

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00845 COA

FLOYD EVERETT MCGEE A/K/A

FLOYD EVERETTE MCGEE, JR.,

A/K/A FLOYD EVERETTE MCGHEE

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. GEORGE C. CARLSON, JR.

COURT FROM WHICH APPEALED: TATE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JACK R. JONES III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: ROBERT KELLY

NATURE OF THE CASE: ROBBERY

TRIAL COURT DISPOSITION: FOUND GUILTY AND SENTENCED TO SERVE A TERM OF
15 YEARS IMPRISONMENT

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

SOUTHWICK, J., FOR THE COURT:

Floyd McGee was convicted of robbery in the Circuit Court of Tate County. He appeals, arguing that he was prejudiced by the use of evidence of two prior convictions as impeachment. On January 28, 1997, we ordered that a hearing be conducted on the issues surrounding the use of the prior convictions. The hearing was held on March 26, 1997. We have been provided with a transcript of that hearing, and detailed findings by the trial court. We find no error in the use of the two prior convictions as impeachment, and affirm.

FACTS

Mrs. Deborah Vanzant was holiday-shopping at Wal-Mart on December 23, 1993. As she loaded her purchases into her pickup truck in the parking lot of Wal-Mart, a man tackled and slammed her against her truck. The robber grabbed her wallet and ran. Mrs. Vanzant watched the robber as he fled the scene. The visibility in the parking lot was good and Mrs. Vanzant testified that she was able to see very well. She immediately wrote down the man's license plate number, and gave it to a security guard in Wal-Mart. Mrs. Vanzant was able to see what the robber was wearing and gave a description of his clothing and what he looked like from behind. She was also able to give a description of the car in which the robber fled. Based on this information, the police apprehended the appellant, Floyd Everett McGee. McGee had Mrs. Vanzant's wallet in his possession.

DISCUSSION

Prior to trial, McGee filed a motion in limine to prevent the prosecution from using certain prior convictions of burglary, grand larceny and forgery for impeachment purposes. A pre-trial hearing was held on July 1, 1994, and an order was entered sustaining the motion as to the burglary conviction, but overruling the motion as to the grand larceny and forgery convictions. At the trial on August 8, 1994, the defense counsel requested that the court reconsider its previous ruling on the prior convictions. The judge upheld his earlier decision.

At trial McGee testified in his own behalf. His counsel asked him on direct examination, "You have a history of grand larceny, is that correct?" McGee answered "yes." His counsel then stated, "Two convictions; one in '83 and one in '84." McGee said "Okay." There was no further mention by the defense or State of the prior convictions. There was evidence that McGee had been convicted of as many as seven crimes, but the two grand larceny convictions are the only ones involved in this appeal.

It is true that the State never introduced the prior convictions. However, the issue is not moot for that reason. The court's pretrial ruling that some convictions were admissible caused McGee to make a pre-emptive acknowledgment of what the State was entitled to prove on cross-examination. McGee's choice to introduce the convictions himself does not waive the issue.

Mississippi Rule of Evidence 609 governs the admissibility of evidence of prior convictions to

impeach a witness. That rule states:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party or (2) involved dishonesty or false statement, regardless of the punishment.

M.R.E. 609(a). The Comment to the Rule gives a list of 609(a)(2) crimes:

perjury or subordination of perjury, false statement, fraud, embezzlement, false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. . . .

Once a crime is categorized as a M.R.E. 609(a)(2) crime, the court must allow evidence of these prior convictions unless they were more than ten years old as calculated in the rule . The trial court found these two convictions to be admissible under subsection (a)(2), but then examined the time limit issue. The next section of the rule states:

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period *of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date*, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. . . .

M.R.E. 609(b)(emphasis added). The Rule requires notice if a conviction of this vintage is to be offered, but no issue of that is made here. The dates of the convictions were October 31, 1983, and March 6, 1984. Those are not the latest relevant dates for starting the ten year calendar, unless McGee was not incarcerated. At trial there was no evidence as to when McGee was released from imprisonment. In the absence of such evidence, the court properly used the date of conviction. We will discuss below the additional information that was provided at the remand hearing.

We also note that the trial court assumed that the date of the testimony was the correct termination of the ten year period. There is dispute concerning the correct cut-off date, with an earlier possible date being the date of the crime for which the defendant is now being tried. 28 WRIGHT & MILLER, FED. PRAC. & PROC., 6136 at 260-61 (1993). Considering that the purpose of this evidence is to test the credibility of a witness, we find that the date of testimony is the correct end date for the ten year period.

