEAR SENTENCES FOR DRUG VIOLATIONS THAT OCCURRED SIMULTANEOUSLY

Appellant contends that the trial court abused its discretion in sentencing Appellant to 50 years in prison as a result of convictions occurring simultaneously, and that justice required concurrent 25 year sentences for one act of possessing 2 different drugs

CONCLUSION

For the reasons expounded in Arguments I - V above, Appellant would respectfully request that his convictions be reversed and that he be granted a new trial Or, in failing to obtain a new trial that his sentence be modified to 25 year concurrent sentences

May 1 2008



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Marion County
The Honorable Edward B. Cottingham, Circuit Court Judge
Trial Case No.: 2006-GS-33-297

THE STATE,

Respondent,

v.

GLENN Q. PERNELL,

Appellant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUE ON APPEAL

I

The circuit court properly exercised its discretion in allowing evidence regarding events occurring just prior to and during Appellant s arrest (Appellant's Issues I, II and III)

II

The circuit court properly denied Appellant's motions for a new trial or a mistrial based on the admission of evidence regarding events occurring just prior to and during Appellant's arrest (Appellant's Issue IV)

III

The circuit court acted within its discretion in sentencing Appellant to consecutive sentences (Appellant's Issue V)

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case

STATEMENT OF FACTS

On August 2, 2006, a confidential informant purchased cocaine from Appellant Glenn Q Pernell ("Pernell") in a controlled transaction monitored by members of the Marion County Combined Drug Unit(the "Drug Unit') (Trial Transcript [TT], pp 63-66 117-120, Record on Appeal [R], pp 27-30, 80-83) An arrest warrant for distribution of cocaine was issued that day, and the confidential informant arranged to meet Pernell at a local motel that afternoon (TT, pp 66-68, 120-122, R , pp 30-32, 83-85) Pernell was arrested when he arrived at the motel, and a search incident to arrest revealed a small quantity of marijuana on his person (TT, pp 68-70, 163-164, R , pp 32-34, 112-113) In addition, officers discovered large quantities of crack cocaine (79 66 grams) cocaine (128 64 grams), and a scale, in his car (TT, pp 69-72, 143-144, R , pp 33-36, 101-102)

On November 21, 2006, the Marion County Grand Jury indicted Pernell on one count of distributing cocaine base, one count of trafficking cocaine, and one count of trafficking cocaine base [1] (Indictment No 2006-GS-33-297, R , pp 1-4) The case was called for a jury trial on February 27, 2007, before the Honorable Edward B Cottingham, Circuit Court Judge

Prior to trial, Pernell moved for a continuance on the ground the State had failed to turn over evidence relating to the distribution charge, specifically an audiotape and a videotape of the drug transaction between Pernell and the confidential informant, and photographs of the drugs found in Pernell's car after he was arrested Pernell's counsel

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[1]The Grand Jury also indicted Pernell on two counts of possession with intent to distribute within proximity of a school or park, but he was acquitted of those charges at trial and they are not at issue in this appeal

conceded the State had not purposely withheld evidence, and the failure to produce the evidence was due to an oversight The circuit court granted the continuance as to the distribution charge, but denied it as to the remaining charges The court also preliminarily ruled that evidence relating to the distribution charge was relevant to the basis for Pernell's arrest at the motel (TT, pp 29-35, R , pp 11-15)

Prior to opening statements, Pernell moved to exclude evidence regarding the distribution charge The circuit court ruled the evidence was an "integral part" of the State's case as the basis for Pernell's arrest at the motel, but indicated the jury would be instructed the evidence was admitted only for the purpose of showing the basis for his arrest (TT, pp 47-48, R , pp 22-23)

Lieutenant David Rouse ("Lt Rouse") of the Mullins Police Department testified he supervised the Drug Unit, and on August 1, 2006, a confidential informant told him she could purchase cocaine from Pernell Pernell objected to the testimony as irrelevant, and stated he would stipulate there was a valid warrant for his arrest The circuit court overruled the objection, and instructed the jury the testimony went to the basis for the subsequent arrest warrant (TT, pp 62-64, R , pp 26-28)

Lt Rouse then testified that the following day, the informant and her vehicle were searched, a body transmitter was placed on her, and she was given marked "buy' money The informant went to Pernell's residence, the drug transaction was monitored by audio and video recordings, and she returned to the officers with drugs Thereafter, the officers obtained a warrant for Pernell s arrest for distribution of cocaine, the informant arranged to meet Pernell at a local motel that afternoon, and Pernell was arrested when he arrived at the

motel After Pernell's arrest, Lt Rouse discovered an open black bag containing large quantities of crack cocaine and cocaine and a pair of scales on the seat of Pernell's car, a Ford Crown Victoria Two other people ("Graves" and "Platt") were in Pernell's car, and they were placed under arrest (TT, pp 64-72, R , pp 28-36)

