IN THE COURT OF APPEALS 4/9/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00805 COA

ALBERT S. TAYLOR

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. HENRY LAFAYETTE LACKEY

COURT FROM WHICH APPEALED: LAFAYETTE CIRCUIT COURT

ATTORNEY FOR APPELLANT:

TIMOTHY BALDUCCI

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIDRE MCCRORY

DISTRICT ATTORNEY: LAWRENCE L. LITTLE

NATURE OF THE CASE: CRIMINAL - ESCAPE - JAIL

TRIAL COURT DISPOSITION: SENTENCED TO SERVE LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS AN HABITUAL OFFENDER

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

KING, J., FOR THE COURT:

Today, we are asked to decide whether shots fired in rapid succession killing two persons are "separate incidents at different times" so as to qualify the Defendant for enhanced sentencing under section 99-19-83 of the Mississippi Code of 1972. We find that under the specific facts of this case, the killings were not at different times and that the State erred in using them to enhance the Defendant's sentence. We affirm the conviction; however, we remand this case for resentencing.

I.

On November 18, 1973, Taylor killed Camilla M. Fox and Johnnie Fox Green. Fox and Green, mother and daughter respectively, were in a parked car engaged in conversation when they were struck and killed by gunshots fired by Taylor in rapid succession.

On March 21, 1974, Taylor was convicted of murder for the killing of Camilla M. Fox in cause number 9494, and pled guilty to manslaughter for the killing of Johnnie Fox Green, in cause number 9495. As a result of these convictions, Taylor was sentenced to life and twenty years on the charges of murder and manslaughter respectively, with the sentences to run concurrently. Taylor was ultimately paroled on June 8, 1987.

On June 18, 1993, Taylor was being held in the Lafayette County jail, charged with simple assault on a law enforcement officer, when he escaped. On December 14, 1993, Taylor was indicted as an habitual offender for jail escape pursuant to sections 99-19-83 and 97-9-49 of the Mississippi Code of 1972, respectively. As a foundation for enhancement as an habitual offender, it was alleged that Taylor (1) had been convicted of murder and received a life sentence in cause number 9494 on March 21, 1974, and (2) had been convicted of manslaughter and sentenced to twenty years on March 21, 1974, in cause number 9495.

Prior to trial, Taylor moved to quash the indictment as to his status as an habitual offender. During the hearing on the motion, Taylor argued that the prerequisites of section 99-19-83 were not met since the two underlying felonies occurred on the same day and at the same time, rather than being two separate convictions, "arising out of separate incidents at different times." The trial court denied Taylor's motion to quash holding that because there were two pulls of the trigger, resulting in two dead bodies, the prerequisites of section 99-19-83 were met.

After deliberation, the jury found Taylor guilty of jail escape as charged in the indictment. In a separate sentencing hearing to determine whether Taylor should be sentenced as an habitual offender, Andy Waller, Detective-Captain of the Oxford Police Department, identified the indictment in which Taylor was charged with killing Camilla M. Fox and Johnnie Fox Green on November 18, 1973. Waller testified that Taylor was convicted of murder and that Taylor pled guilty to a reduced charge of manslaughter. Waller also gave the following testimony:

Q. Detective Captain Waller, did you participate in the investigation of either the murder or the manslaughter case that you just testified to?

A. I went out to the scene that day and assisted the Sheriff.

Q. Tell the Court, if you will, your recollection of how these two people were killed.

A. These two people, Mrs. Fox and Mrs. Green, were found in a automobile [sic] on the Buford Chapel Road in the College Hill area here in Lafayette County. They died as a result of multiple gunshot wounds from a .22 caliber rifle.

Q. From your investigation, did you determine approximately when these people were killed? Were they killed at the same time?

A. Yes. They were killed at the same time, within a few minutes of the when [sic] the Sheriff and I arrived on the scene.

Q. Prior to your arrival?

A. Right.

Q. There were two people seated in the car. Is that correct?

A. Right.

Q. Mrs. Fox and Mrs. Green were both there; one was the driver and one the passenger in the vehicle.

A. Right.

Q. And they were both shot while seated in the vehicle.

A. Yes, sir.

Q. And when the shots occurred, a number of shots were fired at one time in succession?

A. Yes.

Q. And both people died at the scene?

A. One died later at the hospital, I believe.

Q. They were both injured, and they were both in the car.

A. There was one, the older lady, was in the car dead when we arrived, and the other lady died at the hospital, best of my recollection.