The trial judge's obligations under this rule have been addressed in numerous supreme court precedents. The original interpretation almost ten years ago remains good law. *Peterson v. State*, 518 So. 2d 632, 636-37 (Miss. 1987). That case holds that when admissibility depends on whether the probative value of the prior convictions outweighs their prejudicial effect, a balancing of five factors must be made on-the-record. In a later case, the court held that this same on-the-record balancing must be done for a Rule 609(a)(2) conviction that is more than ten years old. *Johnson v. State*, 529 So. 2d 577, 587 (Miss. 1988). The probative value of any conviction that runs afoul of the time limit

must be weighed against the prejudice. The wording of Rule 609(b) is even more restrictive than under Rule 609(a)(1) -- the probative value of a conviction beyond the ten year limit must "substantially" outweigh the prejudice. *McGee v. State*, 569 So. 2d 1191, 1197 Miss. 1990).

Thus it was necessary for the trial court to make an on-the-record determination of the admissibility of these prior convictions as impeachment. The "*Peterson* factors" for determining admissibility are these:

- (1) The impeachment value of the prior crimes;
- (2) The point in time of conviction and the witness' 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."

Peterson, 518 So.2d at 636-637. In our opinion of January 28, we determined that the trial court did not consider all the necessary factors under *Peterson*. Part of the difficulty at that time was the circuit court properly relied upon a supreme court decision that determined larcenies to be admissible under Rule 609(a)(2). *Bogard v. State*, 624 So. 2d 1313, 1316 (Miss. 1993). Under that case, these larcenies were found to be 609(a)(2) convictions. The court then noted the age of the convictions, and held without examining the *Peterson* factors one-by-one, that the probative value outweighed the prejudice. Since the time of the hearing, the Mississippi Supreme Court has concluded that grand larceny is not a 609(a)(2) crime. The court stated:

[w]hile there is a split of authority on the question whether theft crimes such as larceny and shoplifting should be categorized as *crimen falsi*, historically they have not been and this Court has adopted the majority view that they are not.

Blackman v. State, 659 So. 2d 583, 595 (Miss. 1995). The trial court was reasonable in relying on *Bogard*, but the law has since been clarified. The issue was again raised at trial, but the court at that stage also did not make an on-the-record determination of the weight of the five *Peterson* factors.

At the hearing conducted following our remand, a thorough review of the facts surrounding the two convictions occurred. Based on the testimony of a witness from the Records Department of the Mississippi Department of Corrections, the court determined that the two convictions were not more than ten years old as Rule of Evidence 609 (b) calculates time. That is, the date that McGee was released from incarceration under the two convictions was less than ten years before trial. That point was contested by McGee's personal testimony, but the circuit court did not err in relying on the dates in the official records.

Since the convictions were less than ten years old on the date of their use as impeachment, their admissibility is to be measured under Rule 609(a)(1). The court fulfilled his obligation to examine the *Peterson* factors and determine on balance whether the probative value of the convictions as impeachment outweighed the prejudicial effect. This is the consideration given to each factor by the trial court:

(1) The impeachment value of the prior crimes. The court found that the value was minimal, but the weight against admissibility would be only slight.

(2) The point in time of conviction and the witness' subsequent history. The court found that McGee's criminal history since those prior convictions was substantial, and that this factor weighed slightly in favor of admissibility.

(3) The similarity between the past crime and the charged crime. The court found the violent crime of strong arm robbery for which McGee was being tried in 1994, to be sufficiently different from the more passive crime of larceny used for impeachment that the factor weighed in favor of admissibility.

(4) The importance of the defendant's testimony. The court found that McGee did not so much deny the commission of the crime as he stated that since he had been on drugs at the time, he could not remember what happened. The court rather unavoidably concluded that the credibility of the defendant's testimony was not an important factor. He never denied guilt; he only denied the memory of guilt. A voluntary drug-induced state is not a defense to a crime. McGee's credibility was not a strong factor and this weighs in favor of admission.

(5) The centrality of the credibility issue. Whether McGee was telling the truth was not central; whether the various witnesses properly identified McGee as the perpetrator was the principal question. This factor was also found to be in favor of admissibility.

On balance, the court found that the *Peterson* factors supported a finding that the probative value of the convictions outweighed the prejudicial impact of the jury's learning of McGee's criminal record. We review that conclusion under an abuse of discretion standard. *McGee v. State*, 569 So. 2d 1191, 1195 (Miss. 1990). We find the court's conclusion amply supported by the thorough record prepared after remand, and affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF TATE COUNTY OF CONVICTION OF STRONG ARMED ROBBERY AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS AN HABITUAL OFFENDER IS AFFIRMED. COSTS ARE ASSESSED TO TATE COUNTY.

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