On cross-examination, Lt Rouse testified the confidential informant's husband had been arrested for distributing crack cocaine, but there was no agreement regarding her husband's case when she purchased drugs from Pernell The circuit court then sua sponte instructed the jury again that the evidence regarding that drug transaction "was only permitted as a basis for their further arrest warrants " (TT, pp 81-82, R , pp 45-46)

The confidential informant testified she had known Pernell since the early 1990s when he dated her cousin, and she was trying to help her husband on outstanding drug charges when she agreed to purchase drugs from Pernell in August 2006 When the informant arrived at Pernell's house on August 2, 2006, he had a black bag with drugs and a scale in it, and she saw a white Crown Victoria parked in his yard Pernell used the scale to weigh out the drugs for her, but said she was acting suspicious and if she was not "playing games," she would come back to meet him at a motel She agreed to meet him, and told the narcotics officers about it when she met them after purchasing the drugs (TT, pp 117-121, R pp 80-84)

Over the next few hours, Pernell called her a number of times about meeting him at the motel, and told her to call him when she got there After the officers got everything set up at the motel she called Pernell and told him she was there Pernell arrived at the motel in the Crown Victoria she saw earlier in his yard and went into the motel office, where he

was arrested (TT, pp 121-125, R pp 84-88)

The informant identified the black bag and scale seized from Pernell's car at the motel as the ones she saw in his house earlier that day (TT, pp 119-120, R , pp 82-83) When Pernell objected to her subsequent testimony about seeing the black bag earlier that day, the circuit court instructed the jury

> [T]his defendant is not charged in these proceedings with any cause of action relating to the first incident I am permitting this testimony only as to how it may or may not bear on the further events occurring at the Crown (sic) motel some hours later But I specifically charge the jury that he is not being tried for any alleged sale at this time This testimony is only as it relates to the subsequent events, if any, at the Crown (sic) Motel

(TT, pp 123-124, R , pp 86-87)

Prior to testimony from the arresting officer, Pernell objected to evidence regarding marijuana he had on his person when he was arrested The circuit court ruled the officer could testify regarding what he found incident to the arrest, but stated the jury would be given a limiting instruction regarding the evidence (TT, pp 154-157, R , pp 103-106)

Deputy Shad Barfield ("Deputy Barfield") of the Marion County Sheriff's Office then testified he was the first officer to enter the motel office after Pernell went inside When Pernell saw Deputy Barfield enter the office, he threw something on the floor and tried to leave through another doorway After Pernell was handcuffed, Deputy Barfield found a small bag of marijuana in his pants pocket, and retrieved a larger bag of marijuana from the floor The circuit court instructed the jury that the testimony regarding the marijuana was admitted only as to what the officer said he found when he arrested Pernell (TT, pp 158-164 R , pp 107-113)

Deputy Brian Wallace ("Deputy Wallace) of the Marion County Sheriff's Office

testified he worked with the Drug Unit and assisted in monitoring the confidential informant's controlled drug transaction with Pernell on August 2, 2006 Pernell objected to his testimony regarding the drug transaction, and the circuit court again instructed the jury the testimony was admitted only as it related to subsequent events (TT, pp 218-220, R , pp 167-169) Deputy Wallace then testified about Pernell's arrest at the motel, and statements he made subsequent to his arrest, in which he initially stated the drugs belonged to him and Graves and Platt were not involved, but subsequently claimed he did not have anything to do with the drugs and was not driving the car (TT, pp 220-226, R , pp 169-175)

At the close of the State's case, Pernell moved for a directed verdict on the ground the State failed to prove he had exclusive dominion and control over the drugs found in his vehicle He also moved "for a new trial or for a mistrial," based on the admission of evidence regarding the controlled drug transaction with the confidential informant After reciting the evidence linking the controlled drug transaction with the events at the motel approximately four hours later, the circuit court found the evidence was admissible for the jury's consideration, and denied Pernell's motions (TT, pp 247-250, R , pp 190-193)

The jury found Pernell guilty of both trafficking charges, and the circuit court sentenced him to consecutive terms of twenty-five years incarceration on each count (TT, pp 321-322, 336, Sentencing Sheets dated 3/1/07, R , pp 196-197, 210, 3-4) This appeal followed

ARGUMENT

I The circuit court properly exercised its discretion in allowing evidence regarding events occurring just prior to and during Appellant's arrest (Appellant's Issues I, II and III)

Pernell asserts the circuit court erred in admitting evidence regarding the drug transaction with the confidential informant (Issue I), his possession of marijuana at the time of his arrest (Issue II), and police information that he might have a gun in his possession (Issue III) He contends none of this evidence was relevant to the trafficking and proximity charges at issue in the trial

The admission or exclusion of evidence is addressed to the sound discretion of the trial judge *E g*, State v Gaster, 349 S C 545, 564 S E 2d 87, 93 (2002), State v Edwards,373 S C 230, 644 S E 2d 66, 68 (Ct. App 2007) The trial court's rulings on these matters will not be reversed on appeal absent an abuse of discretion or commission of legal error, resulting in prejudice to the defendant Edwards, 644 S E 2d at 68