Q. Both shootings occurred on the same day.

A. Right.

Q. And both shootings, in your opinion, occurred just in the same moments of each other?

A. Right. That's my opinion.

The defense did not present evidence during the sentencing hearing; instead it relied upon testimony presented in the pre-trial hearing on the motion to quash the Indictment as to Taylor's habitual offender status.

The trial court sentenced Taylor, as an habitual offender, to life in the custody of the Mississippi Department of Corrections.

II.

WHETHER THE INDICTMENT AND SENTENCING UNDER SECTION 99-19-83 WERE PROPER?

Taylor first contends that the State failed to prove that he served one year or more on the two prior convictions used to enhance his status as an habitual offender. Taylor argues that because he was given concurrent sentences for the two prior crimes, the State was precluded from meeting its burden of proving that he served separate one-year sentences.

This argument has no merit. ''[S]erving one year or more on concurrent sentences for separate convictions amounts to serving more than one year on each sentence.'' *Bogard v. State*, 624 So. 2d 1313, 1320 (Miss. 1993) (citing *King v. State*, 527 So. 2d 641, 645 (Miss. 1988)). In the instant case, the record clearly shows that Albert Taylor was indicted and charged with two counts of murder. After a jury convicted Taylor for the crime of murder in cause 9494, the trial court sentenced him to life. In addition, Taylor pled guilty to a reduced manslaughter charge in cause 9495, and the trial court sentenced him to twenty years. Taylor served ten years and thirty-eight days prior to being paroled in 1982. He later violated parole and was again incarcerated in 1984. Taylor was paroled again on June 8, 1987.

Next, Taylor contends that the two underlying felonies, a conviction on March 21, 1974, for murder, and a conviction on March 21, 1974, for manslaughter, used to enhance his sentence were insufficient to establish his status as habitual offender. Relying on *Riddle* and *Nicolaou*, Taylor argues that both of the prior crimes used to enhance his sentence arose from a single incident and were not ''separate incidents at different times'' as required by section 99-19-83 of the Mississippi Code of 1972.

The State distinguishes *Riddle* and *Nicolaou* and argues that the murders committed by Taylor were ''separate incidents at different times'' because the victims were separate entities. If we read *Pittman* in isolation, we might agree with the State. However, since we are obliged to ''take the legislative language as we have been given it, not as we wish it were,'' *Pittman v. State*, 570 So. 2d 1205, 1206 (Miss. 1990), we are more inclined and feel that the better approach is to review and interpret the law as presented in *Riddle*, *Nicolaou*, and *Pittman.*

In *Riddle*, the defendant was indicted and convicted of rape, kidnapping, and burglary. *Riddle v. State*, 413 So. 2d 737, 738 (Miss. 1982). All of the crimes were committed in a single incident. *Id.*

After the jury found Riddle guilty of all charges, the trial court determined that Riddle was an habitual offender and sentenced him to life imprisonment. *Id.* On appeal, the State conceded that section 99-19-81 was ‘‘inappropriately applied’’ in that there was insufficient proof that the defendant had been ‘‘convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times.’’ *Id.* The Mississippi Supreme Court remanded the case for resentencing. *Id.* ‘‘Though subject to separate prosecution, the *Riddle* offenses arose out of a common temporal nucleus of operative fact and did not qualify as ‘separate incidents at different times.’’’ *Pittman*, 570 So. 2d at 1206 (citing *Riddle*, 413 So. 2d at 738).

In *Nicolaou*, the defendant, Nicolaou, was indicted and charged with the capital murder of a fellow prison inmate. *Nicolaou v. State*, 534 So. 2d 168, 173 (Miss. 1988). Nicolaou was indicted as an habitual offender under section 99-19-81. *Id.* The underlying felonies used to support the habitual offender status were (1) two convictions and sentences for murders, (2) a conviction and sentence for armed robbery, and (3) two convictions and sentences for kidnapping. *Id.* All of the crimes of the underlying felonies occurred on the same day wherein Nicolaou killed two men and took one of the victim’s car. Later the same day, Nicolaou robbed a convenience store and kidnaped two females. *Id.* On appeal, Nicolaou contended that because all of the crimes used to enhance his sentence ‘‘arose from the same incident at the same time,’’ section 99-19-81 did not apply. *Id.* at 173.

