IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EARNEST LEE WILSON, JR. APPELLANT

VS. NO. 2007-KA-01532-COA

STATE OF MISSISSIPPI APPELLEE

APPEAL FROM
THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY

REPLY BRIEF FOR APPELLANT

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ARGUMENT OF ISSUES

ISSUE ONE

THE INDICTMENT FAILED TO STATE AN ELEMENT OF THE CRIME OF EMBEZZLEMENT, SECTION 97-23-19

Apparently, Wilson's argument of this issue was misunderstood by the State. The two categories of potential victims to which Wilson referred in his Brief for Appellant were (1) "any incorporated company," or (2) "any private person." Specifically, the indictment failed to allege that Wilson was a "director, agent, clerk, servant, or officer," and that the victim was an "incorporated company," or that Wilson was a "trustee, factor, carrier, bailee, clerk, agent, or servant" of a "private person." Obviously, Ms. Anderson was not an incorporated company, and therefore, the indictment failed to state that Wilson was a "trustee, factor, carrier, bailee, clerk, agent, or servant" of Ms. Anderson, a private person.

The State says in its Brief that the entities set out in sub-sections (1) and (2) refer to the perpetrator, not the victim of embezzlement. That is incorrect. Simply stated, Wilson's argument is that the indictment failed to allege that Ms. Anderson was a private person and that Wilson was her "trustee, factor, carrier, bailee, clerk, agent, or servant."

ISSUE TWO

PERMITTING THE TESTIMONY OF WITNESSES GRIFFIN, CHAMBERS, AND BRUNSTON VIOLATED M.R.E. 403 AND 404(B).

The State says that the testimony of the three women "constituted proof of modus operandi, a recognized exception to the

prohibition of evidence of other crimes." (Brief for the Appellee, p.9). However, Jury Instruction 7 states that the testimony of the three women was to be considered "only for the limited purpose of showing intent or absence of mistake or accident." (C.P. 42) "Intent, or absence of mistake or accident" are not synonymous with "modus operandi."

The State does not address Wilson's argument that the trial court apparently allowed the testimony, because it believed character was an issue. Again, the trial court said, "And I believe character is an issue in this case." (Brief for Appellant, p. 12).

Further, the State fails to address the issue that the incidents about which the three women testified were not "interconnected" with that involving Ms. Anderson. Ms. Anderson said that she first met Wilson in November, 2005 (T. 180). The last payment made by Ms Anderson to Wilson was in February, 2006 (Exhibit S-2, p. 92). Tamie Griffin could only say that it was in the summer of 2005 that she had dealings with Wilson (T. 180). Crystal Chambers said that it was "toward the end of 2006" that she had dealings with Wilson (T. 181). Lotonia Brunston said that it was in 2005 that she had dealings with Mr. Wilson (T. 186). The significant gaps in time between these various dealings do not satisfy the requirement stated in Neal v. State, 454 So. 2d 743 (Miss. 1984), stating in part:

> Proof of another crime is admissible where the offense and that offered to be proved are so interrelated as to constitute a single

> transaction or occurrence or a closely related series of transactions or occurrences. (Brief for Appellant, p. 13).

The State cites three cases in support of its contention that, "These cases contradict Wilson's argument that other crimes or acts admitted pursuant to Rule 404(b) must be interconnected with the charged offense in order to be admissible." (Brief for the Appellee, p. 9). That statement by the State seems to ignore the ruling in Neal, supra, with respect to the necessity for interconnectedness. The cases cited by the State, Winding, Ford, and Fisher, are not analogous to the case at bar. In Winding the defendant objected solely on the ground of relevance concerning handcuffs being in his vehicle. There was no suggestion of any separate crime or wrong as in the case at bar. In Ford, the Court says:

> Appellee asserts that in at least the case of forgery, this Court has recognized that: "... evidence of similar transactions committed at or about the same time as a forgery offense, is admissible for the purpose of proving identity, intent, knowledge or a common scheme to defraud. " Harrington v. State, 336 So. 2d 721, 722 (Miss. 1976). Accord, Thompson v. State, 309 So. 2d 533 (Miss. 1975)." (underline supplied)

It seems clear that the significant phrase in Harrington, supra, in which this Court's intent is plain is "... at or about the same time..." Id., at 722. Ford, at 694. Thus, in Ford, the State admitted that the transactions had to be "at or about the same time." Further, Ford involved modus operandi, which the Court says is the equivalent of "plan." Again, Jury Instruction 7 did not

instruct the jury that it can consider the testimony of the three persons as evidence of a "plan."

