IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2002-KA-00261-COA

CHRISTOPHER BURCHFIELD **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	2/15/2002
TRIAL JUDGE:	HON. GEORGE B. READY
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JACK R. JONES III
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	JOHN W. CHAMPION
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	POSSESSION OF OVER TWO HUNDRED FIFTY DOSAGE UNITS OF EPHEDRINE OR PSEUDOEPHEDRINE: SENTENCED TO SERVE A TERM OF FIVE YEARS IN THE CUSTODY OF MDOC.
DISPOSITION:	REVERSED AND REMANDED-07/22/2003
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

EN BANC

IRVING, J., FOR THE COURT:

¶1. Christopher Burchfield was convicted by a jury in the Circuit Court of DeSoto County of possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance. The trial judge sentenced Burchfield to five years in the custody of the Mississippi Department

of Corrections. Feeling aggrieved, Burchfield appeals and assigns as error six issues which we quote verbatim from his brief:

1. That the trial court erred in overruling the motion to suppress.
2. That the trial court erred in failing to require the State to prove with expert testimony (toxicologist) the contents of the contraband.
3. That the trial court erred in allowing the testimony of Johnny Cox in that same was prejudicial and irrelevant.
4. That the trial court erred in denying the motions for directed verdict and peremptory instruction and JNOV.
5. That the trial court erred in overruling the objection to the prosecutor's closing argument.
6. That the trial court erred in giving the maximum sentence.

¶2. Finding error in the admission of certain evidence, this Court reverses and remands for a new trial.

FACTS

¶3. Brian Bradley was a supervisor with the narcotics division of the Horn Lake Police Department. He received a phone call from a clerk at Walgreens who stated that two white men were in the store buying large amounts of ephedrine/pseudoephedrine contained in over-the-counter cold medications. The men were leaving the parking lot as the clerk was talking to Bradley. The clerk described their vehicle's color and license plate and gave the direction in which the vehicle was traveling. The vehicle was described as a silverish Cadillac with an Arkansas license plate, traveling westbound on Goodman Road from Highway 51. Bradley called the Horn Lake Police Department and advised the dispatcher to announce to officers to be on the lookout (BOLO) for a vehicle matching this description.

¶4. Kevin Thomas was on patrol for the Horn Lake Police Department and heard the BOLO announcement. Thomas went to the area where the vehicle was suspected to be traveling and saw a Cadillac fitting the description of the BOLO announcement. Thomas initiated a traffic stop of the vehicle

at the intersection of Goodman and Tulane Roads. While talking with the driver, Thomas noticed a Walgreens shopping bag on the back seat. The shopping bag contained two boxes of ephedrine. Thomas asked the driver if he had anything illegal in the car and later asked the driver if he could search the vehicle. The driver consented to a search of the vehicle. The search uncovered approximately 864 unit dosages of ephedrine in the trunk and body of the car. The passenger in the Cadillac was Christopher Burchfield. Burchfield and the driver of the vehicle were arrested. Other pertinent facts will be related during the discussion of the issues.

ANALYSIS AND DISCUSSION OF THE ISSUES

Denial of Motion to Suppress and Admission of Evidence

¶5. The first three issues raised by Burchfield concern the denial of his motion to suppress and admission of certain evidence and testimony which he sought to exclude. Since they are interrelated, we combine them for discussion.

¶6. Burchfield's first contention is that the trial court erred when it denied his motion to suppress the 864 unit dosages of ephedrine seized from the vehicle in which he was a passenger. Burchfield contends that Officer Thomas lacked probable cause to stop and search the vehicle. He argues that there was no evidence that he or the driver was involved in any type of illegal activity and that there was no allegation of a driving violation which would have justified the stop. Thus, Burchfield claims that the trial judge committed reversible error in allowing the seized packages of ephedrine to be admitted into evidence.

¶7. Conversely, the State maintains that the search of the Cadillac was legal because the driver of the Cadillac consented to the search after a proper investigatory stop. Therefore, the seized packages of ephedrine were not the fruit of an illegal seizure. We agree.