Evidence of other crimes is admissible when it provides part of the context of the crime, is necessary for a full presentation of the State's case, or is "so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its 'environment' that its proof is appropriate in order to complete the story of the crime on trial " State v Adams, 322 S C 114, 470 S E 2d 366, 370-71 (1996) (*quoting* United States v Masters, 622 F 2d 83 (4th Cir 1980)) When evidence is admissible to provide a full presentation of the case, "'[t]here is no reason to fragmentize the event under inquiry by suppressing parts of the 'res gestae '" *Id* , *see also* State v Preslar, 364 S C 466, 613 S E 2d 381, 385 (Ct App 2005) (*res gestae* theory recognizes evidence of other bad acts may be integral part of crime with which defendant is charged or may be needed to

aid the fact finder in understanding the context in which crime occurred)

A Drug Transaction

Pernell contends the circuit court allowed evidence of the drug transaction with the confidential information under the common scheme or plan exception to the general prohibition of bad act evidence On the contrary, the circuit court's initial analysis indicates the court saw the evidence as "an integral part of [the State's] case" regarding subsequent events (TT, pp 34-35, 48, R , pp 16-17, 23) After hearing all the evidence, the court indicated that in light of the fact Graves and Platt were in the car with Pernell, the evidence was relevant to Pernell's possession of the Crown Victoria and the black bag in which the drugs were discovered at the motel (TT, pp 247-250, R , pp 190-193) Thus, even though the court mentioned the close temporal proximity of the incidents, the analysis focused on the *res gestae* aspect of the evidence, not common scheme or plan [2]

Further, Pernell's claim he was not driving the car and did not know anything about the drugs made the circumstances of the previous drug transaction even more relevant to the trafficking charges Those claims made Pernell's earlier sole possession of the Crown Victoria, the black bag and the drugs directly relevant to identify Pernell as the owner of the car and the drugs *See* State v Gillian, 373 S C 601, 646 S E 2d 872, 876 (2007) (evidence of defendant's participation in July 2000 jewelry store burglary was relevant to January 2001

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[2]Since the circuit court did not admit the evidence as common scheme or plan evidence, Pernell's reliance on State v Tuffour 364 S C 497 613 S E 2d 814 (Ct App 2005) (*cert granted* October 4, 2006), is misplaced Further, Tuffour is clearly distinguishable from this case in that it involved the admission of testimony regarding numerous prior drug transactions between the informant and the defendant, rather than a single transaction occurring the same day the defendant was arrested

murder charge against him because it served to identify him as the murderer in light of defendant's statements connecting the murder to the burglary location)

Significantly, the drug transaction evidence was limited in detail and scope The audiotape and videotape of the transaction were not admitted as evidence, and neither the police officers nor the informant testified about how much cocaine was purchased The evidence presented merely revealed that a transaction occurred, what car was parked at Pernell's house at that time, and the informant's observations inside the house as to the black bag, the scale and the drugs Thus, the evidence was not unduly prejudicial Gillian, 646 S E 2d at 876 (amount of evidence regarding jewelry store burglary was unnecessary)

B Marijuana

Pernell also contends Deputy Barfield's testimony regarding the marijuana Pernell had on his person when he was arrested was admitted for the sole purpose of attacking his character As found by the circuit court, however, the testimony went only to what happened during the arrest In addition, the circuit court specifically charged the jury the evidence was admitted only as it related to the search incident to arrest, and Pernell was not on trial for possessing marijuana[3] (TT, pp 154-155, 163-164, R , pp 103-104, 112-113) Since the testimony regarding the search incident to arrest was necessary to a full presentation of the State's case, and the jury was immediately instructed as to its limited purpose, the circuit did not abuse its discretion in allowing the evidence

[3]Pernell did not object to the substance of the limiting instruction or ask for any additional instructions on the issue

C Gun Possession

Pernell further asserts the circuit court erred in allowing Lt Rouse to testify the police had information there could be a gun in Pernell's car The testimony at issue was offered only to explain why the officers waited until Pernell got out of the car and went into the motel office before arresting him, and the circuit court stated the jury could determine what, if any, relevance to give it (TT, pp 68-69, R , pp 32-33) *See* State v Thompson, 352 S C 552, 575 S E 2d 77, 80-81 (Ct App 2003) (evidence offered to explain why officers took certain actions is not inadmissible hearsay since it is not offered for the truth of the matter asserted)

Pernell concedes Lt Rouse's testimony regarding the possibility of a gun in the car was not unduly prejudicial He also concedes the jury subsequently heard the officers did not find a gun on Pernell or in the car In light of that testimony, it is pure conjecture to conclude the jury characterized Pernell as a "'gun toting, crack cocaine selling, marijuana possessing'" defendant, and then based its conviction of him on the trafficking charges because of that perception [4]

The circuit court properly allowed the challenged evidence as part of the *res gestae* of the crimes for which Pernell was on trial The evidence of Pernell's guilt on the trafficking charges was overwhelming, and amply supported the jury's verdict Therefore, his convictions should be affirmed

