

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GEORGE LEE BUTLER

APPELLANT

V.

NO. 2008-KA-0883-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

Erin E. Pridgen, MS Bar No. [REDACTED]

301 North Lamar Street, Suite 210

Jackson, Mississippi 39201

Telephone: 601-576-4200

Counsel for George Lee Butler

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

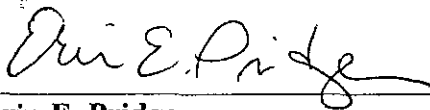
1. State of Mississippi
2. George Lee Butler, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Charles E. Webster, Circuit Court Judge

This the 24th day of October, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



Erin E. Pridgen
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF THE ISSUE

THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO CONDUCT A *PETERSON* HEARING OR 403 BALANCING ACT CONCERNING BUTLER'S PRIOR CONVICTIONS AND "BAD ACTS."

STATEMENT OF THE CASE

On February 5, 2008, George Lee Butler was indicted, as a habitual offender, for burglary of a dwelling by a Tunica County, Mississippi grand jury. The Honorable Charles E. Webster, Circuit Court Judge, presided over the one-day trial, held on April 15, 2008. The jury returned a guilty verdict and Butler was sentenced to serve twenty-five (25) years, without possibility of probation or parole, in the custody of the Mississippi Department of Corrections.

Butler timely noticed this appeal on May 21, 2008.

FACTS

On September 29, 2007, Otis Whalen returned to his home at 1020 Grant Street in Tunica County, Mississippi, to find that his home had been burglarized. [Tr. 71-73] He discovered that his

trailer was torn apart and his gun and jewelry were missing. [Tr. 72]. According to Whalen, he purchased the gun for approximately \$400-500 and the jewelry was worth about \$2,000. [Tr. 73]. After making a police report and contacting neighbors, Whalen recovered his property from Bobby Braxton between the hours of 6:00-7:00p.m. that evening. [Tr. 74] Whalen paid Braxton about \$140 to retrieve his property. [Tr. 74]

According to Whalen, he received a phone call from the defendant, George Butler, sometime earlier during the evening, prior to recovering his property. [Tr. 75] Whalen and Butler had been friends for all of Butler's life. Whalen said Butler called him and admitted to breaking into his house, while promising to assist Whalen in retrieving his property. [Tr. 80] According to Butler, however, he only called Whalen to inform him that *he only knew* who had broken into Whalen's house and that he would help retrieve the belongings. [Tr. 105]

Butler testified that, on the night of the burglary, he was leaving a club when a man named Jake Cotton stopped him and asked him to sell the gun and jewelry to a guy named Bobby Braxton. [Tr. 103]. Butler suspected this property was stolen but he did not know the property belonged to Whalen until the following day. [Tr. 105] When the police arrested Butler, Butler signed a statement that he committed the burglary. [Tr. 103] Butler stated that he signed the statement because the police promised to assist him with drug rehabilitation and with a sentencing deal. [Tr. 104]

SUMMARY OF THE ARGUMENT

The trial court committed plain error in allowing Butler's prior convictions and bad acts into evidence. Under the prior convictions, the trial court erred in failing to hold a Peterson hearing to weigh the probative value of the evidence. The court also allowed the State to introduce Butler's prior bad act, the accusation that he had previously burglarized Whalen's house. All this evidence, taken together, was highly prejudicial and requires the Court to reverse the trial court's decision.

ARGUMENT

THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO CONDUCT A *PETERSON* HEARING OR 403 BALANCING ACT CONCERNING BUTLER'S PRIOR CONVICTIONS AND "BAD ACTS."

During trial, Butler generally admitted that he had several felonies, one of which included a count of uttering forgery. [Tr. 101-02] However, the State, during cross-examination, questioned Butler about individual convictions that were listed on his indictment. [Tr. 108-09] These felonies included the following:

Cause No.	Court of Conviction	Date of Conviction	Offense	Date of Offense	Sentence (Years)
3117	Cir.Ct. Tunica County, MS	09/25/96	Poss. Of C/S	07/12/96	3
3251	Cir.Ct. Tunica County, MS	03/06/97	Poss. Of C/S	10/31/96	2
04-0228	Cir. Ct. Tunica County, MS	06/07/05	Poss. Of C/S	08/11/03	2
05-0003	Cir. Ct. Tunica County, MS	07/08/05	Uttering Forgery	5/29/04	1
05-0030 Ct.I	Cir.Ct. Tunica County, MS	07/08/05	Burlary of Bus.	07/26/04	4
05-0030 Ct. II	Cir. Ct Tunica County, MS	10/15/04	Burglary of Bus.	07/26/04	4
05-0169 Ct. I	Cir.Ct. Tunica County, MS	08/29/05	Auto Theft	02/16/05	5

05-0169 Ct. II	Cir.Ct Tunica County, MS	08/29/05	Escape	02/16/05	5
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R.E 3

These prior convictions were admitted into evidence without an on-the-record discussion of whether these felonies were admissible or not, pursuant to Rule 609 of the Mississippi Rules of Evidence. Rule 609 of the Mississippi Rules of Evidence addresses the admissibility of prior convictions by stating, in pertinent part, the following:

- (a) *General Rule.* For the purpose of attacking the credibility of a witness,
 - (1) evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted if the court determines that the probative value or admitting this evidence outweighs its prejudicial effect to the party; and
 - (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment. . . .