¶8. In order to review the propriety of the denial of the motion to suppress, we must first examine the circumstances revolving around the search of the Cadillac. "The Fourth Amendment to the United States Constitution and Article 3, Section 23 of the Mississippi Constitution contain almost identical language expressing a person's right to be secure from unreasonable searches and seizures." *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 114 (¶14) (Miss. 1999). The prohibition against unreasonable searches and seizures "applies to seizures of the person, including brief investigatory stops such as the stop of a vehicle." *Id*.

> Police activity in preventing crime, detecting violations, making identifications, and in apprehending criminals may be divided into three types of action: (1) Voluntary conversation: An officer may approach a person for the purpose of engaging in a voluntary conversation no matter what facts are known to the officer since it involves no force and no detention of the person interviewed; (2) Investigative stop and temporary detention: To stop and temporarily detain is not an arrest, and the cases hold that given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest; (3) Arrest: An arrest may be made only when the officer has probable cause.

Singletary v. State, 318 So. 2d 873, 876 (Miss. 1975).

¶9. The constitutional requirements for an investigative stop and detention are less stringent than those for an arrest. An investigative stop of a suspect may be made so long as an officer has "a reasonable suspicion, grounded in specific and articulable facts, that a person he encounters was involved in or is wanted in connection with a felony." *Floyd*, 749 So. 2d at 114 (¶ 18). The test is thus one of reasonableness, and the supreme court has not articulated a concrete rule to determine what circumstances justify an investigatory stop. *Id*. at 115 (¶18). The question is approached on a case-by-case basis. *Id.* Determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. *Floyd*, 749 So. 2d at 113 (¶11).

¶10. Based on the information contained in the BOLO announcement, Thomas decided to stop the Cadillac. The broadcast heard by Thomas was an official dispatch and is presumed to be authentic. *Barton v. State*, 328 So. 2d 353, 354 (Miss. 1976). The BOLO announcement was based upon the information provided by the Walgreens store clerk. The clerk's tip was specific and detailed; therefore, the stop of the Cadillac as an investigatory stop was entirely proper. *Tucker v. State*, 403 So. 2d 1271, 1273 (Miss. 1981).

¶11. After Thomas initiated the investigatory stop, he noticed a Walgreens shopping bag in the back seat that contained ephedrine. He asked the driver for consent to search the Cadillac, and the driver voluntarily assented. When a driver voluntarily consents to a search of his vehicle, there is no need for a search warrant. *Luton v. State*, 287 So. 2d 269, 272 (Miss. 1973).

¶12. Burchfield does not argue that the consent given by the driver to search the Cadillac was involuntary; rather, he merely asserts the absence of probable cause to stop and search. But as has already been discussed, there was ample cause to make an investigatory stop of the vehicle in which Burchfield was a passenger. The driver of the Cadillac freely and voluntarily gave his consent for his automobile to be searched. Therefore, admission into evidence of the fruits of the search was proper. This issue is without merit.

¶13. Burchfield next argues that it was improper to admit into evidence the packages containing the ephedrine without a toxicologist or crime laboratory analysis proving that the pills actually contained ephedrine. Burchfield contends that admitting this evidence was improper in that there was no conclusive proof as to the contents of the packages and that to hold someone criminally responsible, there must be actual scientific evidence to prove the nature and chemical make-up of the substance. Burchfield cites two

cases, *Kettle v. State,* 641 So. 2d 746 (Miss. 1994) and *Crisp v. State,* 796 So. 2d 233 (Miss. 2001), in support of his contention that the trial court committed reversible error when it admitted the medications without expert testimony that they contained the precursor drug ephedrine.

¶14. Conversely, the State maintains that the cold medications containing ephedrine were commercially packaged under a trade name and were self authenticating as to the chemical content. Thus, the State contends that it was not required under the rules of evidence to produce a toxicologist to prove the pills contained ephedrine. More specifically, the State argues that Rule 902 (7) of the Mississippi Rules of Evidence administers the death blow to Burchfield's argument that the trial court erred in allowing the admission of the cold medications, which allegedly contained ephedrine, without the benefit of the testimony of a toxicologist or the benefit of a chemical analysis that the medication did indeed contain the banned drug. The State also candidly admits that this issue causes it concern but concludes that the State met its burden of proof, though barely.

