

IN THE COURT OF APPEALS 5/7/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00886 COA

CONSOLIDATED WITH

NO. 93-KA-01162 COA

RONNIE JOE WALKER

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. JOHN LESLIE HATCHER

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

RICHARD B. LEWIS

ATTORNEY FOR APPELLEE:

ATTORNEY GENERAL MIKE MOORE, BY:

JEFFREY A. KLINGFUSS

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED OF TWELVE COUNTS OF SALES TAX
EVASION AND SENTENCED TO: COUNT I, THREE YEARS CONSECUTIVE TO ANY AND
ALL SENTENCES PREVIOUSLY IMPOSED; COUNT II, THREE YEARS CONSECUTIVE TO
COUNT I; COUNTS 3-12, FIVE YEARS SUSPENDED ON EACH COUNT CONDITIONALLY

AND CONSECUTIVE TO COUNTS I AND II.

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

THOMAS, P.J., FOR THE COURT:

Ronnie Joe Walker was convicted of sales tax evasion. Feeling aggrieved he appeals to this Court assigning four alleged errors. Finding merit in Walker's assertion as to counts ten, eleven and twelve, we reverse; we affirm counts one through nine.

FACTS

In 1983, Walker started a business under the name of Ron Walker's Heating and Air Conditioning. In 1987, Walker's business was audited by the Mississippi Tax Commission for the time of November 1984 through October 1987. As a result of this audit, Walker was told what part of his bookkeeping techniques were in error and what he needed to do to properly report his sales tax to the Commission. Walker was told that when reporting his taxable income he must report all income and not just the amount that he deposited into his business accounts.

Subsequently, Walker went out of business and filed for bankruptcy. The bank repossessed all of his equipment and sold it to his wife, Norma Walker. Thereafter, Walker attempted to obtain a state tax number under the name of Walker Heating and Air Conditioning, but was refused by the Commission. Failing to get a tax number under that name, the business was incorporated as Clarksdale Heating and Air, Inc. Tony Tudor, was named president of the corporation, and Steve Williams was named vice-president. Both Tudor and Williams were previous employees of Walker. A state tax number was applied for under the name of the corporation and granted by the Commission.

Both Tudor and Williams testified that Walker approached them and told them that in order to keep their jobs and keep the business going, they must join a corporation with them as officers. They were told to do this for the sole reason that this was the only way that they could get a tax number from the Commission. They testified that while they were the officers of the corporation, in all reality, they were employees of Walker.

However, Walker testified that Tudor and Williams approached him about starting the corporation and that he was hired by them as a business manager. He was hired for the sole purpose of explaining to Tudor and Williams how to run the business. Walker was in charge of filing all taxes, writing all checks, obtaining loans for the business, and obtaining bids for the business.

As part of his duties Walker was responsible for the payment of the company's sales tax to the Commission. Generally, when a business sells merchandise or services to the general public, it charges the customer a 6% sales tax. This tax is placed in escrow by the company until the twentieth of each month at which time that money is sent to the State Tax Commission. Walker failed to file a sales tax return, and failed to remit sales tax for the months of May, June, and July of 1989. As a result of the failure to file a return, an audit was conducted by the Commission for the months of July of 1988 through July of 1989.

Jimmy Helms, from the tax commission, was placed in charge of the audit. After investigating Walker's business records he learned that Walker was understating his taxable income, thereby understating his tax liability. Helms testified that Walker was taking his bank accounts and only reporting his net deposits, when he should be reporting his net taxable income. For example in some months Walker would take checks to the bank, deposit some of the money, and take the rest out in cash. However, when it came time to report his taxable income he was not adding back the amount of cash withdrawn, but only reporting the net deposit. In some instances Walker would assign some of his subcontracting fees to the bank to repay a previous loan and none of these fees were reported to the Commission as taxable income. This method of computing his taxable income left significant shortages.