M.R.E 609.

Butler's prior conviction of uttering a forgery would be admissible under Rule 609 (2), as this is a crime that involves "dishonesty or false statement." However, Rule 609 (a)(1)(B) requires that a court must determine that the probative value of the evidence outweighs its prejudicial effect. *Triplett v. State*, 88 So. 2d 303, 305 (Miss. 2004). The trial court is required to make the Rule 609(a)(1)(B) determination in an on-the-record finding, as a result of the Mississippi Supreme Court's holding in *Peterson v. State*, 518 So. 2d 632, 636 (Miss. 1987)¹.

¹While *Peterson* requires the trial court to conduct a balancing test on the record, Butler recognizes that this requirement has been modified by the Court's holding in *DeLoach v. State*, 722 So. 2d 512 (¶34) (Miss. 1998). In *DeLoach*, the Court determined that the failure to conduct the balancing test on- the- record, may be considered harmless error if, when in light of the overwhelming weight of the evidence, the defendant is found guilty. *Id.*

In *Peterson*, the Court announced the following five factors the trial court should consider in weighing the admissibility of prior convictions under Rule (a)(1)(B):

- (1) The impeachment value of the prior crime
- (2) The point in time of the 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
- (5) The centrality of the credibility issue.

Peterson, 518 So. 2d at 636-39.

During trial, the defense counsel failed to object to the introduction on Butler's prior convictions without the *Peterson* hearing. [Tr. 108-09]. Failure to make a contemporaneous objection at trial, otherwise procedurally bars the issue on appeal. *Ratliff v. State*, 906 So. 2d 133, 136 (¶7) (Miss. Ct. App. 2004). However, this Court should consider this issue under the plain error doctrine. The plain error doctrine requires the Court to consider this error when a manifest miscarriage of justice occurred as the result of the error. *Id.* Plain error is only applied when the defendant's substantive or fundamental rights are affected. *Williams v. State*, 794 So. 2d 181, 187 (¶23) (Miss. 2001).

PRIOR "BAD ACTS"

The trial court failed to make any determination on any of the Peterson factors. In addition to the prior convictions, the trial court also allowed evidence of prior "bad" acts into evidence, without any determination of its admissibility. During cross-examination, the following colloquy took place:

- (STATE) Q: Did you ever break in that [Whalen's] house?
(BUTLER) A: I ain't never broke in the house.
Q: This isn't the second time you broke in that house?
A: I ain't never broke in that house.
Q. You didn't break in Otis Whalen's house, and he forgive (sic) you once?
A. Otis Whalen never forgive me for breaking in the house because I ain't

broke in that house....

[Tr. 112, Lns 8-15]

The State called Whalen as a rebuttal witness and the following took place:

- (STATE) Q: Mr. Whalen, is this the first time the defendant has broken into your house?
- (WHALEN) A: No, the second time.
- Q: When was the first time?
- A: The first time probably - - probably a couple of years ago.
- Q: And how did you know he did the first one?
- A: Another guy caught him.
- Q: Caught him?
- A: Well, he saw him.
- Q: And are you sure he broke in your house the first time?
- A: Well, he didn't get in - - quite get in because he was - - a guy was looking at him doing it.
- Q: And he pulled him out of the house?
- A: No, he ran.

[Tr. 155-16. Lns. 29, 1-13]

On cross-examination of Whalen, the following occurred:

- (DEFENSE) Q: Okay. And you distinctly remember that incident when you say he went in the house, but he didn't go in the house?
- (WHALEN) A: He didn't get in. He was - - he was almost in. Like I say, he had the door about to come open, but another guy over the back street was up.
- - -
- Q: . . And you saw that with your own eyes? Yes or no?
- A: No.

[Tr. 117, Lns 19-23; Tr. 118, Lns17-18]

Mississippi Rule of Evidence 404 (b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or intent.

M.R.E. 404 (b).

In this case, the State introduced testimony that Butler had attempted to burglarize Whalen's house in the past. This information was notably based on hearsay, as brought out during Whalen's cross-examination. This evidence should have been excluded through M.R.E. 403, which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

M.R.E.403

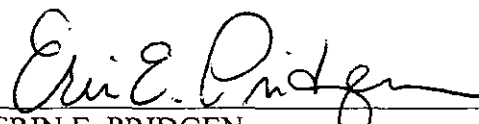
Hearsay evidence of Butler's alleged prior home burglary was extremely prejudicial and the probative value is substantially outweighed by the danger of unfair prejudice. The similarity of events arguably led to the confusion of the issues and the evidence should have been excluded.

CONCLUSION

The trial court erred in allowing the introduction of prejudicial evidence which included Butler's prior convictions and alleged bad acts. The court committed plain error by failing to conduct a *Peterson* hearing on the prior convictions. Likewise, the State's attempt to introduce a prior bad act was so prejudicial, it created an irreversible prejudice. This Court should consider these errors under the plain error doctrine.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


ERIN E. PRIDGEN

MISSISSIPPI BAR NO. [REDACTED]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

CERTIFICATE OF SERVICE


I, Erin E. Pridgen, Counsel for George Lee Butler, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Charles E. Webster
Circuit Court Judge
Clarksdale, MS 38614

Honorable Laurence Y. Mellen
District Attorney, District 11
Post Office Box 848
Cleveland, MS 38732

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 24th day of October, 2008.


Erin E. Pridgen
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200