[4]If that was the case, the jury would also have convicted him on the proximity charges

II The circuit court properly denied Appellant's motion for a mistrial based on the admission of evidence regarding events occurring just prior to and during Appellant's arrest (Appellant's Issue IV)

Pernell asserts the circuit court erred in denying his motion for a mistrial based on the admission of evidence regarding the drug transaction with the confidential informant, information indicating Pernell might be armed at the time of his arrest, and the discovery of marijuana on his person after his arrest Initially, the only ground asserted in the circuit court as a basis for the mistrial motion was admission of evidence regarding the controlled drug transaction with the information Thus, Pernell's assertions regarding other evidence are not properly before this Court for review E g , State v Nichols, 325 S C 111, 481 S E 2d 118, 123 (1997) (issue must first be raised to and ruled on by the trial judge to be preserved for appellate review), *see also* State v Bailey, 298 S C 1, 377 S E 2d 581, 584 (1989) (party cannot argue grounds on appeal different than those argued to the trial court)

The decision to grant or deny a mistrial is committed to the sound discretion of the trial judge, and the power to declare a mistrial should be used with the greatest caution for plain and obvious reasons State v Crim, 327 S C 254, 489 S E 2d 478, 480 (1997) The trial court's decision regarding a mistrial will not be disturbed on appeal absent an abuse of discretion amounting to an error of law State v Simpson, 325 S C 37, 479 S E 2d 57, 60 (1997)

As discussed above, evidence regarding the events prior to Pernell's arrest were part of the *res gestae* of the crimes for which he was on trial, and necessary to a full presentation of the State s case In denying Pernell's motion for a mistrial, the circuit court listed the specific issues to which the evidence was relevant, including his possession of the Crown

Victoria and the black bag found in that car after he was arrested (TT, pp 248-250, R,, pp 191-193) There is ample support in the record for the circuit court's findings and conclusion, and a mistrial was not warranted

III The circuit court acted within its discretion in sentencing Appellant to consecutive sentences (Appellant's Issue V)

Pernell contends the circuit court abused its discretion in sentencing him to consecutive terms of incarceration on the trafficking convictions He asserts the offenses occurred simultaneously, and justice required concurrent rather consecutive sentences

The trial judge has wide discretion in determining what sentence to impose upon conviction, including whether multiple sentences should run consecutively or concurrently State v. Barton, 325 S C 522, 481 S E 2d 439, 444 (Ct App 1997) "Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the limit prescribed by statute" *Id*

Pernell's trafficking in cocaine conviction carried a mandatory minimum sentence of twenty-five years *See* S C Code §44-53-370(e)(2)(c) (2002) (person convicted of trafficking 100 grams or more, but less than 200 grams, of cocaine must be sentenced to mandatory minimum term of twenty-five years imprisonment) His trafficking in cocaine base conviction carried a sentence of up to thirty years imprisonment *See* S C Code §44-53-375(C)(2)(B)(2007 Supp) (person convicted of trafficking twenty-eight grams or more, but less than 100 grams of cocaine base must be sentenced to not less than seven years nor more than thirty years imprisonment) The circuit court considered Pernell's prior drug offenses, and did not abuse its discretion in determining consecutive sentences were appropriate

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

DEBORAH R J SHUPE
Assistant Attorney General

E L CLEMENTS, III
Solicitor, Twelfth Judicial Circuit

BY DEBORAH R J SHUPE

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ATTORNEYS FOR RESPONDENT

June 2, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Marion County
The Honorable Edward B Cottingham, Circuit Court Judge
Trial Case No 2006-GS-33-297

THE STATE,

Respondent,

vs

GLENN Q PERNELL,

Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings"

HENRY DARGAN McMASTER
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JOHN W McINTOSH
Chief Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

June 2, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Marion County
The Honorable Edward B Cottingham, Circuit Court Judge
Trial Case No 2006-GS-33-297

THE STATE,

Respondent,

vs

GLENN Q PERNELL,

Appellant

PROOF OF SERVICE

I, Ellen R DuBois, certify that I served the within Final Brief of Respondent on Appellant by depositing three copies in the United States mail, postage prepaid, addressed to

J M Long, III, Esquire
319 Beaty Street
Conway, SC 29526

I further certify that all parties required by Rule to be served have been served

This 2nd day of June, 2008

Ellen R DuBois

FLLEN R DUBOIS
Legal Assistant

Office of Attorney General
Post Office Box 11549
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v

Glenn Q Pernell, Appellant

Appeal From Marion County
Edward B Cottingham, Circuit Court Judge

Unpublished Opinion No 2009-UP-394
Heard March 18, 2009 – Filed July 20, 2009

AFFIRM

J M Long, Jr , of Conway, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W McIntosh, Assistant Deputy Attorney General Salley W Elliott, and Assistant Attorney General Deborah R J Shupe,

all of Columbia, and Solicitor Edgar L Clements, III , of Florence, for Respondent