After Helms reported the shortage to the Commission, Sam Corder, an investigator with the State Tax Commission was called to help the investigation. Corder computed the amount of sales tax that Walker was submitting to the Commission, computed the sales tax that he should have been submitting, and finally computed the additional amounts due. The following is a chart showing Corder's computations.

MONTH SALES TAX ACTUAL SALES SHORTAGE

SUBMITTED TAX RECEIVED

FILED RETURN BUT UNDERSTATED AMOUNT

August '88 \$826.00 \$1,249.44 \$423.44

September '88 \$277.89 \$1,398.99 \$1,121.10

October '88 \$561.77 \$1,709.26 \$1,147.49

November '88 \$756.34 \$1,080.76 \$324.42

December '88 \$548.91 \$626.50 \$77.59

January '89 \$189.51 \$514.34 \$324.83

February '89 \$481.68 \$1,654.19 \$1,172.51

March '89 \$233.84 \$699.93 \$466.09

April '89 \$1,229.48 \$2,022.96 \$793.52

FAILED TO FILE A RETURN

May '89 \$000.00 \$1,897.11 \$1,897.11

June '89 \$000.00 \$1,762.83 \$1,762.83

July '89 \$000.00 \$542.93 \$542.93

Helms testified that Walker told him that he started the corporation because that was the only way that he could stay in business. He further testified that Walker stated that he would be liable for the sales tax, and "not the others," referring to Tudor and Williams. Subsequently, both Tudor and Williams were exonerated from any tax liability. Helms testified that Walker admitted that he did not properly compute his sales tax liability and further admitted that the proper way to file the sales tax return was explained to him by Phelps during his last audit.

All twelve counts of the indictment were submitted to the jury, which returned guilty verdicts on all counts. After trial Walker obtained the services of a new attorney for the purposes of appeal. A motion for new trial was subsequently filed asserting that his trial counsel was ineffective, and that because of such, he was entitled to a new trial. Walker asserted, among other things, that his counsel was ineffective in the following manner: did not seek any discovery; did not interview any witnesses; did not call any witnesses on behalf of his client, even though he was instructed to do so; did not call as a witness the attorney who set up the corporation to show that it was a viable entity; did not seek to do an independent audit; conducted only a cursory cross-examination of the State's witnesses; failed to ask for a lesser included offense on all counts; did not argue that four counts were barred by the statute of limitations; failed to discover exculpatory documents in possession of state's witnesses; failed to subpoena corporate records of Clarksdale Heating & Air, Inc.; failed to object to a statement taken by Sam Corder during criminal investigation even though statement was made prior to Miranda rights being read; failed to object to hearsay evidence submitted at trial; and failed to inquire into plea bargain possibility as requested by Walker.

A hearing was had upon the matter and Walker was allowed to call witnesses showing what they would have testified to had they been called to testify. After arguments were made by both parties the trial court denied Walker's motion for a new trial based upon ineffective assistance of counsel. The trial court found that the State's case against Walker was so overwhelming that Walker suffered no prejudice.

DISCUSSION

Walker appeals to this Court assigning four alleged errors. He argues that because there are two statutes under which he could have been charged, the trial court should have sentenced Walker under the lesser penalty. He further argues that the lower court should have vacated counts ten, eleven, and twelve because the facts showed that he failed to file a return for those months as opposed to evading sales tax. Next, he argues that the trial court erred in failing to vacate counts one through four as being in violation of the two year statute of limitations. Finally, he argues that the trial court was in error in failing to grant a new trial because of defense counsel's ineffective assistance through the course of the trial.

I.

In his first assignment of error Walker argues that the trial court erred in failing to grant him a new trial because of trial counsel's ineffective assistance. The State responds that notwithstanding Walker's many arguments of trial counsel deficiencies, Walker cannot show that he was prejudiced. We agree with the State and find that under our standard of review, Walker could not show prejudice as to counts one through nine; however, we do find that Walker was prejudiced by trial counsel's ineffectiveness on counts ten through twelve.