Though we are without knowledge or privy to all of the facts surrounding the double murder in *Nicolaou*, it is clear that even though the two victims were killed in close proximity to each other, the State conceded, and the Mississippi Supreme Court agreed, that the two murders did not count as two prior convictions for enhancement purposes. *Nicolaou*, 534 So. 2d at 173. After noting the State’s concession, the Mississippi Supreme Court explained that it did not need to address Nicolaou’s contention as to the two murders. *Id.* (citing *Riddle*, 513 So. 2d at 737). The State pointed out, however, that ‘‘the robbery and two kidnappings took place following the completion of, and apart and separate from the murders.’’ *Id.* The court held that ‘‘the two murders and the kidnappings occurred at different times and different places, and clearly were *two separate ‘incidents*.’’’ *Id.* (emphasis added). By its language, the court combined the two murders into one incident and the two kidnappings into one incident.

In 1990, the Mississippi Supreme Court revisited the meaning of the phase ‘‘separate incidents at different times’’ as used in the habitual sentencing statutes. In *Pittman*, the defendant argued that the two prior convictions of burglary used to enhance his sentence ‘‘were not sufficiently separate and distinct one from the other that they qualif[ied] him for enhanced sentencing.’’ *Pittman*, 570 So. 2d at 1205. Both of the convictions that Pittman challenged arose from events, which occurred on February 13, 1987, when Pittman burglarized two elementary schools.

In its quest to determine ‘‘how distant in time the prior criminal acts must be,’’ before they are separate incidents at different times, the Mississippi Supreme Court explained that:

> Section 99-19-81's language implies a common sense premise, if only it had been tightly tailored to fit only that premise. A person who on three separate occasions has pursued a criminal design should be dealt with severely, more so than on his first or even second offense. Three separate criminal acts suggest a likely-to-be-repeated habit of behavior

> such that the community ought intervene. But before such behavior should be labeled habitual, it would seem that the events should be sufficiently separate that the offender's criminal passions may have cooled so that he has time to reflect, and if after such an interval the individual forms and actualizes a new criminal design, and then does so a third time, he should be met with all of the power of the public force. Conversely, *two offenses committed in rapid succession do not suggest the same repetitiveness of criminal design such that the offender may be thought predictably habitual thereafter, or deserving of severe sanction.*

Pittman, 570 So. 2d at 1206 (emphasis added). In affirming Pittman's sentence, the court explained that ''[e]ven if on February 13, 1987, [Pittman] burglarized the Dotson School and then stole the color television sets from the Wilson School, as quickly as one could physically accomplish these acts,'' it would be obligated to hold the burglaries ''separate incidents at different times'' since Dotson Elementary School and the Wilson Elementary School were separate schools, ''notwithstanding their proximity and common use of the auditorium and cafeteria.'' *Id*. at 1207.

In the instant case, it is undisputed that on November 18, 1973, Taylor fired a number of shots, in rapid succession, into a vehicle and killed Johnnie Fox Green and Camilla M. Fox. During the hearing on Taylor's status as an habitual offender, the trial court was of the opinion that because there were two separate bodies and because the individuals were killed as a result of multiple gunshot wounds, that even a "split second difference" was sufficient to justify a finding that the two killings were incidents arising out of separate incidents at different times as required by section 99-19-83. We disagree.

It is without a doubt that Taylor showed a total disregard for human life by firing the shots in quick succession into the victims' car, and should be and has been punished. However, the habitual offender statutes clearly state that in order for the prior convictions to be used to enhance a defendant's sentence, the convictions must have been separate incidents at different times. Unlike the defendant in *Pittman*, who broke into and burglarized one school and then burglarized a second school, and who had time to change his mind or ''cool off'' while going from one school to the other, in the instant case, it is undisputed that the shots were fired in quick succession, without stopping and that there was no cooling off period between shots. Although the two murders were separate acts, for all practical purposes, they were spontaneous acts committed at the same time from the same criminal intent.

We are, therefore, obliged to find that under the facts of this case, Taylor's acts were not sufficiently separate and distinct one from the other to qualify him for enhanced sentencing. For the foregoing reasons, the conviction of jail escape is affirmed; the sentence of life, as an habitual offender, is reversed, and this cause is remanded for resentencing.