PER CURIAM In this criminal case from Marion County, Glenn Q Pernell appeals his conviction and sentence for trafficking in cocaine and trafficking in crack cocaine We affirm

FACTS AND PROCEDURE

On August 2, 2006, police conducted a "controlled buy" in which Appellant allegedly sold crack cocaine to a female confidential informant Five hours later, after obtaining an arrest warrant, police staked out the Imperial Motel in Marion, S C , knowing that the confidential informant and Appellant were scheduled to meet at that location [1]

Appellant arrived at the motel in a white Ford Crown Victoria with two male passengers Leaving the passengers in the vehicle, Appellant entered the motel lobby, where the police approached him to execute the arrest warrant A search of Appellant incident to his arrest yielded two bags of marijuana [2] Meanwhile, other officers searched the Crown Victoria, finding a black pouch containing cocaine, crack cocaine and scales on the driver's seat

While still at the scene, police read Appellant Miranda warnings, which he indicated he understood, and inquired about the black pouch Appellant initially confessed ownership of the pouch and its contents, however, moments later he recanted this statement and claimed the pouch and drugs

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[1] It appears that in order to alleviate Appellant's suspicion the confidential informant agreed to meet Appellant at the motel under a promise of sexual intercourse

[2] Police found one bag in Appellant's pocket and Appellant discarded another bag after seeing police approaching in the motel lobby

were not his and that he had not arrived in the Crown Victoria He suggested the person who drove up in the vehicle must have fled through a nearby field

As a result of the controlled buy, Appellant was indicted for distribution of crack (the distribution charge) Furthermore based on the incidents surrounding his arrest, Appellant was also indicted for (1) trafficking in cocaine 100-200 grams, (2) possession of cocaine with the intent to distribute in close proximity to a school, (3) trafficking in crack cocaine 28-100 grams, and (4) possession of crack cocaine with the intent to distribute in close proximity to a school (collectively referred to as the trafficking and proximity charges) [3]

Trial on this matter began on February 27, 2007 Based on discovery delays, the trial court granted a motion for a continuance of the distribution charge but denied a continuance as to the trafficking and proximity charges

Appellant made a motion in limine to suppress any testimony about the controlled buy and offered to stipulate to the existence of a valid arrest warrant The trial court denied the motion, finding the testimony about the controlled buy admissible as "an integral part of [the State's] case to show the basis for the arrest " However, the trial court offered a limiting instruction in which the jury was informed that the evidence was being offered only "for the basis of showing further arrest "

The trial court permitted testimony regarding Appellant's possession of marijuana as well as testimony that the police believed he may have been armed with a pistol when he arrived at the motel [4]

At the close of the trial, Appellant's motion for a mistrial was denied Appellant was found guilty of two counts of trafficking The trial court

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[3] It is not disputed that the Imperial Motel is within one–half mile of Mullins Primary School as prescribed by Section 44-53-445(B)(1) of the Code of Laws of South Carolina

[4] No firearm was found on Appellant's person or in his vehicle, however, police discovered ammunition in the vehicle

sentenced him to twenty-five years on each charge to run consecutively The Appellant's motion to reconsider the sentence was denied This appeal follows

ISSUES ON APPEAL

I Did the trial court err in admitting testimony about the controlled buy, Appellant's possession of marijuana, and the police's belief that Appellant may have been carrying a pistol?

II Did the trial court err in denying Appellant's motion for a mistrial?

III Did the trial court err in sentencing Appellant to consecutive twenty-five year prison terms?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only State v Baccus, 367 S C 41, 48, 625 S E 2d 216, 220 (2006) Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous Id

LAW/ANALYSIS

I

Appellant alleges the trial court erred in allowing testimony regarding the drug buy, the marijuana discovered during his arrest, and the police's belief that he may have been carrying a pistol when he arrived at the motel We disagree

The admission of evidence is in the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion State v Pagan, 369 S C 201, 208, 631 S E 2d 262, 265 (2006), State v Gaster, 340 S C 545, 557, 564 S E 2d 87, 93 (2002) In order to reverse the trial court's admission of evidence we must find (1) an abuse of discretion on the part of

the trial court and (2) likely prejudice State v Wise, 359 S C 14, 21, 596 S E 2d 475, 478 (2004) A trial court abuses its discretion when its conclusions lack evidentiary support or are controlled by an error of law Pagan, 369 S C at 208, 631 S E 2d at 265, State v McDonald, 343 S C 319, 325, 540 S E 2d 464, 467 (2000)

A The controlled drug buy

Appellant avers that the trial court erred in admitting testimony regarding the prior drug transaction with the confidential informant[5] We disagree

