IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01302 COA

WILLIAM BROWN 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. C. E. MORGAN III

COURT FROM WHICH APPEALED: WINSTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: F. KEITH BALL

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: DOUG EVANS

NATURE OF THE CASE: CRIMINAL: POSSESSION OF COCAINE

TRIAL COURT DISPOSITION: POSSESSION OF COCAINE: SENTENCED TO SERVE A TERM OF 3 YEARS IN THE MDOC & PAY A $3,000.00 FINE TO THE CLERK OF WINSTON CIRCUIT COURT WITHIN 1 YEAR OF HIS RELEASE DATE; SENTENCE SHALL RUN CONSECUTIVE TO ANY PREVIOUSLY IMPOSED

MANDATE ISSUED: 9/2/97

BEFORE THOMAS, P.J., HERRING, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

William Brown appeals his conviction of possession of cocaine raising the following issues as error:

I. THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING CROSS-EXAMINATION OF THE DEFENDANT'S ONLY WITNESS WITH HIS PRIOR FELONY CONVICTIONS ABSENT A PRIMA FACIE SHOWING THAT THE CONVICTIONS WERE PROBATIVE OF HIS VERACITY AND WITHOUT WEIGHING, ON-THE-RECORD, THE MANDATORY FACTORS NECESSARY TO DETERMINE ADMISSIBILITY.

A. The State Failed to Meet its Threshold Burden of Establishing Prima Facie That the Prior Convictions of the Defendant's Witness had any Probative Value as to His Propensity for Truthfulness.

B. The Trial Court Failed to Weigh the Mandatory Factors Necessary to Determine the Admissibility of Prior Criminal Convictions.

II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In view of the disposition we make of the Rule 609 issue, we find it unnecessary that Brown's other assignments of error be addressed. Finding error, we reverse and remand.

FACTS

On February 16, 1995, William Brown, along with his brother, Derek Brown, and another individual, Undray Young, were traveling in a gray Cadillac on Hunt Street in Louisville, Mississippi. Between 10:00 a.m. and 11:00 a.m., the gray Cadillac was stopped by officers of the Louisville Police Department and agents with the Tri-County Narcotics Task Force. They had a warrant for William's arrest.

Agent Derek Holland, with the Tri-County Narcotics Task Force, testified that he pulled the gray Cadillac over with the help of a patrol car that blocked the Cadillac's path. Holland testified that William was driving the Cadillac. He knew this because he checked his driver's license. Later, Agent Tim Hamilton and Officer Michael Perkins arrived. Holland testified that Hamilton and Perkins searched the car and found a white powdery substance. He heard William state, while referring to the white powdery substance, something to the effect "why charge everybody because it was mine." Officer Michael Perkins arrived at the scene of the stop. After arriving at the scene, Officer Perkins approached the gray Cadillac and saw what "appeared to be some white, small white piece of something on the [driver's] seat." The location of the white powdery substance was described by Perkins to be under where the driver's right leg would be, if he were sitting in the car. Perkins announced to the three occupants of the vehicle that they were all under arrest for possession of cocaine. Thereafter, Perkins testified that William stated, "That stuff is not theirs; its mine."

Agent Tim Hamilton with the Narcotics Task Force testified to being present when the gray Cadillac was stopped. Agent Hamilton testified that Officer Perkins noticed some material on the driver's seat that appeared to be crack cocaine. Hamilton did a field test on the substance, and it tested positive for crack cocaine.

Edwina Ard, the Director Analyst of the Tupelo Police Department, testified that she ran three separate tests on the substance, and it tested as a cocaine base substance.

After the State rested, the defense called Derek Brown, the defendant's brother, as a witness. Derek testified that he was driving the gray Cadillac when it was pulled over. Derek stated that his brother said, "That's my stuff," when the police pulled William's jacket out of the car. During the trial, the lower court allowed the State to impeach Derek with prior convictions for aggravated assault and shooting into a dwelling.

The defendant did not choose to testify.

In rebuttal, Agent Derek Holland again testified. He stated that Derek Brown, the defendant's brother, stated at the police station, "Are y'all still going to charge me with this possession after my brother has already said that it was his?"

Sargent Lawrence Estes testified that the defendant, William Brown, was the driver of the Cadillac that day. Estes stated that he knew William for ten years or better. Estes testified that as Officer Perkins was giving what appeared to be crack cocaine to Officer Hamilton, William said, "It's not theirs; its mine."