THE CONVICTION OF THE LAFAYETTE COUNTY CIRCUIT COURT OF JAIL ESCAPE IS AFFIRMED; THE SENTENCE OF LIFE IMPRISONMENT AS AN HABITUAL OFFENDER IS REVERSED; AND THIS CAUSE IS REMANDED TO THE LAFAYETTE COUNTY CIRCUIT COURT FOR RESENTENCING. COSTS ARE ASSESSED AGAINST LAFAYETTE COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, McMILLIN, AND SOUTHWICK, JJ., CONCUR.

FRAISER, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY PAYNE, J.

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FRAISER, C.J., CONCURRING IN PART, DISSENTING IN PART:

I agree with the majority that Taylor's conviction should be upheld but disagree with the majority's determination that Taylor is not an habitual offender. The majority misconstrues the law of this State as to whether two criminal acts which occur in rapid succession constitute separate crimes for the purpose of enhancing sentencing under section 99-19-83 of the Mississippi Code, Sentencing of Habitual Criminals to Life Imprisonment. The Mississippi Supreme Court has held that two separate criminal acts against different entities, that occur one after the other, as quickly as one could possibly accomplish them, constitute "separate incidents at different times" under section 99-19-83. *Pittman v. State*, 570 So. 2d 1205, 1207 (Miss. 1990). Thus, Taylor's actions of shooting and killing two different victims in rapid succession constitute two "separate incidents at different times" for sentencing purposes.

The majority admits that "[i]f we read *Pittman* in isolation, we might agree with the State. However since we are obliged to 'take the legislative language as we have been given it, not as we wish it were,' we are more inclined to feel that the better approach is to review and interpret the law as presented in *Riddle*, *Nicolaou*, and *Pittman*." citing *Pittman v. State*, 570 So. at 1206. What the majority fails to recognize is that the very case they quote construed the statutory language in question. Because *Pittman* did interpret the statutory language at issue this Court is bound by *stare decisis* to follow the *Pittman* Court's statutory interpretation. *Land Comm'r v. Hutton*, 307 So. 2d 415, 421 (Miss. 1974) (holding that *stare decisis* is particularly applicable in cases involving the interpretation of statutes). Further, *Pittman* was decided in 1990. The legislature has had ample opportunity to revisit the law applicable to habitual offenders if it disagreed with the Mississippi Supreme Court's holding in *Pittman. See Hubbard v. United States*, 115 S. Ct. 1754, 1763 (1995) (holding that the legislature's prolonged failure to act to overturn a judicial opinion is in itself an indication that the legislative intent was correctly found and should not be disturbed). We must remember that "[a] judge's role in an intermediate appellate court is to follow the law, not impose one's personal opinions to change it." *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 861 (Fla. 3d Dist. Ct. App. 1994)*; see also* 20 Am. Jur. 2d *Courts* § 201 (1965).

In *Pittman*, the Mississippi Supreme Court in a less than artful discussion of section 99-19-81, which employs identical language to section 99-19-83, stated:

> Section 99-19-81's language implies a common sense premise, if only it had been tightly tailored to fit only that premise. A person who on three separate occasions has pursued a criminal design should be dealt with severely, more so than on his first or even second offense. Three separate criminal acts suggest a likely-to-be-repeated habit of behavior such that the community ought intervene. But before such behavior should be labeled habitual, it would seem that the events should be sufficiently separate that the offender's criminal passions may have cooled so that he has time to reflect, and if after such an interval the individual forms and actualizes a new criminal design, and then does so a third time, he should be met with all of the power of the public force. Conversely, two offenses committed in rapid succession do not suggest the same repetitiveness of criminal design such that the offender may be thought predictably habitual thereafter, or deserving of severe sanction. In this sense Section 99-19-81's scheme may have been more rational if it required, say, a minimum twenty-four hour interval between offenses. No such language appears. Instead, all we are told is that the prior offenses must have arisen out of "separate incidents at different times," and we must take the legislative language as we have been given it, not as we wish it were. It is well to reflect that, subject only to constitutional limitations, the legislative branch of government holds the exclusive power to provide punishments for crimes.
>
> We do not write upon a clean slate. We have on several occasions held that "priors" arising out of incidents occurring on the same date may nevertheless be "separate incidents at different times" within Section 99-19-81. In Burt the defendant broke and entered two dwelling houses at "Route 1, Duck Hill, Mississippi" on June 26, 1980, and we held these separate incidents because Burt had burglarized "separate dwellings occupied by two individuals." In Nicolaou the priors concerned a robbery and two kidnappings that took place following the completion of two murders, all of which were a part of the same