¶15. At trial, the State did not present a toxicologist or a chemical analysis of the pills. However, the State was allowed, through Officer Bradley, to inform the jury that the various medications contained ephedrine. This was accomplished by having Bradley read to the jury, over Burchfield's objection, the ingredient label contained on the packages of seized medications found inside the Cadillac. Also, the trial judge permitted the State to introduce into evidence the packages of medicine which, according to the ingredient label, contained ephedrine. We quote directly from the record the reasons offered by the trial judge for admitting the medication:

> First, I think that since the Legislature has seen fit to make it illegal to possess this substance and it's clear what this substance is, if it is still in its packaging, that that [sic] would be effectively prima facie proof of the fact that it is that substance. Of course, that

> could be overridden, I suppose, as could in any drug test or in any kind of - - several different evidentiary situations. But it would be almost like the chain of custody issue. Unless there is some doubt cast on it by some other circumstance, I think the Court could take it as prima facie evidence that it is what it's intended and labeled to be by the drug companies when they present it for sales [sic] at the stores. There is no evidence of any kind of tampering or change or that it's not what it is, then I would have to say it would have to be accepted for what it is.

¶16. The "admissibility and relevancy of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990). Unless the trial judge's discretion is so abused as to be prejudicial to the accused, an appellate court will not reverse his ruling. *Shearer v. State*, 423 So. 2d 824, 826 (Miss. 1983). The discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence. *Johnston*, 567 So. 2d at 238.

¶17. We now turn to a discussion of this issue. We begin our discussion with *Barnette v. State*, 481 So. 2d 788, 791 (Miss. 1985), which appears to be the seminal case on the issue we face here.

¶18. In *Barnette*, the defendant was convicted of selling cocaine. *Id.* at 789. During the trial, over the defendant's objection, the State was allowed to introduce, pursuant to Mississippi Code Annotated section 13-1-114, the certificate of analysis indicating that the substance sold was indeed cocaine.[1] The analyst who conducted the tests did not testify. *Id.* at 790. The defendant contended that admission of the certificate without the accompanying testimony of the analyst who performed the analysis, violated his Sixth Amendment right to confront witnesses against him. *Id*.

¶19. In resolving the issue, the Mississippi Supreme Court made the following pronouncement:

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[1] Mississippi Code Annotated section 13-1-114, which allowed the admission of the certificate as evidence, was repealed July 1, 1991.

> [A]n essential element of the crime of selling a controlled substance is that the substance sold is indeed a controlled one . . . . This must be determined by a chemical analysis. To allow, without the consent of the defendant, this essential element to be proven solely by a certificate of the analyst impermissibly lessens the constitutionally required burden which is on the state.

Id. at 791.

> To allow the certificate of analysis to be admitted without the accompanying testimony of the analyst who prepared the certificate . . . violates the defendant's right of confrontation.
>
> The certificate of analysis may be admitted as substantive evidence of the facts therein along with the testimony of the analyst who prepared the certificate.
>
> The certificate may be admitted as substantive evidence of the facts therein without the testimony of the analyst only if the defendant consents to such and waives his right to confront that witness in a pretrial agreement with the prosecuting attorney.

Id. at 792.

¶20. *Kettle* involved the sale of cocaine where the court was confronted with the admissibility of a laboratory report introduced by a person who did not conduct the drug analysis on the substance which was the subject of the report. *Kettle*, 641 So. 2d at 747. The defendant filed a motion *in limine* to prevent the use of the report at trial. In his motion, the defendant alleged that, in addition to concerns of reliability, use of the report would violate his Sixth Amendment right of confrontation. *Id*. The motion was overruled, and the report was introduced pursuant to the business records exception, Rule 803 (6) of the Mississippi Rules of Evidence. *Id*. The report "contained the results of the tests performed on the substance that was purchased." *Id*.