The jury returned a verdict against William Brown of guilty of possession of cocaine.

ANALYSIS

I.

THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING CROSS-EXAMINATION OF THE DEFENDANT'S ONLY WITNESS WITH HIS PRIOR FELONY CONVICTIONS ABSENT A PRIMA FACIE SHOWING THAT THE CONVICTIONS WERE PROBATIVE OF HIS VERACITY AND WITHOUT WEIGHING, ON-THE-

RECORD, THE MANDATORY FACTORS NECESSARY TO DETERMINE ADMISSIBILITY.

In an attempt to discredit William Brown's only witness, Derek Brown, the State cross-examined this witness with his prior crimes of aggravated assault and shooting into a dwelling under Mississippi Rule of Evidence 609(a)(1). Brown argues that when the prosecution seeks to impeach a witness with prior convictions under Rule 609(a)(1), it bears a "threshold burden" to establish a prima facie showing that the prior conviction has probative value on the witness's truthfulness. Brown argues that the prosecution did not make a prima facie showing in this instance.

Secondly, William argues that the lower court failed to engage in the mandatory analysis required under Rule 609(a) to determine whether the admittance of such evidence held more probative value than prejudicial value. *See Peterson v. State*, 518 So. 2d 632 (Miss. 1987). Regarding the admissibility of the prior convictions, the following discourse occurred in the judge's chambers:

By Mr. Hill (Assistant District Attorney): Your honor, I would like to have the Court's permission to impeach this witness with his prior felony convictions of which there are two, one for aggravated assault and one for shooting into a dwelling. . . .

By the Court: What is the date on those?

. . . .

By Mr. Hill: The indictment shows that these convictions were had on the 27th, or I'm sorry, that these events occurred on the 27th of February of this year. And I offer this because, for several reasons. First of all, this witness is the Defendant's brother. He has given testimony that I think is patently self contradictory. He is an inmate in the Department of Corrections.

By the Court: What is self contradictory? Now what do you mean by that?

By Mr. Hill: Well, this business about the car. First of all, he doesn't know about the car, what it's doing in there and how it got there, and then I think his testimony is highly suspicious. And I believe this--

By the Court: Well, it's just not what you wanted to hear, but I don't know; there is nothing in the record that contradicts it. Go ahead.

By Mr. Hill: And I think the fact that he is in custody on a criminal charge, that he is testifying in this case in the manner that he is, I believe that this felony conviction would be probative of his credibility in this case.

By Mr. Liddell (Counsel for Brown): Your Honor, I don't see where aggravated assault or shooting into a dwelling has to do with any kind of crime to do with his moral turpitude in terms of the ability to, whether or not he will tell the truth or not. I mean the rule, I believe, is clear about the nature of the kind of crime that can be used to impeach him, and neither one of those are one of those crimes.

By the Court: No. They are 609 crimes. They are both-- they are within ten years. They both were punishable by more than one year. The question is whether the probative value outweighs the prejudicial effect.

By Mr. Liddell: Well, Your Honor--

By the Court: And, well, let me just make this note on there. I can make this short. He has testified in direct conflict with what the officers testified about who was driving the vehicle.

By Mr. Liddell: That's correct.

By the Court: Therefore, his credibility is at issue, and therefore, I think the probative value outweighs the prejudicial effect, and I'm going to allow it. Let me say this now. I'm going to give y'all leeway to ask whatever questions y'all want to. Let's stick to the point and get this thing moving on. I mean it's not going to make much difference why the car was in the shop or whatever like that other than the fact I realize somebody may be laying it off on somebody else's dope. But we can move this a little bit faster than we are moving it, okay.