ISSUE THREE

THE CONDUCT OF THE SENTENCING PHASE VIOLATED WILSON'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION AND HIS RIGHT TO DUE PROCESS

The State says that if there was any error, it was harmless, because the trial court had to impose a ten year sentence. The State's argument ignores the fact that the trial court had the authority to impose less than the maximum sentence imposed by statute. Bonner v. State, 962 So. 2d 606 (Miss. App. 2006); Flowers v. State, 522 So. 2d 762 (Miss. 1988).

The State's Brief says that Wilson's statements to the Court could not have had an effect on the outcome of sentencing, presumably, because of the State's contention that the sentence was mandatory. The State cites Kohlberg v. State, 829 So. 2d 29, 67 (Miss. 2002) for what constitutes "harmless error." Kohlberg says the basic test for harmless error is:

> [T]he inquiry is not whether the jury considered the improper evidence or law at all, but rather, whether the error was unimportant in relation to everything else the jury considered on the issue in question.

If the sentence imposed by the Court was mandatory, which it was not, then there was absolutely no need for the trial court to question Wilson about his past acts. Apparently, the trial court believed that its questions and Wilson's answers were important to the sentence Wilson should receive, otherwise, the questions would not have been asked.

As argued in his initial Brief, Wilson was questioned by the Court even after he stated he had nothing to offer. The State apparently suggests that Wilson should have either ignored the Court's questions or have told the Court for the second time he did not want to answer the Court's questions. The trial court's colloquy with Wilson was obviously not cordial, and Wilson easily could have thought that the wrath of the Court could be imposed upon him if he refused to answer the Court's questions, again, after he had already said he had nothing to offer.

The State cites Strohm v. State, 845 So. 2d 691 (Miss. App. 2003) for the proposition that a Fifth Amendment objection may be barred "for failure to interpose a proper objection." In Strohm the Defendant was represented by counsel, who objected during trial, not on Fifth Amendment grounds, but for religious reasons. Strohm is not analogous to the case at bar. Wilson, in effect, raised a Fifth Amendment objection by telling the Court, prior to its questioning of him, that he had nothing to say. Again, as argued in the Brief for Appellant, once Wilson chose to remain silent, then all questions by the trial court should have ceased.

ISSUE FOUR

THE STATE FAILED TO SATISFY ITS BURDEN OF PROOF AS TO THE ELEMENTS OF EMBEZZLEMENT, AND THE COURT SHOULD HAVE GRANTED WILSON'S MOTION FOR DIRECTED VERDICT AND MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, JUDGMENT NOTWITHSTANDING THE VERDICT.

The State's argument does not address the issue of a necessary element not being included in Jury Instruction 8, nor in the indictment. Because there was no evidence that Wilson was a "trustee, factor, carrier, bailee, clerk, agent, or servant" of Ms.

Anderson, he could not be convicted. Because that element was not included in Jury Instruction 8, the jury could not make a finding that that element was proven beyond a reasonable doubt.

CONCLUSION

Due to the State's failure to include in the indictment a necessary element of the crime of embezzlement and in Jury Instruction 8, stating the elements of the crime which the State had to prove, the conviction of Wilson should be reversed. It would violate the Double Jeopardy clauses of the U.S. Constitution and Mississippi Constitution to re-try Wilson, and therefore, this Court should render a decision in favor of Wilson. The State failed to satisfy its burden of proof that Wilson committed the crime of embezzlement, and therefore, the conviction of Wilson should be reversed and a decision rendered in his favor. In the alternative, the conviction of Wilson should be reversed and the matter remanded to the Circuit Court for a new trial.

Respectfully submitted,

DONALD W. BOYKIN
ATTORNEY FOR EARNEST LEE WILSON, JR.

CERTIFICATE OF SERVICE

I, Donald W. Boykin, hereby certify that I have this day mailed by United States Mail or hand delivered, a true and correct copy of the Reply Brief for Appellant to:

a. Hon. William E. Chapman, III, Circuit Judge;

b. Hon. Diedre McCrory, Special Assistant Attorney General; and

c. Hon. Michael P. Guest, District Attorney

This the 16th day of May, 2008.

Donald W. Boykin

DONALD W. BOYKIN