¶21. On appeal, the Mississippi Supreme Court quoted extensively from *Barnette v. State*, 481 So. 2d 788, 791 (Miss. 1985), and then concluded with the following:

> When the Sixth Amendment right to confrontation arises, the ultimate question is whether hearsay evidence offered qualifies under a firmly rooted hearsay exception. If so, it may be admitted despite a claimed Sixth Amendment right to confrontation objection. Today we are not required to go beyond the facts of this case, and we hold that here the defendant was entitled to have the person who conducted the test appear and testify in person.

Kettle, 641 So. 2d at 750 (citations omitted). The court did not explain why the 803 (6) business records exception was not a "firmly rooted" exception to the admission of hearsay. Justice Banks, in a concurring opinion, expressed his understanding of what the majority held. In his view, the majority was only excluding the use of certificates or reports, in criminal cases, that were prepared in anticipation of litigation.

¶22. In *Crisp*, the second case cited by Burchfield, the Mississippi Supreme Court was again confronted with a question as to the legality of the admissibility of a crime lab certificate of analysis without the accompanying testimony of the analyst who performed the chemical analysis. In resolving the issue, the court yet again quoted extensively from *Barnette* and observed that the defendant had not given his pretrial consent to the admission of the certificate of analysis without the testimony of the analyst. Additionally, the court noted the absence of any indication that the defendant had waived his right to confront the analyst at trial. In concluding that the trial court had erred in allowing the admission of the certificate, the court made the following pronouncement:

> This Court holds that the circuit court erred in allowing the certificate of analysis to be admitted without the accompanying testimony of the analyst who prepared the certificate. This allowed the prosecution to put on its case without meeting its burden of proving beyond a reasonable doubt that Crisp possessed marijuana.

Crisp, 796 So. 2d at 236.

¶23. We are satisfied that the labels on the various medications purporting to have been affixed thereto in the course of business and indicating the ingredients contained therein, along with the origin of the

medications, were sufficient, under Rules 901 and 902 (7) of the Mississippi Rules of Evidence, to dispense with the requirement that the State prove, by extrinsic evidence, the authenticity of the various medications and, in the absence of any objection by Burchfield, would have satisfied the State's burden of proof that the medicines did in fact contain the precursor drug ephedrine as reflected on the labels. However, *Barnette, Kettle,* and *Crisp* make clear that the State cannot meet its burden of proof — to prove that a criminal defendant has possessed or sold a controlled or banned substance — without presenting evidence of the chemical analysis of the substance, along with the analyst who performed the analysis, unless the defendant agrees to admission of the certificate of analysis without the testimony of the analyst or otherwise gives or indicates a waiver of his right of confrontation.

¶24. We have reviewed the record before us, and it is clear that Burchfield objected to the admission of the cold medications as well as to the testimony of Officer Bradley who informed the jury, by reading from the labels, that the medications contained the precursor drug ephedrine. While Burchfield did not use the magic language, that is, that allowing admission of the medication and Bradley's testimony, were violative of his Sixth Amendment right of confrontation, he made it clear that the physical presence of the analyst was required. This is what the record reveals:

> BY MR. JONES (Burchfield's counsel): With regards to the introduction of these boxes, obviously in chambers prior to trial we discussed several issues and also it was discussed how I felt that they had to prove this with a toxicologist. Likewise, that is also an objection; that this is not relevant or admissible until they have valid, scientific proof through toxicology.

In his motion for a new trial, Burchfield alleged, among other things, that the trial court erred in failing to require the State to prove, "by [a] toxicologist, the substance alleged in the indictment."

¶25. We can see no substantive difference between a certificate of analysis, indicating the identity of a substance tested, and a label, affixed to a bottle of medication, which identifies the ingredients in the medication. Therefore, we hold that the trial court erred when it allowed the packages of medication to be admitted into evidence along with the testimony of Officer Bradley that the medications contained the precursor drug ephedrine. As our supreme court said in *Barnette, Kettle,* and *Crisp*, the State was required to prove, as an essential element of its case, that the medications did in fact contain the precursor drug ephedrine. That had to be done either by scientific chemical analysis, along with the testimony of the analyst performing the analysis, or by the admission, pursuant to an agreement with Burchfield, of the packages of medications whose labels indicated the presence of the drug.

