

IN THE COURT OF APPEALS 08/20/96
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00096 COA

FRAN FRIERSON LOMBARDO

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. JAMES E. THOMAS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT:

ALBERT NECAISE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

NATURE OF THE CASE: CRIMINAL - FORGERY

TRIAL COURT DISPOSITION: CONVICTED OF FORGERY AND UTTERING FORGERY.
SENTENCED TO 15 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

Fran Lombardo was tried and convicted of forgery and utterance of forgery in the Circuit Court of Hancock County on change of venue to Harrison County. She was sentenced to serve the maximum term allowable by statute, fifteen years incarceration in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Lombardo appeals her conviction on the following grounds:

I. WHETHER THE STATE'S PROOF AT TRIAL DEMONSTRATED THAT THE CORPORATION NAMED IN THE INDICTMENT AS THE PARTY ALLEGEDLY DEFRAUDED IS IN FACT A CORPORATION

II. WHETHER THE MEDICAL QUESTIONNAIRE SHOWN TO BE A FORGERY IS A WRITING SUBJECT TO FORGERY WITHIN THE SCOPE OF MISS. CODE ANN. § 97-21-35

III. WHETHER THE COURT ABUSED ITS DISCRETION IN IMPOSING THE MAXIMUM ALLOWABLE SENTENCE ON THE DEFENDANT

We find that the issues raised by the Appellant are without merit and affirm the decision of the trial court.

FACTS

In 1983 Fran Lombardo desired to purchase a life insurance policy on her ex-husband, Frank Lombardo, and name herself as the beneficiary. However, due to Frank's ill health Fran thought her ex-husband would be unable to pass the physical examination required by the insurer. In order to circumvent the problem of Frank's ill health, Fran arranged to have a third party take the physical examination and sign the medical questionnaire as Frank Lombardo. Fran located a willing individual who was successful in passing the exam and forging Frank's signature on the medical questionnaire. Approximately a year later Frank died and Fran collected the policy benefits from Liberty National Life Insurance Company. Fran was subsequently tried and convicted of forgery and utterance of forgery in the Circuit Court of Harrison County.

ANALYSIS

I. WHETHER THE STATE'S PROOF AT TRIAL DEMONSTRATED THAT THE CORPORATION NAMED IN THE INDICTMENT AS THE PARTY ALLEGEDLY DEFRAUDED IS IN FACT A CORPORATION

Lombardo argues that the State's failure to put on proof at trial that Liberty National Insurance Company is in fact a corporation, as alleged in the indictment, is a fatal variance between the indictment and the proof which requires the reversal of her conviction. The State concedes that it did

not establish at trial that Liberty National is in fact a corporation, but argues that the policy behind correctly identifying the alleged victim named in the indictment is for purposes of (1.) informing the defendant of the offense for which he is to be tried and (2.) protecting him from double jeopardy. The State further argues that since a copy of the forged writing was attached to the indictment and is part of the judicial record, Lombardo was properly notified of the act for which she was indicted and there is no potential for double jeopardy.

Lombardo bases much of her argument on older cases dealing with facts that are distinguishable from those at bar. These fact patterns include situations where the victim named by the indictment was said to be a "company," which in reality was not a corporation but a partnership and the indictment failed to identify all the partners. In these types of cases, the court held that a double jeopardy problem might occur since not all the victims were enumerated in the indictment, creating the possibility that a previously unnamed victim could later come forth and seek to have the defendant tried again for the same offense for which he had already been tried. Additionally, some of the older cases concerned indictments that failed to name any victim, or where the proof at trial identified the victim by a name that was materially different from the one used in the indictment. All of the cases cited by Lombardo are factually distinguishable from the case at bar. See *McGaha v. State*, 163 So. 442, 443 (Miss. 1935) (stating that indictment must "allege ownership of the property stolen"); *Hampton v. State*, 54 So. 722, 723 (Miss. 1911) (holding that "American Express Company, a corporation" was material variance from "American Express Company, a partnership"); *State v. Tatum*, 50 So. 490, 491 (Miss. 1909) (holding that when partnership was victim of fraud indictment must include names of all individual persons who composed partnership).

In addition to being factually distinguishable from the case at bar, the cases cited by Lombardo have a common theme of scrutinizing the name used to identify the victim, as alleged in the indictment, with that of the victim identified at trial, for the purpose of preventing double jeopardy. See *Hays v. State*, 43 So. 2d 206, 207 (Miss. 1949) (holding that purpose of making name of victim identified in indictment correspond to proof adduced at trial was to protect defendant against double jeopardy); *Pippin v. State*, 88 So. 502, 503-04 (Miss. 1921) (acknowledging prevention of double jeopardy as reason for requiring specificity in name of victim alleged in indictment). In reviewing Lombardo's assignment of error, we are fortunate to have guidance from our supreme court in a case directly on point to that at bar. In *Stone v. State*, 242 So. 2d 127, 128 (Miss. 1970), the court addressed a fact pattern where the indictment alleged that the victim of the defendant's fraud was a corporation, yet the prosecution failed to demonstrate at trial that the victim was in fact a corporation. After analyzing the court's prior holding in *Criddle v. State*, 165 So. 2d 339, 341 (Miss. 1964) where it held that "[w]hen property is alleged to be that of a named corporation there must be proof that such company is in fact a corporation," the court held that an exception to this rule applies in cases where a copy of the forged writing is attached to the indictment. *Stone*, 242 So. 2d at 128. The court held:

Under these circumstances we are of the opinion there is not the remotest possibility that the defendant could be again prosecuted for uttering this forgery. In the improbable event a subsequent forgery prosecution, based on this check, is instituted, we think the introduction of this record, which portrays the check, would be efficacious to bar such proceeding.

