IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00908 COA

BILLY MARTIN, JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HOWARD Q. DAVIS, JR.

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ALSEE MCDANIEL

ATTORNEY FOR APPELLEE:

OFFICE OF ATTORNEY GENERAL

BY: SCOTT STUART, SPECIAL ASSISTANT ATTORNEY GENERAL

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: CRIMINAL - NEGLIGENT HOMICIDE IN THE OPERATION OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

TRIAL COURT DISPOSITION: GUILTY; SENTENCED TO TWENTY-FIVE YEARS IN MDOC; TEN YEARS SUSPENDED

BEFORE THOMAS, COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Billy Martin, Jr. was convicted of vehicular homicide. On appeal he alleges two grounds for reversal: (1) the court erred in refusing a jury instruction regarding the victim's own negligence, and (2) the verdict was against the great weight of the evidence. Although we find no merit in these issues, we find plain error in the sentencing of Martin to twenty-five years imprisonment when the statute only provided for a maximum ten-year penalty at the time the crime was committed. We affirm the conviction, but remand for resentencing.

FACTS

On March 14, 1992, Martin and his wife drove to Inverness to visit relatives. On the way the couple stopped at a local store to buy a wine cooler, which Martin was drinking when they arrived at the relatives' house. Martin then decided to go back to Indianola without his wife. He turned on to B.B. King Road in Indianola at approximately 7:30 p.m. On the road were Anthony Harris, twelve, and Leroy Wilson, age fifteen, who were riding their bicycles. Leroy, who was riding in front of Anthony, heard Martin's car coming and yelled to warn Anthony. Even so, Anthony was struck by the car and knocked into the ditch. Anthony was transported to Delta Medical Center in Greenville, where he died the next morning.

Martin did not stop after hitting the boy, but instead drove to the Indianola Police Station where he told officers that he had hit a child on a bicycle. The officers detected the odor of alcohol and asked Martin if he would consent to an intoxilizer test. He did, and the test results registered .12 per cent by weight volume of alcohol.

DISCUSSION

Martin alleges that the accident was caused by Anthony's turning his bicycle into the path of the vehicle. He alleges that evidence of Anthony's negligence compels a decision that the verdict was against the great weight of the evidence. He further alleges error in failing to be granted an instruction regarding the victim's possible negligence. We will consider these two issues together.

1. Weight of evidence and jury instruction

The supreme court has stated that "[i]n determining whether a jury verdict is against the overwhelming weight of the evidence, . . . this Court accepts as true all evidence which supports the verdict and will reverse only when convinced that the trial court has abused its discretion in failing to grant a new trial." *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995).

Martin was found guilty of violating this statute:

> (1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; or (c) has

> ten one-hundredths percent (.10%) or more by weight volume of alcohol in the person's blood based upon milligrams of alcohol per one hundred (100) cubic centimeters of blood as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter.

Miss. Code Ann. § 63-11-30 (1992).

It is undisputed that Martin consented to an intoxilizer test and was found to be legally intoxicated while driving a vehicle. Thus, this threshold element was established at trial. Martin argues that he was not the cause of the accident, but that the deceased's negligent actions caused the accident by failing to follow the rules of the road. A defense instruction that would have raised this issue was refused. That instruction, D-3, read as follows:

> The Court instructs the Jury that a person riding a bicycle upon a road or highway has the same duties applicable to the driver of a motor vehicle, including obedience to all rules of the road and traffic regulations.

The court refused to give Instruction D-3, but gave Instruction D-2 which stated:

> The Court instructs the Jury that if you find from the evidence that the State has failed to prove beyond a reasonable doubt that Billy Martin, Jr. was negligent in the operation of his automobile and thereby negligently caused the death of Anthony Leroy Harris, then your verdict shall be for the Defendant.

We find that Instruction D-2 properly stated the law. The jury had an opportunity to review all of the evidence presented and to determine whether or not it believed Martin was guilty of the crime alleged. Section 63-11-30 only requires that a defendant (1) operate a vehicle while intoxicated; and, (2) cause the death of another in a negligent manner. He need not be the sole proximate cause, but only a cause. Instruction D-2 allows the jury to return a verdict of not guilty if the State failed to prove beyond a reasonable doubt that any negligence in the operation of his vehicle was not a cause of Anthony’s death. In other words, if the jury believed Martin’s intoxication and negligence did not cause the youth’s death, Instruction D-2 required them to acquit.

