

IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00486 COA

THOMAS DALE HOUSTON A/K/A TOMMIE

D. HOUSTON 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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NESHOPA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: JAMES M. MARS II

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: JOLENE M.
LOWRY

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: AGGRAVATED ASSAULT: SENTENCED TO SERVE A TERM OF 20 YRS IN THE MDOC

MANDATE ISSUED: 9/30/97

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

HERRING, J., FOR THE COURT:

Tommy Dale Houston was convicted of aggravated assault on March 20, 1995, and sentenced by the Circuit Court of Neshoba County, Mississippi, to serve a term of twenty years with the Mississippi Department of Corrections. Houston now appeals his conviction to this Court. Houston raises the following assignments of error on appeal:

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED HOUSTON'S MOTION TO BE TRANSFERRED TO MISSISSIPPI STATE HOSPITAL AT WHITFIELD FOR PSYCHIATRIC AND PSYCHOLOGICAL EXAMINATION.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF CERTAIN PHOTOGRAPHS INTO EVIDENCE DENYING HOUSTON HIS DUE PROCESS RIGHT TO A FAIR TRIAL?

Finding no reversible error, we affirm.

I. THE FACTS

Steve Breazeale, age thirty eight, worked as a service technician with his father at the Philadelphia Amusement Company in Neshoba County, Mississippi. On June 21, 1994, he was alone at his place of business and was talking on the telephone to Brian Savell. At this time, Tommy Dale Houston walked in the front door of the Philadelphia Amusement Company with a knife in his hand. Breazeale had known Houston for an extended period of time and had allowed him, over the years, to perform odd jobs around the business premises. On this occasion, Houston approached Breazeale and said, "[Y]ou been talking about me. I don't want you to ever say my name again." Houston then stabbed Breazeale once in the left arm, three times in the left leg, once in the right leg, three times in the right arm, and four or five times about the head. Brian Savell, who had been talking to Breazeale by telephone, overheard the sounds of the struggle and after a few moments of reflection, went to the premises of the Philadelphia Amusement Company. When he arrived at the scene, he found a bloodied Breazeale lying on the floor with Houston bending over him.

When Houston noticed Savell, he turned and advanced upon him. Savell retreated and closed the front door behind him. Meanwhile, Houston went out the side door of the building and departed the premises. Savell ran to the nearest telephone and called 911. He then returned to assist Breazeale and stayed with him until the ambulance arrived. Subsequently, Houston was arrested and signed a statement in which he admitted to stabbing Breazeale. As to why Houston attacked him, Breazeale speculated that Houston must have discovered that he wrote a note to one of his employees concerning Houston which stated, "Watch him, he will steal."

Prior to trial, Houston's attorney filed a motion requesting that Houston receive a mental examination pursuant to section 99-13-11, Mississippi Code of 1972, as amended. This motion was granted, and Houston was examined on December 31, 1994, by Dr. William Wood, a psychiatrist from Meridian who was a consultant to East Mississippi Hospital. Dr. Wood's purpose was to determine Houston's ability to stand trial and to assist his attorney in his defense, as well as to determine Houston's ability to know the difference between right and wrong and to understand the nature and quality of his actions at the time of the offense. After an interview of approximately one hour and ten minutes, Dr. Wood concluded that Houston did not suffer from mental illness, hallucinations, thought disorder, or retardation.

On March 9, 1995, Houston gave written notice of his intent to rely on insanity as a defense at the time of the alleged crime. Houston's counsel also filed a motion for a pretrial hearing to determine Houston's competence on March 13, 1995. On March 14, 1995, the day of his trial, Houston's attorney filed a new motion to transfer Houston to the Mississippi State Hospital at Whitfield for further examination for competency. Dr. Wood was called by Houston to testify at the trial and restated his opinion that Houston was competent. He was asked to review records of a psychological test performed by a technician upon Houston in 1980, which indicated that Houston might be suffering from schizophrenia.⁽¹⁾ While the doctor stated that it would be appropriate for additional tests to be performed upon Houston at the Mississippi State Hospital if a second opinion were necessary, he remained steadfast in his view that Houston was competent to stand trial and was *not* schizophrenic. Furthermore, Dr. Wood pointed out that from his review of the 1980 records, no psychiatrist claimed that Houston was schizophrenic at that time. At this point, the trial judge overruled the motion for a further mental examination, and Houston's trial proceeded to its conclusion, at which time the jury found Houston guilty of aggravated assault. In his defense, Houston called no witnesses other than Dr. Wood.

