

IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01037 COA

MICHAEL WAYNE JOHNSON 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: YALOBUSHA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: DAVID CLAY VANDERBURG

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CT 1 CONSPIRACY: CT 2 EMBEZZLEMENT: CT 1 5 YRS;
PAY \$1,000.00 FINE; PAY COURT COSTS; CT 2 5 YRS; CT 2 CONCURRENT CT 1; PAY
RESTITUTION OF \$3,000.00 TO LYNCH OIL CO.

MANDATE ISSUED: 8/19/97

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

THOMAS, P.J., FOR THE COURT:

Michael Wayne Johnson appeals his convictions of conspiracy and embezzlement, raising the following issues as error:

I. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT; JURY INSTRUCTION D-1; MOTION FOR NEW TRIAL; AND MOTION FOR J.N.O.V.

II. THE COURT ERRED IN ALLOWING INTO EVIDENCE THE DEFENDANT'S STATEMENT TO LAW ENFORCEMENT OFFICERS.

Finding no error, we affirm.

FACTS

Michael Wayne Johnson, along with two co-defendants, Pamela Griffin and Mickey Smith, were indicted in a two count indictment charging each with conspiracy and embezzlement for the December 18, 1994 larceny of a Shell gas station. The three defendants' trials were severed. Johnson was found guilty of both conspiracy and embezzlement.

On December 18, 1994, Pamela Griffin was an employee for the Shell Oil Company at the Shell gas station in Water Valley, Mississippi. Her shift that day was from 2:00 in the afternoon until 9:00 at night. According to the statement given by Johnson to the police, he received a call from Griffin that night telling him to come to the Shell station where she was working and to come alone. Johnson did so and was then told by Griffin to retrieve the white garbage bag that was on the ground behind some trash cans. He did and found that the bag contained several thousand dollars in cash. Johnson took the bag to his home. About three hours later that evening, Mickey Smith, for whom Johnson worked, came by Johnson's house and took the bag of money from Johnson. Later that evening, Griffin came

by Johnson's house and gave him \$450.00 in cash, but thereafter left when she remembered that she had failed to leave the door to the Shell station open when she left. Johnson continues in his statement to the police by stating that the next day, December 19, 1994, Griffin took Johnson to buy a car with the \$450.00, and she told Johnson that they had stolen about \$7,000.00 from the store. Griffin told Johnson to keep quiet about the money from the Shell station. Also, Mickey Smith, on December 20, 1994, took Johnson to buy his car tag and gave him an extra \$150.00 in cash to make the purchase.

On December 19, 1994, Judy Shinault arrived for work at the Shell station. She discovered that the door to the station was open. She then called the police. Officer Roger Thomas arrived on the scene to find the only door to the station open with the bolt of the dead bolt lock protruding in such a manner that the door could not be completely closed. The room in which the cashier worked was in complete disarray, and the safe was open and empty, as was the cash register. The security camera had been turned off, and there was no sign of forced entry.

The manager of the Shell station, Opal Holloman, gave police officers the name of Beverly Twilla as a possible suspect. Twilla had an on-again, off-again relationship with Mickey Smith. After interviewing Twilla, Officer Thomas ascertained the names of Johnson, Griffin and Smith as suspects to the larceny. Johnson was subsequently interviewed by Officer Thomas and Police Chief Mike King. At this time, Johnson gave a complete statement to police, implicating himself, Griffin and Mickey Smith in the taking of the money. Both Officer Thomas and Chief King testified that Johnson was read his rights, and that he freely and voluntarily waived his rights and signed a waiver form. Both officers testified they used no force, and made no threats toward Johnson. However, on cross, both admitted to telling Johnson that Mickey Smith implicated Johnson in the crime, when in fact, the police had not yet interviewed Mickey Smith. After Johnson gave his statement, the statement was reduced to writing and signed by Johnson. Johnson testified that he fabricated the whole story in order to leave the police station. Johnson stated that the police officers told Johnson that he would go to Parchman if he did not help in the investigation.