Generally, "evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged " State v Lyle, 125 S C 406, 415, 118 S E 803, 807 (1923), see also Rule 404(b), SCRE (1976) ("Evidence of other crimes, wrongs or acts may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent ") In addition, "evidence of other bad acts or other crimes may be admitted under the *res gestae* theory[ ]" State v Martucci, 380 S C 232, 257, 669 S E 2d 598, 611 (Ct App 2008), State v Adams, 322 S C 114, 122, 470 S E 2d 366, 370-71 (1996) *Res gestae* allows for the admission of prior bad acts when the prior acts are an "integral part of the crime charged or may be needed to aid the fact finder in understanding the context in which the crime occurred " Martucci, 380 S C at 258, 669 S E 2d at 612, State v Owens, 346 S C 637, 652, 552 S E 2d 745, 753 (2001), overruled on other grounds by State v Gentry, 363 S C 93, 610 S E 2d 494 (2005), State v Wood, 362 S C 520, 527-28, 608 S E 2d 435, 439 (Ct App 2004), State v Adams, 354 S C 361, 379-80, 580 S E 2d 785, 794-95 (Ct App 2003)

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[5] Appellant alleges that it was error to allow testimony about the controlled buy under the common scheme or plan exception However, the record indicates that the court did not admit the evidence to show a common scheme or plan

Here, the trial court found that testimony about the controlled buy, which occurred just five hours prior, was an integral part of the case to show the basis for the arrest This evidence was relevant to understanding the context in which the crime occurred as it explained why the confidential informant was at the motel[6] and how and why she recognized the black bag and the Crown Victoria In light of Appellant's conflicting statements as to whether he drove the Crown Victoria and owned the bag containing the drugs, the evidence of the controlled buy offered by the confidential informant demonstrated that when purchasing crack during the controlled buy she saw Appellant in possession of the black bag and noticed the white Crown Victoria parked in front of his residence There was no attempt by the State to introduce the video or audio surveillance of the controlled buy Moreover, the trial court repeatedly instructed the jury that the only purpose for the evidence was to demonstrate the basis for the arrest

Accordingly, the trial court did not abuse its discretion in admitting this evidence

B. The marijuana and testimony regarding the belief Appellant was armed

Appellant alleges that it was error for the trial court to introduce testimony that police found marijuana on his person when he was searched incident to his arrest and that they believed he may have been armed We find these arguments abandoned on appeal

Appellant makes a conclusory argument that the prejudice of this testimony is manifest and brings no legal authority to this Court's attention to support his position Accordingly, these arguments are abandoned See Bennett v Investors Title Ins Co , 370 S C 578, 599, 635 S E 2d 649, 660 (Ct App 2006) (finding that when an appellant made only a conclusory argument and cited no legal authority the issue was abandoned), Mulherin-Howell v Cobb, 362 S C 588, 600, 608 S E 2d 587, 593-94 (Ct App 2005)

---

[6] Evidence indicates that during the controlled buy, the informant feigned interest in meeting Appellant at the hotel later in the day for sexual relations in order to ease his suspicion

(noting that failure to cite legal authority for a position and making conclusory arguments results in an abandonment of the issue on appeal) [7]

II

Appellant contends it was error to deny his motion for a new trial or mistrial based on the errors alleged above We disagree

Initially we note that not all of Appellant's arguments are preserved for appeal At trial, Appellant moved the court "for a new trial or for a mistrial [because] the testimony concerning the distribution charge was highly prejudicial" Because Appellant did not move for a mistrial based on the testimony about the marijuana or the pistol, the only argument preserved for appeal is whether the admission of the testimony regarding the controlled buy should warrant the granting of a mistrial See S C Dep't of Transp v First Carolina Corp of S C, 372 S C 295, 301-02, 641 S E 2d 903, 907 (2007) (demonstrating that in order for an issue to be preserved for appellate review it must be both raised to and ruled on by the trial court), Payne v Payne, 382 S C 62, 70, 674 S E 2d 515, 519 (Ct App 2009) (stating that "issues not raised and ruled upon by the trial court will not be considered on appeal"), see also State v Byram, 326 S C 107, 119, 485 S E 2d 360, 366 (1997) (noting a party cannot argue one ground below and then argue a different ground on appeal)

The decision to grant or deny a motion for a mistrial is in the sound discretion of the trial court and will not be overturned absent an abuse of discretion amounting to an error of law State v Stanley, 365 S C 24, 33, 615

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[7] Moreover, notwithstanding the abandonment of these arguments, in light of the overwhelming evidence of guilt and the fact that the evidence bore out that no gun was found on Appellant, the admission of this testimony did not prejudice Appellant See State v Hamilton, 368 S C 188, 213, 628 S E 2d 482, 495 (Ct App 2006) (stating that this Court reviews errors in the context of the record as a whole and when there exists overwhelming evidence of guilt, we may affirm under the harmless error doctrine), overruled on other grounds by State v Gentry, 363 S C 93, 610 S E 2d 494 (2005)

S E 2d 455, 460 (Ct App 2005), State v Garrett, 350 S C 613, 619, 567 S E 2d 523, 526 (Ct App 2002) (stating generally the grant or refusal of a new trial is within the trial judge's discretion and will not be disturbed on appeal without a clear abuse of that discretion) In light of our decision that it was not an abuse of discretion to admit the testimony regarding the controlled buy, the trial court correctly denied Appellant's motion for a mistrial