II. ANALYSIS

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED HOUSTON'S MOTION TO BE TRANSFERRED TO MISSISSIPPI STATE HOSPITAL AT WHITFIELD FOR PSYCHIATRIC AND PSYCHOLOGICAL EXAMINATION.

In support of his position on this issue, Houston relies on *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) and *Hill v. State*, 339 So. 2d 1382, 1384 (Miss. 1976). In *Ake*, the United States Supreme Court stated:

We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant

access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as is the case of the provision of counsel we leave to the State the decision on how to implement this right.

Ake, 470 U.S. at 83. In the case *sub judice*, Houston was provided with a psychiatrist to examine him, at the State's expense, whose qualifications and expertise were stipulated to by both parties. Dr. Wood found Houston to be competent and suffering from no mental illness. He did state that, while it might be helpful to have further testing at the Whitfield facility if a second opinion was needed, he was confident in his opinion that Houston was perfectly sane, competent to stand trial, and knew the difference between right and wrong.

In *Hill v. State*, the psychiatrist who initially examined the defendant for one hour and fifteen minutes stated, that while his opinion was that the defendant was competent and capable of distinguishing between right and wrong at the time of the crime, he nevertheless recommended that "further examination of the defendant was needed." *Hill*, 339 So. 2d at 1385. Under such circumstances, our Mississippi Supreme Court ruled that the trial court committed reversible error in refusing the defendant's renewed motion to allow the defendant to undergo further psychiatric examination, preferably at a state hospital. *Id.* Moreover, the court stated:

While considerable discretion is to be vested in trial judges applying § 99-13-11, in the present case the examination by the psychiatrist was inadequate as demonstrated by the fact that the examining psychiatrist himself testified that further examination of the defendant was needed.

Id. However, our supreme court, in a later reference to *Ake*, also stated:

[T]his court has not interpreted *Ake* to mean that an expert must be supplied anytime an indigent defendant requests one "[W]here a defendant offers no more 'than undeveloped assertions that the requested assistance should be beneficial,' no trial court is under an obligation to provide him with fishing equipment."

Fisher v. City of Eupora, 587 So. 2d 878, 883 (Miss. 1991) (citation omitted). See also *Wheeler v. State*, 536 So. 2d 1347, 1354 (Miss. 1988), where the Mississippi Supreme Court held:

Denial of the request for further mental examination to determine competency to stand trial, after a mental examination has resulted in the determination that Wheeler was competent to stand trial, is not error. In addition, since the motion for further psychiatric examination was unsupported by proof, the trial court fulfilled its duty and "did not abuse its discretion in denying the motion for further psychiatric evaluation after hearing on such motion wherein no proof was offered."

Id. (citations omitted). During the hearing on the motion for further mental examination, outside the

presence of the jury, Dr. Wood summarized his testimony as follows:

A. There is a need I think to clarify the issue of whether he is mentally ill. I might add the psychological evaluation done in 1980, if indeed he had been using marijuana prior to his hospitalization, marijuana may present a psychological profile consistent with schizophrenia. The discharge summary from East Mississippi says schizophrenia by history. The discharge summary did not state schizophrenia was found. It said by history. So, I don't know where the diagnosis of schizophrenia came from in 1980. The admitting diagnosis was prepared by Dr. Henry, a family physician, who is no longer in practice. The psychological examination was performed by a psychological technician. He has not had a battery of psychological testing rendered by a qualified clinical psychologist. The psychiatric examination in 1980, by Dr. Rubio, who is deceased now, but a qualified psychiatrist, and his statement is schizophrenia by history. Mr. Houston has not had treatment for schizophrenia. He's never had treatment. There's never been sufficient evidence of mental illness for him to be committed to a psychiatric hospital. I can't find schizophrenia. That does not mean it is not present. I can't find it.

