IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00688 COA

DONALD DOTSON

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. JOSEPH H. LOPER, JR.

COURT FROM WHICH APPEALED: ATTALA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES H. POWELL, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

NATURE OF THE CASE: CRIMINAL FELONY

TRIAL COURT DISPOSITION: TWO CTS AGGR ASSAULT;SENT. TO TWENTY YRS IN THE CUSTODY OF MDOC FOR CT I; CONSECUTIVE SENT. TO TEN YRS IN CUSTODY OF MDOC FOR CT II WITH FIVE YEARS SUSPENDED; $13,000 IN RESTITUTION TO VICTIMS

BEFORE THOMAS, P.J., BARBER, AND MCMILLIN, JJ.

MCMILLIN, J., FOR THE COURT

A jury in the Attala County Circuit Court convicted Donald Dotson of two counts of aggravated assault. The only issue that Dotson raises on appeal is whether the trial court erred in failing to excuse for cause a number of venire persons who were employed in law enforcement or related by blood or marriage to law enforcement officials.

The pool of potential jurors in this case was composed of thirty-six people. In response to a very broad inquiry concerning venire members' connections with law enforcement, thirteen jurors responded in the affirmative. Of those thirteen, only three ultimately served on the jury that returned the guilty verdict.

Dotson asserts that these facts are analogous to those in *Mhoon v. State*, and that, by failing to address the "statistical aberration" in the makeup of the pool of potential jurors, the trial court committed reversible error. *Mhoon v. State*, 464 So. 2d 77, 80 (Miss. 1985). In *Mhoon*, the venire panel consisted of twelve members with law enforcement connections, of whom six were ultimately selected for service on the jury. *Id.* The supreme court found that the makeup of the jury required reversal because of the potential that these jurors exercised improper influence over the remaining jurors. *Id.* at 82.

The *Mhoon* decision's precedential impact on subsequent cases raising the same issue is difficult to assess. *Mhoon* draws no bright lines on any of the three critical questions essential for analysis of the issue. It neither states with any certainty what the critical threshold is for percentage of venire members having personal connections with law enforcement, nor does it define the proximity of kinship necessary to include or exclude a venire member in the potentially-tainted class. Finally, there is the related problem of whether the actual law enforcement activity involved should properly become a consideration. By way of example, is a venire member whose third cousin is a police radio dispatcher in Detroit subject to the same analysis as a venire member who is serving as a member of the local police force? These considerations, not definitively answered in *Mhoon* and probably impossible of a precise answer, appear to continue to leave the trial court with necessarily broad discretion in dealing with the general principles of the *Mhoon* decision in a particular situation. Thus, under our established standard of review for matters entrusted to the sound discretion of the trial court, we are confined to an assessment of whether there has been an abuse of discretion in the trial court's handling of the matter resulting in a manifest injustice to the defendant. *Carr v. State*, 555 So. 2d 59, 60 (Miss. 1989) (citations omitted).

Mhoon requires the trial court, in the face of a conclusion that it has encountered a "statistical aberration" in the make-up of the venire, to consider three possible solutions to preserve both the appearance and the actuality of a fair trial. *Mhoon*, 464 So. 2d at 81. The court may, in order to restore some balance to the venire and, ultimately, to the jury itself, (1) expand the venire, (2) permit additional peremptory challenges to the defendant, or (3) grant "at least some of the challenges for cause" based upon law enforcement connections. *Id.* We take the third option to mean that the trial court may apply a relaxed standard of review to challenges for cause based on law enforcement connections, since, if randomly applied, it would appear to be indistinguishable from the second option. At trial, defense counsel never suggested an expansion of the venire. He did, however, offer

challenges for cause against twelve members of the venire based solely upon their personal or family connections with law enforcement. In each case, the challenge for cause was denied. Also, prior to final jury selection, defense counsel, citing the *Mhoon* decision, requested additional peremptory strikes, but that request was also denied.