Id.

Like the facts in *Stone*, a copy of the forged document was attached to the indictment brought against Lombardo. That indictment and attached copy of the forged document are part of the permanent record of both the trial court and this Court. In the event a subsequent prosecution for forgery or utterance of forgery was brought against Lombardo for this incident, she would need only to refer the prosecutor to this record in order to protect herself from being again tried for this offense. Accordingly this assignment of error is without merit.

II. WHETHER THE MEDICAL QUESTIONNAIRE SHOWN TO BE A FORGERY IS A WRITING SUBJECT TO FORGERY WITHIN THE SCOPE OF MISS. CODE ANN. § 97-21-35

Lombardo's second assignment of error concerns whether the medical questionnaire containing the forged signature of Frank Lombardo is a writing capable of effecting a fraud, under the terms of section 97-21-35 of the Mississippi Code. The essence of Lombardo's argument is that this section of the Code requires that the forged writing be an "instrument" evidencing a monetary right, in order to be capable of effecting a fraud and subject the forger of such document to liability under the statute. Lombardo cites several cases involving the forgery of "instruments" under earlier versions of section 97-21-35, but fails to note that these cases also make it clear that the subject matter of a forgery can be any "writing," with the critical element to a forgery conviction being that the "writing" was capable of causing "injury" to another. *See Moore v. State*, 65 So. 126, 127 (Miss. 1914) (holding that writing alleged to have been forged must be one which, if genuine, might injure another); *State v. Ellis*, 137 So. 102, 103 (Miss. 1931) (stating that allegedly forged paper must be capable of causing injury to another); *Rowland v. State*, 531 So. 2d 627, 630 (Miss. 1988) (holding that writing alleged to have been forged must cause injury to another).

An inspection section 97-21-35 shows that the section is applicable to "any instrument or writing . . . purporting to be the act of another, by which any pecuniary demand or obligation shall be . . . in any manner affected, by which false making, forging, altering or counterfeiting any person may be . . . in any way injured in his person or property." Miss. Code Ann. § 97-21-35. On its face, this broad language is clearly designed to encompass any type of writing containing a forgery which is used as the vehicle to accomplish a fraud. There is no requirement that the writing be an "instrument" or have any intrinsic monetary value. In the case at bar, Liberty National Insurance Company would not have issued an insurance policy on the life of Frank Lombardo but for the forged medical questionnaire submitted by Fran Lombardo. Lombardo knew the medical questionnaire was essential to her obtaining an insurance policy on her ex-husband's life; therefore, she used the forged document to cause injury to the insurer, i.e. an act prohibited by section 97-21-35. Accordingly this assignment of error is without merit.

III. WHETHER THE COURT ABUSED ITS DISCRETION IN IMPOSING THE MAXIMUM ALLOWABLE SENTENCE ON THE DEFENDANT

Lombardo's final assertion of error is that the trial court abused its discretion in sentencing her to the maximum term allowable under Section 97-21-33 of the Mississippi Code. However, Lombardo does not assert that the sentence of fifteen years imposed on her rises to the level of cruel and unusual punishment in violation of the Eighth Amendment.

The Mississippi Supreme Court has repeatedly held that "[a]s a general rule, sentencing is purely a matter of trial court discretion so long as the sentence imposed lies within the statutory limits." *Wallace v. State*, 607 So. 2d 1184, 1188 (Miss. 1992) (citations omitted); *see also Johnson v. State*, 461 So. 2d 1288, 1292 (Miss. 1984) (holding that trial court will not be held in error or held to have abused discretion if sentence imposed is within limits fixed by statute). The exception to the "general rule" described in *Wallace* occurs where the sentence is alleged to be "grossly disproportionate" to the crime committed, so as to constitute a violation of the Eighth Amendment prohibition on cruel and unusual punishment. *See Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992) (holding sentences "grossly disproportionate" to crime committed subject to attack on Eighth

Amendment grounds). Since the sentence imposed on Lombardo was within the statutory limits and she alleges no constitutional violation, this assignment of error is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY ON CHANGE OF VENUE FROM HANCOCK COUNTY OF CONVICTIONS OF FORGERY AND UTTERANCE OF FORGERY AND SENTENCES OF FIFTEEN (15) YEARS IN EACH COUNT TO RUN CONCURRENTLY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND ORDER TO PAY RESTITUTION OF \$200,000 IS AFFIRMED. COSTS ARE ASSESSED AGAINST APPELLANT.

FRAISER, C.J., BRIDGES, P.J., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.