

IN THE COURT OF APPEALS 01/28/97

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

MANDATE ISSUED: 6/24/97

BEFORE THOMAS, 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. We find a need for further proceedings on this issue, and therefore remand.

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 10-year calendar, unless McGee was not incarcerated. 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 also note that the trial court assumed that the date of the testimony was the correct termination of the 10-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 10 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. We have examined the record to determine whether the trial court made an on-the record analysis. The issues involved were first the subject of a pre-trial motion in limine hearing. The court sustained the motion in limine as to the burglary conviction, but held that the grand larceny convictions would be admissible under Rule 609 (a)(2). The court found that a then-recent supreme court precedent had 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 *crimen falsi* question really does not matter, however, since for a conviction more than 10-years old as calculated under Rule 609(b), the *Peterson* factors must be applied.

The issue was again raised at trial. In response, the judge stated that "if we have a conviction that is more than ten years old, then the Court may allow such conviction only if the Court determines in the interest of justice that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. So [it is] even a heavier burden, where the Court would be less inclined in weighing out the situation to indeed admit the evidence. . . ." He concluded:

I think the Court has to look at it from the standpoint of when the convictions were obtained, and the date on which the convictions are being offered for admission into evidence. And here there is a grand larceny conviction that was obtained on October 31, 1983, in DeSoto County, County Court, Criminal Division, at which time Judge Barbee, on a plea of guilty by this defendant to grand larceny, sentenced this defendant to three years in the state penitentiary, to run concurrently with other time that he was receiving or had received. That grand larceny conviction was a result of an indictment charging this man with having stolen three motorcycles from an individual. And then over in Sumner, in Tallahatchie County, Second District, on March 6, 1984, this defendant, Floyd Everette McGee, pleaded guilty before Judge Baker to the crime of grand larceny, which involved breaking into a drug store over there in Sumner, and then stealing assorted jewelry, and colognes, and perfumes, and Kodak cameras, and insulin syringes, and Timex watches, and \$350.00 cash, and an undetermined amount of drugs, including Valium, and Librium, and Percodan, and Tylenol III. And the defendant, again, was convicted on March 6, 1984, for that grand larceny. So as to those grand larceny convictions, notwithstanding the fact that they may be over ten years old, and with the Court now having the evidence before it here, still the Court feels that in the interest of justice that the probative value of allowing these convictions, supported by the specific facts and circumstances of this case that is before the Court at this point, then substantially outweighs its prejudicial effect. In other words, the Court finds specifically that the probative value of these prior grand larceny convictions, even though they are a little over ten years old, but still the probative value of the convictions, supported by the specific facts and circumstances, substantially outweighs its prejudicial effect. So the Court will allow those prior grand larceny convictions to be used.

We have quoted at length to highlight all that the trial court said on the issue. We see no consideration of the third, fourth and fifth factors. The court may have determined that the *Peterson* process, the on-the-record analyzing of five factors, need not be followed since these were 609(a)(2) crimes. As already discussed, the same process is in fact required for crimes over ten-years old. *Johnson*, 529 So. 2d at 587. The court understood the need to determine under 609(b) whether specific circumstances existed that caused the probative value *substantially* to outweigh prejudice. What he did not do, however, is make the "heightened" 5-part *Peterson* analysis on the record. *Peterson* itself suggested that a remand just for a hearing to make on-the-record findings was appropriate, unless the evidence "was manifestly prejudicial," i.e., the balancing would have to result in exclusion of the evidence. *Peterson*, 518 So. 2d at 638.

We therefore remand the case for a hearing on the *Peterson* issue. At that time the fact question of

whether these convictions were more than 10-years old as Rule 609(b) calculates time can be addressed. The purpose of that is to measure whether Rule 609(b) is applicable.

THIS MATTER IS REMANDED TO THE TATE COUNTY CIRCUIT COURT FOR A MAXIMUM PERIOD OF SIXTY DAYS WITHIN WHICH THE COURT IS DIRECTED TO CONDUCT A *PETERSON* REVIEW OF THE 1983 AND THE 1984 GRAND LARCENY CONVICTIONS THAT WERE EARLIER RULED TO BE ADMISSIBLE. IF THE TRIAL COURT FINDS THAT EITHER SHOULD NOT HAVE BEEN ALLOWED AS IMPEACHMENT, THE COURT IS DIRECTED TO ORDER A NEW TRIAL. IF A NEW TRIAL IS ORDERED OR THE CASE IS OTHERWISE FULLY DISPOSED OF AT THE TRIAL LEVEL, THE TRIAL COURT SHALL FORWARD TO THIS COURT A CERTIFIED COPY OF THE RELEVANT ORDER SO THAT WE MAY REVERSE AND REMAND THE JUDGMENT. ALTERNATIVELY, IF AFTER THE COURT DETERMINES BOTH CONVICTIONS WERE PROPERLY ADMISSIBLE AS IMPEACHMENT, THE TRIAL COURT'S ON-THE-RECORD FINDINGS SHALL BE CERTIFIED TO THIS COURT WITH A TRANSCRIPT OF THE HEARING HELD ON THIS MATTER. UPON OUR RECEIPT, THIS COURT WILL RESUME PROCEEDINGS ON APPEAL. IF ADDITIONAL TIME IS NEEDED TO CARRY OUT THIS JUDGMENT, THE TRIAL COURT SHALL CERTIFY TO THIS COURT THE REASON FOR THE NEED AND LENGTH OF ADDITIONAL TIME NEEDED.

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

BARBER, J., CONCURS IN RESULT ONLY.