¶26. The dissent, attempts to dismiss the applicability of *Barnette, Kettle*, and *Crisp* by asserting that those cases involved the sale of cocaine or marijuana and that one cannot look at those substances and determine their identity. Therefore, apparently in the dissent's view, a chemical analysis is needed in cases involving those drugs but not in cases involving a banned precursor drug which is identified on the label of a cold medication.

¶27. With respect to the dissent, when we consider the facts in *Barnette, Kettle*, and *Crisp*, we are unable to appreciate the attempt at distinction. Perhaps the dissent has overlooked the fact that in *Barnette, Kettle*, and *Crisp,* the State presented as a part of its case-in-chief a certificate of chemical analysis identifying the substances, yet the Mississippi Supreme Court said in each of those cases that the certificate of chemical analysis alone was insufficient to meet the State's required burden of proving each element of the offense beyond a reasonable doubt and that the process denied the defendant his constitutional right of confrontation.

¶28. We do, however, agree with the dissent that our case appears to be a case of first impression dealing with proof of the identity of a drug via the ingredient label on the medication. However, in our view, the holding and rationale espoused in *Barnette*, *Kettle*, and *Crisp* are applicable and binding in this case, notwithstanding the fact that courts in other jurisdictions may have resolved the issue differently.

¶29. In *State v. Heuser*, 661 N.W. 157 (Iowa 2003), a case cited by the dissent, the Iowa Supreme Court, affirmed the trial court's admission of labels from boxes of cold medication to prove that the medication contained "pseudoephedrine hydrochloride." The trial court admitted the labels under the "market reports, commercial publications" exception to the hearsay rule contained in Rule 5.803(17) of Iowa Rules of Evidence. *Id*. at 162. Rule 803 (17) of the Mississippi Rules of Evidence is the counterpart of Iowa's rule 5.803(17).

¶30. We do not quibble with the concept that the constitutional right of confrontation is not offended by the admission of evidence under one of the firmly-rooted exceptions to the hearsay rule; we just note that our supreme court in *Kettle* dealt with the argument made here by the dissent and rejected it. As we have already observed, in *Kettle*, our supreme court rejected the business records exception, which is no doubt a firmly-rooted exception to the hearsay rule,[2] as a basis for admitting the certificate of chemical analysis,

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[2] See Sarah K. Eddy, "*Sixth Amendment at Trial*," 90 Geo. L.J. 1708, 1740 (2002), fn. 108 (citing *U.S. v. Kayne*, 90 F.3d 7, 13 (1st Cir. 1997) (Confrontation Clause not violated when court admitted certificates of value for rare coins under business records exception because exception is "firmly rooted"); *U.S. v. Waters*, 158 F.3d 933, 940-41 (6th Cir. 1998) (Confrontation Clause not violated when court admitted hotel records under business records exception because the exception is "firmly rooted"); *U.S. v. Roulette*, 75 F.3d 418, 422 (8th Cir. 1996) (Confrontation Clause not violated when court admitted laboratory drug-test reports under business records exception because exception is "firmly rooted"); *U.S. v. Cestnik*, 36 F.3d 904, 907 (10th Cir. 1994) (Confrontation Clause not violated when court admitted money records under business records exception because exception is "firmly rooted"); *U.S. v. Gonzalez*, 71 F.3d 819, 832 (11th Cir. 1996) (Confrontation Clause not violated when court admitted

even while acknowledging that the Sixth Amendment right to confrontation is not offended if the hearsay evidence offered qualifies for admission under a firmly-rooted hearsay exception.

¶31. The third evidentiary issue of which Burchfield complains is the admission of the testimony of Johnny Cox as an expert in crystal methamphetamine. Cox explained to the jury the steps in making crystal methamphetamine. Burchfield contends that Cox's testimony was prejudicial in that Burchfield was not on trial for possessing or manufacturing crystal methamphetamine.

¶32. In order to admit expert opinion testimony, the trial court must first determine the evidence to be relevant. *Oughton v. Gaddis*, 683 So. 2d 390, 395 (Miss. 1996). Burchfield contends that Cox's testimony created nothing but speculation and conjecture against him.