Johnson then agreed to help the police and called Betty Smith, Mickey Smith's wife, with a tape recorder running. During this conversation, Betty Smith stated, "the only way that Mickey can beat this thing, is, like I said, if Pam (Griffin) don't tell them anything." Betty Smith then stated that to get out of Johnson's statement to the police that, "we can always say, all right you are young and they threatened to send you to the penitentiary." Johnson then asked Betty Smith if Mickey could give Johnson some more money so Johnson could "catch out." Betty Smith stated that Mickey did not have any more. Johnson then asked if he had already spent all of that money. Betty Smith responded, "He ain't got no money." Johnson then asked what did Mickey do with the money. Betty Smith responded, "I don't know." The conversation then turned to the statement given by Beverly Twilla to the police officers. Betty Smith told Johnson, "all (Mickey) has got to do is talk her into retracting her statement, tell them that she just made it all up because she was mad." Later, Betty Smith stated, "yea and (Mickey) can convince her . . . if he ever gets her on the phone, he can convince her." Twilla did, in fact, retract her statement to the police.

Johnson continued to help the police by giving another statement on January 9, 1995. This statement was factually similar to the first statement, except that Johnson told police that Mickey Smith told him that he should buy a car with his share of the money. Johnson later stated that he also made up

this statement. He then wore a wire in an attempt to get Griffin to make incriminating statements about the larceny. This attempt failed.

Before trial, Johnson filed a motion to suppress the statements he made to law enforcement officials. A hearing on the motion was set, and on that date, the trial judge, the prosecutor, and the defense counsel were all present, but Johnson did not show. The hearing was canceled because of Johnson's absence. Thereafter, Johnson did not seek to bring the matter to the court's attention until the day of trial. The trial court would not allow Johnson to proceed with a suppression hearing at that date, finding that he had abandoned his motion. However, the trial judge did allow Johnson to attack the voluntariness of the statements during the cross-examination of Officer Thomas and Chief King and also during the direct examination of Johnson. The jury was fully aware of Johnson's contention that his statements to the police were untrue and resulted from police threats.

ANALYSIS

For clarity's sake, issues I and II are combined.

I.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT; JURY INSTRUCTION D-1; MOTION FOR NEW TRIAL; AND MOTION FOR J.N.O.V.

II.

THE COURT ERRED IN ALLOWING INTO EVIDENCE THE DEFENDANT'S STATEMENT TO LAW ENFORCEMENT OFFICERS.

Johnson argues that the trial court erred by denying his motion for a directed verdict, by denying jury instruction D-1, a peremptory instruction, by denying his motion for a new trial, and by denying his motion for a JNOV. Johnson argues that the circuit court erred in denying his motion for directed verdict at the close of the State's case. Since Johnson put on proof after the State rested, his challenge to the sufficiency of the evidence must be considered in light of "the evidence before the court . . . on the last occasion when the sufficiency of the evidence was challenged before the trial court." *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 807-08 n.3 (Miss. 1987). "A defendant waives the appeal of an overruled motion for a directed verdict made at the end of the state's case when the defendant chooses to go forward with its case." *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992) (citing *Wetz*, 503 So. 2d at 808). Put another way, the motion for a directed verdict is a

procedural vehicle[] for challenging the sufficiency of the case for the prosecution. . . . When the sufficiency of the evidence is challenged on appeal, this Court properly should review the Circuit

Court's ruling on the last occasion when the sufficiency of the evidence was challenged before the trial court. Here, of course, that was when the Circuit Court overruled the motion for a new trial. . . .

Wetz, 503 So. 2d at 807-08 n.3.

Since Johnson went forth with his case, he is procedurally barred from raising the denial of his directed verdict at the end of the State's case. However, like a motion for a directed verdict, a JNOV challenges the sufficiency of the evidence supporting a guilty verdict. *Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989). Since Johnson did move for a JNOV, we review the evidence on the last occasion when Johnson challenged the sufficiency of the evidence before the trial court, at the time of his motion for JNOV. *McClain*, 625 So. 2d at 778; *Wetz*, 503 So. 2d at 807-08.