III

Finally Appellant alleges that it was error to impose consecutive sentences We disagree

A trial judge is granted broad discretion in determining a sentence State v Franklin, 267 S C 240, 246, 226 S E 2d 896, 898 (1976), State v Barton, 325 S C 522, 532, 481 S E 2d 439, 444 (Ct App 1997) The scope of the trial court's ability to inquire about information on sentencing is nearly "unlimited either as to the kind of information he may consider, or the source from which it may come " Franklin, 267 S C at 246, 226 S E 2d at 898 "Likewise whether multiple sentences should run consecutively or concurrently is a matter left to the sound discretion of the trial judge " Barton, 325 S C at 532, 481 S E 2d at 444 Moreover, absent "partiality, prejudice, oppression or corrupt motive, this Court lacks jurisdiction to disturb a sentence that is within the limit prescribed by statute " Id , accord Stockton v Leeke, 269 S C 459, 462, 237 S E 2d 896, 897 (1997), Franklin, 267 S C at 246, 226 S E 2d at 898

The trial court considered the circumstances of this case and determined the sentences should run consecutively The record does not support, and Appellant does not allege, the sentence was the product of any partiality, prejudice, oppression, or corrupt motive Accordingly, while the sentence imposed is admittedly substantial, in the absence of an abuse of discretion, this Court is without authority to disturb it

CONCLUSION

Because the testimony concerning the controlled buy was admissible, and the other arguments abandoned, Appellant's motion for mistrial was

properly denied Moreover, we find no error in the trial court's imposition of consecutive sentences Accordingly, the ruling of the trial court is **AFFIRMED**

SHORT, THOMAS and GEATHERS, JJ , concur

The South Carolina Court of Appeals

JEANETTE F BARBER
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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August 7, 2009

REMITTITUR

The Honorable Sherry R Rhodes
100 W Court Street
PO Box 295
Marion, SC 29571-0295

Re The State v Pernell, Glenn Q
2006-GS-33-00297

Dear Ms Rhodes

The above referenced matter is hereby remitted to the lower court A copy of the judgment of this Court is attached

Sincerely,

V. Claire Allen

V Claire Allen
Deputy Clerk of Court

VCA/lf

cc J M Long, Jr , Esquire
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W McIntosh
Assistant Deputy Attorney General Salley W Elliott
Assistant Attorney General Deborah R J Shupe
Edgar Lewis Clements, III, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF MARION	)	2009-CP-33-527
	)	
Glenn Pernell SCDC No 263271	)	
	)	
Applicant	)	
	)	
v	)	**RETURN**
	)	
State of South Carolina	)	
	)	
Respondent	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed December 14, 2009, would respectfully show this Court

I

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court The Applicant was indicted at the November 2006 term of the Marion County Grand Jury for distribution of cocaine base, trafficking in cocaine possession of cocaine with intent to distribute within proximity of a school or park trafficking in cocaine base, and possession of cocaine base with intent to distribute within proximity of a school or park (2006-GS-33 297) J M Long, III, Esquire, represented the Applicant The Applicant proceeded to trial on February 27 March 1, 2007, on counts 2-5 of the indictment (count 1 distribution was nolle prossed with leave to restore), in front of the Honorable Edward B Cottingham and a jury The Applicant was convicted of trafficking in cocaine and trafficking in cocaine base but was acquitted of the two proximity charges He was sentenced by Judge Cottingham to consecutive terms of twenty-five (25) years imprisonment on each charge

A timely Notice of Appeal was filed and an appeal was perfected on the Applicant's behalf The South Carolina Court of Appeals affirmed the conviction State v Pernell 2009-UP 394 (filed July 20 2009) The remittitur was issued on August 7 2009

Attached herewith and incorporated herein are the records of the Marion County Clerk of Court regarding the subject convictions the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the briefs and the opinion from the direct appeal, and the PCR application Any of the above not so attached will be forwarded upon receipt The Respondent reserves the right to amend this Return upon receipt of any relevant materials

II

In his application, the Applicant alleges that he is being held in custody unlawfully for the following reason Ineffective assistance of trial counsel

III

The Respondent submits that the Applicant's allegation that he received ineffective assistance of counsel is without merit The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases See Butler v State 286 S C 441 334 S E 2d 813 (1985)

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application Id Where ineffective assistance of counsel is alleged as a ground for relief the Applicant must prove that ' counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result ' Strickland v Washington 466 U S 668, 104 S Ct 2052 2064 80 L Ed 2d 674 692 (1984) Butler supra

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases The courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment Strickland supra The Applicant must overcome this presumption in order to receive relief Cherry v State, 300 S C 115 386 S E 2d 624 (1989)

A two pronged test is used in evaluating allegations of ineffective assistance of counsel First the Applicant must prove that counsel's performance was deficient Under this prong, attorney performance is measured by its 'reasonableness under professional norms " Cherry 300 S C at 117 386 S E 2d at 625, *citing* Strickland Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different " Cherry, 300 S C at 117-18, 386 S E 2d at 625