¶33. We find that the trial judge did not abuse his discretion in allowing Cox's testimony into evidence, for it was indeed relevant. Generally, testimony must be helpful to the trier of fact in resolving an issue. *Bower v. Bower*, 758 So. 2d 405, 413 (¶37) (Miss. 2000). Cox's testimony meets this requirement. Cox's testimony demonstrated that crystal methamphetamine is largely manufactured from ephedrine extracted from cold medications. This nexus between ephedrine being the key ingredient in manufacturing crystal methamphetamine and Burchfield's buying large quantities, 864 unit dosages of ephedrine in a half of an hour span, coupled with Burchfield's statement that he and the driver intended to resell the ephedrine,

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ATF forms kept by gun dealer under business records exception because exception is "firmly rooted"). Foreign business records introduced according to 18 U.S.C. § 3505 (2000) have been held "at least as reliable as evidence admitted under a firmly rooted hearsay exception." *U.S. v. Garcia-Abrego*, 141 F.3d 142, 179 (5th Cir. 1998)).

allowed an inference that the large amounts of ephedrine were to be used to manufacture crystal methamphetamine. This allegation of error is wholly without merit.

Sufficiency of the Evidence

¶34. In light of our resolution of the second and third issues, there is no need to address this issue.

Closing Argument

¶35. Burchfield's next argument cites error by the trial court in overruling his objection to the State's closing argument. During closing argument, the State inferred that Burchfield knew that the cold medications were to be used in the manufacturing of crystal methamphetamine. Burchfield contends that this was an improper comment by the prosecutor, for it was not supported by the evidence. According to Burchfield, there was absolutely no evidence presented at the trial that he intended to manufacture crystal methamphetamine; therefore, he contends that this inference was improper.

¶36. This argument is without merit. Broad latitude is allowed to attorneys in their arguments. However, it is well established that it is error to argue statements of facts which are not in the evidence or not necessarily inferable. *Tubb v. State*, 217 Miss. 741, 744 , 64 So. 2d 911, 912 (1953). The inference that Burchfield knew that the ephedrine was to be used to manufacture crystal methamphetamine was reasonable. The evidence showed that large quantities of ephedrine were purchased, that ephedrine was purchased from several locations, that Burchfield told the Horne Lake Police Department that the ephedrine was purchased for resell; that the process of extracting ephedrine from the cold medications was simple, and that 864 dosage units of ephedrine were purchased within a short time span. The receipts show that the cold medications were purchased within twenty-four minutes from three different locations. This issue lacks merit.

Sentencing

¶37. Burchfield complains in his last argument that the trial judge imposed the maximum sentence prescribed under the statute. Burchfield contends that this Court should remand for re-sentencing and instruct the trial judge to take into consideration the fact that he had no prior felonies and his youthful age of twenty-three. Burchfield alleges that this sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment.

¶38. We find this argument without merit. A trial court will not be held in error or held to have abused its discretion if the sentence imposed is within the limits fixed by statute. *Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993). Burchfield's sentence of five years was within the limits of the statute under which he was convicted.

¶39. "When a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality' the proportionality analysis of *Solem v. Helm*, 463 U.S. 277 (1983), is used." *White v. State*, 742 So. 2d 1126, 1135 (¶ 37) (Miss. 1999). However, when this Court compares the crime which Burchfield was convicted of with the sentence imposed, we do not find a gross disproportionality. Moreover, in *White*, the defendant was also a first time offender who sold a small amount of cocaine. There, our supreme court held that consideration of first time offender status was not the only consideration of a trial judge when sentencing a defendant to the maximum sentence available. *Id*. at 1137-38 (¶¶ 47-48). The trial judge in this matter did not abuse his discretion in sentencing Burchfield to the maximum penalty available within the statue.

¶40. In conclusion, we find that the trial court erred when it admitted the packages of cold medication and allowed Officer Bradley to read from the ingredient labels that the packages of medication contained

the drug ephedrine. Burchfield did not agree to the admission of the packages of medication or waive his right to confront and cross-examine the person who labeled the medication as containing ephedrine. The State failed to present any evidence that the medications had been chemically analyzed and determined to contain the drug, ephedrine or pseudoephedrine. Under the authority of *Barnette, Kettle*, and *Crisp*, this omission resulted in a failure of the State to carry its burden of proof as to an essential element of the crime charged, as well as a deprivation of Burchfield's Sixth Amendment right. Consequently, this case is reversed and remanded for a new trial consistent with the holding of this opinion.