Johnson argues that the lower court should have granted his motion for a JNOV because without his statements and confessions to law enforcement officers, the State has no other evidence linking him to the crime. Johnson argues that his statements were given under duress and harassment, and were erroneously admitted into evidence over his objections. However, Johnson failed to attend the pre-trial hearing on his motion to suppress, and did not bring the matter to the trial court's attention until the day of trial. By failing to attend, Johnson abandoned the motion to suppress, and ultimately waived any right to that motion. Rule 2.04 of the Uniform Rules of Circuit and County Court states, in pertinent part, as follows:

Failure to pursue a pretrial motion to hearing and decision before trial is deemed an abandonment of that motion; however, said motion may be heard after the commencement of trial in the discretion of the court.

URCCC 2.04.

The movant has the responsibility to obtain a ruling from the court on motions filed by him, and failure to do so constitutes a waiver of that motion. *Holly v. State*, 671 So. 2d 32, 36 (Miss. 1996); *Billiot v. State*, 454 So. 2d 445, 456 (Miss. 1984). By failing to attend, Johnson waived his right to challenge the admissibility of his confessions. The trial court did not err by admitting Johnson's statements into evidence.

Without waiving the procedural bar, we find Johnson's assertion that his statements were coerced and the result of duress to be without merit. When Johnson was brought in for questioning, he was read his *Miranda*⁽¹⁾ warnings from a waiver form. He read the waiver form and initialed the form in relevant parts. He signed the form, waiving his rights. He then gave a statement to the police. His statement was reduced to writing and signed by Johnson. He came back to the police station five days later and gave the police another statement. The second statement was factually similar to the first. This statement was reduced to writing and signed by Johnson. Both Officer Thomas and Chief King stated that no force or threats of force were used on Johnson, and that no promises or hopes of reward was extended to Johnson in exchange for his cooperation. However, each admitted to telling Johnson during the first interview that Mickey Smith had implicated Johnson in the crime, when in

fact, neither officer had interviewed Mickey Smith. Also, throughout this period, Johnson was cooperating with the police in an effort to obtain incriminating evidence against Mickey Smith and Pamela Griffin. He tape recorded a phone conversation with Betty Smith, Mickey's wife, and he wore a wire during a conversation with Griffin. Based on the above evidence, we conclude Johnson understood his rights, and freely and voluntarily waived those rights.

Further, Johnson was allowed to attack the voluntariness of his statements during the cross-examination of Officer Thomas and Chief King, and also, during the direct examination of himself. The jury was fully aware of Johnson's contention that his statements were the result of coercion and threats of jail time. The jury did not buy Johnson's story.

The trial court has the discretionary authority to set aside the jury's verdict and order a new trial only where the court is "convinced that the verdict is so contrary to the weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice." *Roberts v. State*, 582 So. 2d 423, 424 (Miss. 1991) (citations omitted). Based on the record before us, and Johnson's statements to the police, we conclude that there was sufficient evidence to support the jury's verdict. Therefore, both assignments of error are without merit.

THE JUDGMENT OF THE YALOBUSHA COUNTY CIRCUIT COURT OF CONVICTION ON COUNT I OF CONSPIRACY WITH A SENTENCE OF FIVE YEARS AND FINE OF \$1,000.00 AND CONVICTION ON COUNT II OF EMBEZZLEMENT WITH A SENTENCE OF FIVE YEARS AND RESTITUTION IN THE AMOUNT OF \$3,000.00 TO THE VICTIM IS AFFIRMED. THE SENTENCES IMPOSED ARE TO RUN CONCURRENTLY, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS. ALL COSTS OF THIS APPEAL ARE ASSESSED TO YALOBUSHA COUNTY.

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

1. *See Miranda v. Arizona*, 384 U.S. 436 (1966).