In most cases, claims of ineffectiveness are raised based upon trial counsel's failure to do something that appeal counsel claims should have been done at trial. In the usual case we are asked to second guess trial counsel and sit as finders of fact based upon one sided argument without hearing rebuttal. However, in the case *sub judice*, a full hearing was conducted by the trial court to determine whether trial counsel's representations of Walker were deficient enough to warrant a new trial. Walker was given the opportunity to call witnesses to convey what the basis of their testimony would have been had they been called to testify, and was furthermore allowed to argue to the trial court all of trial counsel's shortcomings. After hearing all of the evidence and arguments from both sides, the trial court found:

For defendant's counsel to be ineffective, the movant must show that the performance of counsel was deficient and that the deficient performance prejudiced the defendant, to the extent that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. This means a probability sufficient to undermine confidence in the outcome of the proceedings.

Although trial counsel's performance may not have been exemplary, this Court is unable to say that any alleged errors or omissions were not within the broad realm of a legitimate trial strategy. This notwithstanding the Court finds that the evidence against the defendant was clear, direct and overwhelming, such that the Court's confidence in the correctness of the outcome is satisfied. Thus, the defendant has failed to show prejudice and has therefore failed the second prong of the test.

We have a finding by the trial court that Walker suffered no prejudice, and therefore, has failed the second prong of the test set out in *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

For the most part, we agree with the finding of the trial court.

The State put forth proof that Walker was responsible for the payment of the sales tax and that he intentionally failed to report his entire sales tax liability. It does not matter that trial counsel did not put forth evidence establishing that this was a valid corporation, as Walker claims. Such testimony would have been irrelevant. Walker evaded the payment of sales tax through the preparation of false tax returns. Whether it was the corporation that benefited from Walker's deceit or whether Walker profited personally, does not matter. Walker admitted that he was the person who prepared the returns, and the proof overwhelmingly showed that Walker failed to include all incomes received by the corporation for the computation of the sales tax liability. For this he was tried and convicted.

Under our standard of review we can not say that the trial court's findings of no prejudice as it relates to counts one through nine were in error.

However, we do find that the trial court erred in finding that trial counsel was not ineffective in regard to counts ten through twelve. On counts ten through twelve Walker failed to file a return, and according to the State, this was the way that Walker evaded the payment of sales tax. We agree with the State that a jury could find, as it did in this case, that Walker's failure to file a return was for the sole purpose of evading the payment of sales tax. However, defense counsel should have given the jury another option, namely a lesser included instruction of failure to file a return, which as we have stated is a misdemeanor. We hold that this failure to ask for this lesser included offense was ineffective and that this prejudiced Walker. As to Walker's other claims of ineffectiveness we find them to be without merit

II.

Walker next argues that the trial court was in error in refusing to vacate his conviction under counts ten through twelve, because the State could only prove that he failed to file a tax return for those three months (a misdemeanor), not that he evaded the payment of sales tax (a felony). Because we are reversing counts ten through twelve for a new trial on account of ineffective representations, we need not go into much detail concerning this issue. However, we note that the element instructions in counts ten through twelve were drawn erroneously. The State asked for and was granted a set of form jury instructions setting out the following:

Under Count if you find from the evidence in this case beyond a reasonable doubt that:

(1) the defendant, Ronnie Joe Walker, was engaged in the retail heating and air conditioning business during the month of , 19_, and

(2) the defendant wilfully, unlawfully and feloniously attempted, in any manner, to evade or defeat the Retail Sales Tax or assisted in the evading of such tax, or the payment thereof, and

(3) the defendant intentionally understated his Retail Sales Tax liability in the amount of and refused and failed to pay \$_of said tax for , 19_,

then you shall find the defendant guilty of tax evasion in Count .

This jury instruction was the same for all twelve counts, except the month and the amount of the

sales tax shortage was added. As can be seen, this instruction allows the jury to convict Walker of sales tax evasion if it finds that Walker "intentionally understated his Retail Sales Tax liability."