The specific issue raised on appeal is that the trial court "erred in failing to excuse for cause venire members who were employed in law enforcement or related by blood or marriage to law enforcement officials." As we have observed, the *Mhoon* decision does not compel the trial court to strike for cause all law enforcement-related venire members as there is no blanket prohibition against such service. *Id.* at 82; *Walker v. State,* 671 So. 2d 581, 624 (Miss. 1995). The sole aim of the *Mhoon* decision was to deal with a "unique" situation where the supreme court felt that "the opportunity for undue influence over the opinions of other jurors [by jurors having law enforcement connections] was too great a risk." *Mhoon,* 464 So. 2d at 82. Although we are unconvinced that the defendant has properly articulated the issue in his brief, we conclude that the real question facing this Court is whether the principles of the *Mhoon* decision, once raised by the defendant, were ignored by the trial court with the result that there was an unmistakable appearance of an improper influence on the jury by a clique of jurors having close law enforcement ties. *Id.*

We further conclude that the ultimate reversible error in *Mhoon* was not the mere presence of a "statistical aberration" in the venire. This "aberration" was but the root cause of what was actually the basis for reversal, which was the fact that this "statistical aberration" in the pool of potential jurors was, unfortunately, transferred to the jury itself. We determine, therefore, that our search for error must be based upon whether the jury was improperly weighted with law enforcement-related members, not upon a conclusion that the venire offered the real possibility of such an occurrence.

Directly due to the trial court’s failure to allow the challenges for cause requested by Dotson, three jurors with law enforcement connections were permitted to serve on the jury. The defense used all of its peremptory strikes against the other potential jurors having similar connections. Of the jury members seated to try the case, one juror had a sister who was formerly a policewoman, but who was now working outside the state as a private investigator. There was no evidence that this sister’s present duties were closely connected with law enforcement, or that her present duties even related to investigations of criminal activity. One juror had been a law enforcement officer for approximately eight years, but these duties had ended in 1984, over ten years prior to the commencement of the trial. There was no showing that this juror had maintained any unofficial close ties with law enforcement activities or personnel in that intervening ten year period. The third juror had a first cousin who worked as a police officer in Ridgeland. There was no exploration during voir dire of the degree of actual association between this juror and her cousin beyond the establishment of this relationship of the fourth degree according to the civil law. This jury makeup is remarkably dissimilar to that in *Mhoon,* where a uniformed police officer acted as jury foreman and was joined by five other jurors with law enforcement connections. *Id.* at 80.

We conclude that these three jurors, all otherwise qualified, were not so positioned by virtue of their rather tenuous connection to law enforcement as to create the risk "for undue influence over the opinions of other jurors" that the *Mhoon* Court held impermissible, even were they so inclined. *Id.* at 82. Therefore, though the record seems to indicate that the trial court ignored the *Mhoon* decision in dealing with a legitimate issue properly raised by the defendant concerning the makeup of the venire,

we have determined that the jury ultimately selected to try the case was not so constituted as to violate the principles announced in *Mhoon.* There is, therefore, no basis for this Court to intervene, and the conviction in this case must be affirmed.

This Court notes from its review of the record that, as a part of the sentence announced from the bench by the trial court, the defendant was ordered to make restitution to Edward Rimmer in the amount of $9,000.00 and to Nikki Horne in the amount of $4,000.00. We further note that this portion of the trial court's pronounced sentence was omitted from the written judgment of sentence entered in this cause. Noting this omission as plain error, this Court, sua sponte, amends the judgment entered in this cause to include the requirement of restitution set out above, and affirms the judgment as so modified.

THE JUDGMENT OF CONVICTION OF THE CIRCUIT COURT OF ATTALA COUNTY OF TWO COUNTS OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS FOR COUNT ONE AND CONSECUTIVE SENTENCE OF TEN YEARS WITH FIVE YEARS SUSPENDED FOR COUNT TWO AND TO RUN CONSECUTIVELY WITH ANY PREVIOUS SENTENCE, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AS AMENDED BY THIS COURT TO INCLUDE RESTITUTION IN THE AMOUNT OF $9,000.00 TO EDWARD RIMMER AND $4,000.00

TO NIKKI HORNE IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO ATTALA COUNTY.

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