¶41. **THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY IS REVERSED AND REMANDED FOR A NEW TRIAL. ALL COSTS OF THIS APPEAL ARE ASSESSED TO DESOTO COUNTY.**

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES AND LEE, JJ., CONCUR. MYERS, J., DISSENTS WITH SEPARATE OPINION JOINED BY THOMAS, AND GRIFFIS, JJ. CHANDLER, J., NOT PARTICIPATING.

MYERS, J., DISSENTING:

¶42. The majority believes that the State wrongfully introduced non-scientific evidence of the contents of the cold medicines without Burchfield's agreement. I believe that this was not wrong, and therefore dissent.

¶43. First, I note that I agree with the majority's analysis of Mississippi Rule of Evidence 902 (7). The labeling of the box is sufficient to prove the identity of the cold medications. However, for reasons I will discuss below, I believe the labeling is also sufficient to prove the contents of the medications.

¶44. The three cases that both Burchfield and the majority cite all deal with either marijuana or cocaine. *See Crisp v. Town of Hatley*, 796 So. 2d 233 (Miss. 2001) (possession of marijuana); *Kettle v. State*,

641 So. 2d 746 (Miss. 1994) (selling cocaine); *Barnette v. State*, 481 So. 2d 788 (Miss. 1985) (selling cocaine). I would say these cases are not directly applicable.

¶45. There is a key difference between cocaine or marijuana and a cold medicine. Just looking at a bag of cocaine powder, one cannot tell if it is cocaine, flour, talcum powder, etc. without a chemical analysis. Similarly, one cannot tell, just by looking, that a substance that appears to be marijuana is indeed that substance without chemical analysis.

¶46. Cold medicines are different. There are state and federal laws and regulations regarding their labeling. Whether these labels are competent evidence to prove the contents of the medicines in a criminal proceeding appears to be a matter of first impression in Mississippi. However, some of our fellow states have already considered the issue.

¶47. Recently, the Iowa Supreme Court considered the issue of the trustworthiness of medication labels. In that case, they were called upon, as are we, to decide whether the labeling of cold medicines may accurately indicate that the medicines contain precursors to illegal drugs. While the Iowa court was concerned with an exception to their hearsay rules, I find their reasoning to be applicable to the reliability of the drug labels as well:

> In this modern day, thousands of pharmaceuticals are compounded, processed, or produced, and then packaged and labeled for distribution in that package for direct sale to a customer unopened, and frequently under seal, and as the modern advertising puts it "untouched by human hands." This is no longer an age when the processor puts the ingredients into a vial with an "eyedropper," with highly variable results appearing in the finished "preparation," but an era characterized by automatic mixing, measuring, and filling apparatus, the entire productive process being controlled by electronic and nucleonic gauges, measuring to infinitesimal precision, to produce an absolute result in meeting a required standard.

Iowa v. Heuser, 661 N.W.2d 157, 164 (Iowa 2003) (quoting *Ohio v. Mitchell*, 246 N.E.2d 586, 589 (Ohio Ct. App. 1969)). The *Heuser* court found the label to be "competent proof of its contents . . . ." *Id.*; *accord Illinois v. Shevock*, 782 N.E.2d 949, 954 (Ill. App. Ct. 2003); *In re T.D.*, 450 N.E.2d 455, 458 (Ill. Ct. App. 1983); *Mitchell*, 246 N.E.2d at 589.

¶48. All of the above-cited cases have found that labels on medications (or in the case of *T.D.*, glue) are reliable enough to prove the ingredients of their contents. Federal and state laws and regulations provide penalties should the contents deviate from the stated ingredients. To hold otherwise would place too great a burden upon the state and make Mississippi that much safer for those who choose to manufacture illegal drugs.

THOMAS AND GRIFFIS, JJ., JOIN THIS SEPARATE WRITTEN OPINION.