The facts are clear and the proof uncontradicted that Walker failed to file a tax return in counts ten through twelve; yet the jury was instructed that it must find that Walker understated his sales tax liability. Walker could not have been convicted of "understating" his tax liability because he never filed a return. While this was never objected to by defense counsel, nor was it raised on appeal by appellate counsel, this matter needs to be corrected if the State proceeds to retry Walker.

We do agree with the State that under the facts of this case Walker could have been convicted of sales tax evasion by failing to file his tax returns. Simply put, his failure to file a tax return was the way that he evaded the payment of sales tax. However, by definition a person cannot understate his tax liability if no tax liability was ever reported.

. III.

Next, Walker submits that because there were two statutes which he could have been convicted under (one being a felony, the other a misdemeanor) the trial court was required under Mississippi case law to sentence him to the lesser penalty. In support of this proposition, Walker cites this Court to the case of *Beckham v. State*, 556 So. 2d 342, 343 (Miss. 1990), in which our supreme court stated that "where the indictment is ambiguous, the accused can only be punished under the statute with the lesser penalty."

In that case the indictment was ambiguous because it was silent on the applicable statute. *Id.* In this case, Walker does not have such luck. The indictment against Walker charges him with violation of section 27-3-79(2), of the Mississippi Code, under which he was sentenced.

In *McCrary v. State*, 210 So. 2d 877, 878 (Miss. 1968), our supreme court held that while McCrary could have been charged with the misdemeanor charge of fraudulently using a credit card, nothing in the statute prevented the state was prosecuting McCrary under the felony charge of forgery. We think this case is controlling and find that the state was within its right to seek a felony conviction, and we further find that the trial court was correct in sentencing Walker to the felony charge.

IV.

Finally, Walker argues that the trial court erred in refusing to vacate his conviction on counts one through four because those charges were in violation of the two year statute of limitations. "A person shall not be prosecuted for any offense . . . unless the prosecution for such offense be commenced within two (2) years next after the Commission thereof." Miss. Code Ann. § 99-1-5 (1972). Furthermore, a prosecution is commenced "by the issuance of a warrant or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." *Id.* § 99-1-7.

Walker allegedly committed counts one through four on August, September, October, and November of 1988, respectively. Walker was not indicted until December 19, 1990, which is more than two years after the offense committed. However, the State put forth evidence that in August of 1990, an affidavit and warrant were issued for the arrest of Walker. Under the statutes, the issuance of the

warrant began the prosecution against Walker, preserving the statute of limitations. We do not find any merit in Walker's contention that because the clerk of the court did not witness an oath being given, the affidavit, and warrant were invalid.

CONCLUSION

We hold that Walker was properly tried, convicted, and sentenced on counts one through nine, but reverse and remand counts ten through twelve, for a new trial consistent with this opinion.

THE CONVICTION OF COUNTS ONE THROUGH NINE OF SALES TAX EVASION AND SENTENCE OF: COUNT I, THREE YEARS CONSECUTIVE TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED; COUNT II, THREE YEARS CONSECUTIVE TO COUNT I; COUNT III, FIVE YEARS SUSPENDED CONDITIONALLY AND CONSECUTIVE TO COUNTS I AND II; COUNTS FOUR THROUGH NINE, FIVE YEARS SUSPENDED ON EACH COUNT CONDITIONALLY AND CONSECUTIVE TO COUNTS I AND II AND CONCURRENT TO COUNT III, ARE AFFIRMED. RESTITUTION TO BE PAID AS ADJUDGED IN COUNTS I THROUGH IX. THE CONVICTION OF COUNTS TEN THROUGH TWELVE AND SENTENCE OF FIVE YEARS SUSPENDED ARE REVERSED AND REMANDED FOR A NEW TRIAL. COSTS ARE TAXED TO COAHOMA COUNTY.

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