Brown argues that this conversation above falls woefully short of this Court's, and the Mississippi Supreme Court's, mandates for the introduction of prior convictions under Rule 609. The State counters that "the record indicates that there was no explicit objection made to this impeachment of Derek Brown by his prior convictions." A reading of the above quoted language shows that Brown's attorney was first objecting to the State using the prior convictions because the State failed to meet the threshold burden of establishing that the prior convictions were in any way probative of his tendency to tell the truth. Before prior convictions are allowed to be used for impeachment purposes, "the prosecution has a threshold burden of establishing prima facie that the prior conviction has probative value." *McInnis v. State*, 527 So. 2d 84, 88 (Miss. 1988). "Put otherwise, until this prima facie showing is made by the prosecution, there is nothing for the Circuit Court to balance or weigh against the prejudicial effect." *Id.*

At the risk of belaboring the obvious, the prior conviction is offered to impeach. Rule 609 allows use of prior convictions "for the purpose of attacking the credibility of the witness" and for no other. The issue with respect to which the prior conviction must be relevant, if it is to be admissible, is the [witness's] propensity for truthfulness as a witness.

Id. "The fact that an individual commits a crime of violence has no per se relevance to his or her propensity for truthfulness." *Id.* at 89. "If this threshold be cleared, our cases require that a trial

judge, confronted with a Rule 609(a) ruling, perform an on-the-record weighing of the probative value of the conviction against its prejudicial effect." *McGee v. State*, 569 So. 2d 1191, 1195 (Miss. 1990).

Even if this Court could somehow find that Brown's trial counsel failed to properly preserve this issue for appeal, the Mississippi Supreme Court has considered a court's failure to abide by the *Peterson* and *McInnis* mandates to violate such an important right that it has used the plain error rule to reverse and remand. *See Signer v. State*, 536 So. 2d 10, 12 (Miss. 1988). Thus, the State's argument must fail. Looking at the record before us, we feel that the use of these prior convictions should not have been allowed. It is clear that the prejudicial effect of these prior convictions far outweighs their probative value.

Even if these prior convictions held probative value, the Mississippi Supreme Court has repeatedly held that before admitting evidence of prior crimes not involving dishonesty or false statement, the trial judge must make an on-the-record determination that the probative value of the evidence outweighs its prejudicial effect. *Hopkins v. State*, 639 So. 2d 1247, 1252 (Miss. 1993); *Townsend v. State*, 605 So. 2d 767, 770 (Miss. 1992); *Pugh v. State*, 584 So. 2d 781, 784 (Miss. 1991); *McGee v. State*, 569 So. 2d 1191, 1195 (Miss. 1990); *Signer v. State*, 536 So. 2d 10, 12 (Miss. 1988); *Johnson v. State*, 525 So. 2d 809, 812 (Miss. 1988); *McInnis v. State*, 527 So. 2d 84, 87 (Miss. 1988); *Ivy v. State*, 522 So. 2d 740, 744 (Miss. 1988); *Peterson v. State*, 518 So. 2d 632, 636 (Miss. 1987).

The seminal case on the Mississippi Supreme Court's interpretation of Rule 609 was *Peterson v. State*, 518 So. 2d 632 (Miss. 1987). In this case, the Court recognized that "[t]he plain language of Rule 609(a)(1) requires that, before admitting evidence of a witness' [sic] felony conviction, the trial judge must determine 'that the probative value of admitting this evidence outweighs its prejudicial effect.'" *Id.* at 636. The appropriate five factors for the trial judge to consider when weighing the probative value of convictions against the prejudicial effect of their admission include:

(1) The impeachment value of the prior crimes;

(2) the point in time of conviction and the witness's subsequent history;

(3) the similarity between the past crime and the charged crime;

(4) the importance of the defendant's testimony; and

(5) the centrality of the credibility issue.

Townsend v. State, 605 So. 2d 767, 770 (Miss. 1992) (citations omitted).

One of the reasons we require this articulated balancing process is so that on appeal this Court can more easily ascertain whether or not the trial judge has abused his discretion in granting or denying admissibility of prior convictions for impeachment purposes. . . . When we review on appeal the decision of a trial court within the discretion vested in it, we ask first if the court below applied the correct legal standard.

McGee v. State, 569 So. 2d 1191, 1995 (Miss. 1990) (citations omitted).

There was no on-the-record determination by the trial judge in the case *sub judice* that the probative value of admitting the prior conviction outweighed the prejudicial effect. Even if a *Peterson* balancing test was conducted, the prejudicial effect far outweighs its probative value. Accordingly, this case is reversed and remanded for trial not inconsistent with this opinion.

THE JUDGMENT OF THE WINSTON COUNTY CIRCUIT COURT OF POSSESSION OF COCAINE AND SENTENCE OF THREE YEARS IS REVERSED AND REMANDED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WINSTON COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.