Q. Is it your recommendation that he be sent for further forensic evaluation?

A. I feel comfortable with my opinion. If there is a question as to whether or not there is need for a second opinion, then a forensic unit is the place of choice. I think all of us know if you put two psychiatrists in a room, you will probably get three opinions. Schizophrenia is not black and white. Schizophrenia and psychiatry, in general, two and two is not four. There are doubts in all of mental illness. The only thing we can base our opinion on is what we see at the moment. I think it's important to understand someone with a major psychiatric disorder, that goes untreated for fifteen years, there's going to be progressive deterioration with active psychosis. I did not find that.

Q. When you say active psychosis, what type behavior would that be?

A. They would be acting on delusions. They would not be responsible for their actions. I couldn't find it.

The trial court then questioned Dr. Wood and the following dialogue took place:

Q. In your report of December 20, 1994, and in your summary, you state that you feel that he is capable of cooperating with his attorney. That's what you said in essence; and there was no evidence of this mental illness rendered him incapable of comprehending the nature and consequences of his action. Are you satisfied with that judgment that you would say to the Court, as of today, based upon your examination on December 20, 1994, that he is capable of cooperating with his attorney in his Defense and that he appreciates the difference between right and wrong and is aware of the consequences of his conduct?

A. Yes, sir.

Based upon the testimony of Dr. Wood and a review of his report, as well as the 1980 records of the East Mississippi Hospital, the trial court overruled the motion for a further mental examination of Houston. We rule that the trial court did not abuse its discretion in doing so. There is no merit in this assignment of error.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF CERTAIN PHOTOGRAPHS INTO EVIDENCE DENYING HOUSTON HIS DUE PROCESS RIGHT TO A FAIR TRIAL?

Over timely objection, a series of photographs were introduced into evidence, first through Steve Breazeale and then through Brian Savell, which accurately depicted the wounds suffered by Breazeale and the bloody crime scene after the struggle that transpired between Breazeale and Houston. Houston contends that there was no probative value in these photographs because he adopted an insanity defense and admitted that he stabbed Breazeale. Houston, therefore, contends that the only purpose for introducing the photographs was to inflame the jury.

In taking this position, Houston cites *Alford v. State*, 508 So. 2d 1039, 1041 (Miss. 1987) and *Williams v. State*, 354 So. 2d 266, 267 (Miss. 1978) for the proposition that photographs have no probative value and should not be admitted where the criminal offense is not disputed and the victim's identity is established. On the other hand, it is well settled that the admissibility of photographs "rests within the sound discretion of the trial court, . . . will be upheld unless there has been an abuse of discretion." *Brown v. State*, 690 So. 2d 276, 288 (Miss. 1996). Indeed, "the discretion of the trial judge runs toward almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and the extenuation of probative value." *Id.* (quoting *Hart v. State*, 637 So. 2d 1329, 1335 (Miss. 1994)).

In *Westbrook v. State*, 658 So. 2d 847, 849 (Miss. 1995), the Mississippi Supreme Court recently approved the admissibility of gruesome photographs where the defendant employed an insanity defense. Westbrook also objected to the admissibility of photographs on the basis that he did not deny the killings, and thus, the photographs were not necessary to prove the state's case. The court stated:

Photographs have evidentiary value where they: (1) aid in describing the circumstances of the killing and the corpus delicti; (2) where they describe the location of the body and cause of death; and (3) where they supplement or clarify witness testimony.

Westbrook, 658 So. 2d at 849 (citations omitted).

In the case *sub judice*, the photographs are not particularly gruesome and clearly aid in describing the circumstances of the struggle between Breazeale and Houston. They unquestionably supplement and

clarify witness testimony, particularly since Houston's confession only concedes that he cut Breazeale "a time or two," whereas the attending physician and Breazeale testified that he was cut in numerous places. Moreover, even if error did occur in the admission of the photographs, it was harmless error and did not prejudice the Appellant, since the evidence was overwhelming that Houston had assaulted Breazeale with a deadly weapon. *See Jackson v. State*, 527 So. 2d 654, 657 (Miss. 1988). This assignment of error has no merit.

THE JUDGMENT OF THE NESHOPA COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO NESHOPA COUNTY.

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

1. Schizophrenia was defined by Dr. Wood as a major psychiatric disorder related to a disorganization of brain chemistry. When left untreated, schizophrenia is progressive.