Martin’s arguments regarding the weight of the evidence are unavailing. There was evidence in the record to support each element of the offense. In his defense, Martin put on evidence that the deceased was crossing diagonally into Martin’s right-of-way when he was hit. Expert testimony by Officer McCain was offered by the defense. McCain 's opinion was that the accident was caused by the victim "either turning around to go back in the direction he came from or crossing the road at the time he was hit." However, the officer admitted that he did not know what lane the bicycle was in when Martin hit it, nor did he realize that the bruises and markings on the victim were on his back, not on his side. That suggests that the jury could conclude that Martin was too close to the young bike rider to allow for any quick change in route. The supreme court has stated that "[o]nce a witness

is qualified as an expert to render expert testimony, then it is within the province of the trier of fact to give weight and credibility to the testimony." *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790 (Miss. 1995). We find that the evidence presented at trial for the jury's consideration was sufficient to support its verdict.

2. Sentencing

Though Martin does not raise the issue, we are compelled to address the propriety of the sentence imposed. Between the date of the accident and the date of trial, the penalty for this offense was increased from ten years to twenty-five years. Martin was sentenced under the newer version of the statute. The supreme court has stated that "errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal." *Smith v. State*, 477 So. 2d 191, 195 (Miss. 1985). Sentencing errors should be reviewed by the court under the plain-error rule. *Smith*, 477 So. 2d at 195; *see Stevenson v. State*, 674 So. 2d 501, 505 (Miss. 1996). "The primary purpose of the plain error rule is to prevent a miscarriage of justice." *Johnson v. State*, 452 So. 2d 850, 853 (Miss. 1984) (citing *Bell v. State*, 443 So. 2d 16, 18 (Miss. 1983)).

At the time the accident occurred in March 1992, the statute provided:

> Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb or member of another shall, upon conviction, be guilty of a felony and shall be committed to the custody of the state Department of Corrections for a period of time *not to exceed ten (10) years.*

Miss. Code Ann. § 63-11-30(4) (1972) (emphasis added.). This change became effective on July 1, 1991. 1991 Miss. Laws ch. 480, § 6. The accident occurred on March 14, 1992. The amendment increasing the penalty to twenty-five years was not effective until July 1, 1992. 1992 Miss. Laws ch. 500, § 1.

The supreme court has stated that "[o]ne convicted should be sentenced pursuant to the statute existing on the date of his offense to avoid an ex post facto problem." *Johnston v. State*, 618 So. 2d 90, 94 (Miss. 1993); *see also Allen v. State*, 440 So. 2d 544, 545 (Miss. 1983). The judge sentenced Martin to twenty-five years with the last ten years suspended. By applying the statute that did not become effective until after the offense was committed, error occurred. As the supreme court has held, a trial court has power to impose upon the defendant "any sentence within the scope of the statute as it was written on the date on which he committed his offense." *Allen*, 440 So. 2d at 545.

The legislature has provided for this exact situation:

> No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat the prosecution of any crime committed prior to its enactment, or the collection of any penalty, whether such prosecution be instituted before or after such enactment; and all laws defining a crime or prescribing its punishment, or for

> the imposition of penalties, shall be continued in operation for the purpose of providing punishment for crimes committed under them, and for collection of penalties, notwithstanding amendatory or repealing statutes, unless otherwise provided in such statutes.

Miss. Code Ann. § 99-19-1 (Supp. 1995). The ten year penalty under the statute as it existed at the time of this offense remained in effect for this prosecution.

We affirm the conviction, but reverse and remand for resentencing.

THE JUDGMENT OF THE CIRCUIT COURT OF SUNFLOWER COUNTY IS AFFIRMED AS TO THE CONVICTION OF VEHICULAR HOMICIDE, BUT IS REVERSED AS TO SENTENCING AND REMANDED FOR RESENTENCING. ALL COSTS ARE ASSESSED TO SUNFLOWER COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.