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record The Respondent requests an evidentiary hearing to fully resolve this issue *See* Sharper v State, 279 S C 264, 305 S E 2d 247 (1983)

IV

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel As to all other allegations, the Respondent moves for summary dismissal pursuant to S C Code Ann § 17 27 70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law

V

Each and every allegation contained within the application not hereinbefore expressly

admitted qualified or explained is hereby denied

VI

WHEREFORE having made its Return the Respondent requests that a hearing be held

HENRY DARGAN MCMASTER
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

JULIE M THAMES
Assistant Attorney General

By _____
ATTORNEYS FOR RESPONDENT

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3/26, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	
	)	
	)	2009-CP-33-527
	)	
GLENN PERNELL 263271	)	
	)	
Applicant	)	
	)	
v.	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent	)	
	)	

1 I am an employee of the Respondent in the above-captioned action

2 Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail

3 I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail postage prepaid

Tynika Claxton, Esquire
P O Box 50
Blythewood, SC 29016

DATED this 26th day of March, 2010

Norma Bigbee Legal Assistant
For Respondent

WITNESSES

LT NEIL ROUSE MCDU

Wallace

PROS

D/O 08-02 2006

ARREST WARRANT NO

G404824 (1) 1051482 (2) 1051484 (2)

1051491 (2) 1051486 (3) 1051489 (3)

1051494 (3) 1051483 (4) 1051485 (4)

1051490 (4) 1051487 (5) 1051492 (5)

1051495 (5)

ACTION OF GRAND JURY

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date

DOCKET NO 2006 - GS - 33 - 00297

The State of South Carolina,

County of MARION

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2006

THE STATE

vs

JEFFERY LEVON GRAVES

GLENN Q PERNELL

DERRICK LEVON PLATT

Indictment for

UNLAWFUL DRUGS

INDICTMENT FOR

STATE OF SOUTH CAROLINA)
) UNLAWFUL DRUGS
COUNTY OF MARION)

At a Court of General Sessions convened on NOVEMBER 21, 2006 the Grand Jurors of MARION County present upon their oath

COUNT ONE - DISTRIBUTION OF COCAINE BASE

That GLENN Q PERNELL did in MARION County on or about August 02, 2006, violate Section 44 53-0375(B)(2) of the Code of Laws of South Carolina (1976), as amended, in that he did distribute to a confidential informant of the Marion County Combined Drug Unit, a quantity of Cocaine Base a controlled substance, such distribution not having been authorized by law

COUNT TWO - TRAFFICKING IN COCAINE

That JEFFERY LEVON GRAVES, GLENN Q PERNELL AND DERRICK LEVON PLATT did in MARION County on or about August 02, 2006, violate Section 44-53-0370(e)(2)(c) of the Code of Laws of South Carolina (1976), as amended, in that they was knowingly in actual or constructive possession of more than 100 grams but less than 200 grams of Cocaine

COUNT THREE - POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE WITHIN PROXIMITY OF A SCHOOL OR PARK

That JEFFERY LEVON GRAVES, GLENN Q PERNELL AND DERRICK LEVON PLATT did in MARION County on or about August 02, 2006, violate Section 44-53-0445(B)(1) of the Code of Laws of South Carolina (1976), as amended, in that they did knowingly and intentionally possess with intent to distribute a quantity of Cocaine, a controlled substance, such possession having occurred within a one-half mile radius of a school or park, to-wit Mullins Primary School

COUNT FOUR - TRAFFICKING IN COCAINE BASE

That JEFFERY LEVON GRAVES GLENN Q PERNELL AND DERRICK LEVON PLATT did in MARION County on or about August 02 2006 violate Section 44 53-0375(C)(2)(b) of the Code of Laws of South Carolina (1976), as amended, in that they was knowingly in actual or constructive possession of more than 28 grams but less than 100 grams of Cocaine Base

ATTACHED TO AND BECOMING A PART OF THE ORIGINAL INDICTMENT FOR UNLAWFUL DRUGS WITH THE AFORESAID NAME(S) OF JEFFERY LEVON GRAVES GLENN Q PERNELL AND DERRICK LEVON PLATT SHOWN THEREON

COUNT FIVE - POSSESSION OF COCAINE BASE WITH INTENT TO DISTRIBUTE WITHIN PROXIMITY OF A SCHOOL OR PARK

That JEFFERY LEVON GRAVES, GLENN Q PERNELL AND DERRICK LEVON PLATT did in MARION County on or about August 02, 2006, violate Section 44-53-0445(B)(2) of the Code of Laws of South Carolina (1976) as amended, in that they did knowingly and intentionally possess with intent to distribute a quantity of Cocaine Base, a controlled substance, such possession having occurred within a one-half mile radius of a school or park, to-wit North Mullins Primary School

Against the peace and dignity of the State, and contrary to the statute in such case made and provided

E. L. Clements III

SOLICITOR