> continuous crime spree but which we held "separate incidents" within Section 99-19-81. These cases, however, afford no bright line rule telling us how separate the incidents must be, nor how different the times must be.
>
> No doubt, if Pittman broke and entered one room in the Wilson Elementary School and, finding nothing of value, then moved to another room in the same school and thereafter stole the three television sets from that room, we would consider the union of these acts sufficient that they would constitute but a lone incident under the statute. The record before us, however, reflects that the Dotson Elementary School and the Wilson Elementary School are separate schools, notwithstanding their proximity and common use of the auditorium and cafeteria. *Even if on February 13, 1987, Bobby Ray Pittman burglarized the Dotson School and then stole the color television sets from the Wilson School, as quickly as one could physically accomplish these acts, one after the other, we would be obliged to hold these "separate incidents at different times."*

Pittman, 570 So. 2d at 1206-07 (citations omitted).

At its foundation, *Pittman* stands for the legal proposition that, under our habitual offender statute, criminal acts on separate entities constitute separate crimes for purposes of enhanced sentencing even though the acts are accomplished as quickly as possible and in close proximity to each other. *Id.* This is exactly the situation presented to this Court in this case. Taylor shot into a car killing two different human beings, certainly separate entities, as quickly as he could. The Mississippi Supreme Court held in *Pittman* that the statutory phrase "separate incidents at different times" included factual situations similar to that before us. This Court is bound to follow the *Pittman* decision.

To support its result, the majority cites *Pittman* for the proposition discussed therein that:

> Section 99-19-81's language implies a common sense premise, if only it had been tightly tailored to fit only that premise. A person who on three separate occasions has pursued a criminal design should be dealt with severely, more so than on his first or even second offense. Three separate criminal acts suggest a likely-to-be-repeated habit of behavior such that the community ought intervene. But before such behavior should be labeled habitual, it would seem that the events should be sufficiently separate that the offender's criminal passions may have cooled so that he has time to reflect, and if after such an interval the individual forms and actualizes a new criminal design, and then does so a third time, he should be met with all of the power of the public force. Conversely, two offenses committed in rapid succession do not suggest the same repetitiveness of criminal design such that the offender may be thought predictably habitual thereafter, or deserving of severe sanction.

Pittman, 570 So. 2d at 1206.

The majority quotes this section of *Pittman* out of context. Where the majority errs is in failing to acknowledge, as the Mississippi Supreme Court did immediately after the quotation that "Section 99-19-81's scheme may have been more rational if it required, say, a minimum twenty-four hour interval between offenses. *No such language appears. Instead, all we are told is that the prior offenses must have arisen out of 'separate incidents at different times,' and we must take the legislative language as we have been given it, not as we wish it were*." *Pittman*, 570 So. 2d at 1207 (emphasis added). In essence, the court rejected the argument it just presented, which the majority represents as the holding of *Pittman*, as lacking support in the statutory language. The *Pittman* court then construed "separate incidents at different times" to include criminal acts on separate entities accomplished as quickly possible. *Id.*

In *Pittman*, Pittman burglarized two schools, which were located immediately adjacent to each other and shared a cafeteria and auditorium. If the quoted portion of *Pittman* were the holding of the case the court could not have found that "[e]ven if . . . Bobby Ray Pittman burglarized the Dotson School and then stole the color television sets from the Wilson School, as quickly as one could physically accomplish these acts, one after the other, we would be obliged to hold these "separate incidents at different times." *Id.* Ironically, the portion of *Pittman* quoted by the majority is a contrast illustrating what the legislation could have said , but did not.

In addition, the majority cites *Nicolaou v. State*, 534 So. 2d 168, 173 (Miss. 1988) and *Riddle v. State*, 413 So. 2d 737, 738 (Miss. 1982), in support of its contention that Mississippi law does not allow sentence enhancement based on killings of different individuals that occur in close proximity and in rapid succession. These cases are of no precedential value. In both cases, the State specifically conceded under the facts presented that the acts were *not* separate crimes; consequently, the supreme court did not address the issue of enhanced sentencing based on multiple crimes against separate entities in either case. *Nicolaou*, 534 So. 2d at 173; *Riddle*, 413 So. 2d at 738.

Because this Court is bound by the *Pittman* decision, I would find that the two killings involved were "separate incidents at different times" and uphold the trial court's sentencing of Taylor as an habitual offender.

PAYNE, J., JOINS THIS SEPARATE OPINION.