

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEVIN EUGENE OWEN

APPELLANT

V.

NO. 2008-KA-1469-COA

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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In accordance with Rule 34 (b) of the Mississippi Rules of Appellate Procedure, the Appellant requests oral argument in this case before the Court. This case involves fact-intensive analysis and the Appellant believes that oral argument will greatly aid the Court in its disposition of this case.

REPLY ARGUMENT

I. CHARLES STREET'S STATEMENT WAS TESTIMONIAL IN NATURE AND THE COURT ADMITTED SUCH STATEMENT IN DIRECT VIOLATION OF *CRAWFORD V. WASHINGTON*. AS THIS IS A CONSTITUTIONAL VIOLATION, THERE CAN BE NO HARMLESS ERROR TO THIS ISSUE.

In its brief, the State argues that Charles Street's taped statement should have been admissible because the statement was made to law enforcement officer during the course of its investigation.

[Appellee's Brief, 6] "First, the State would argue that [Charles Street's statement] was not hearsay but offered to show the officers developed their investigation about defendant's tattoo." [Appellee's Brief, 5]

Keith Oubre, the district attorney's investigator, questioned Street during the audio recording in question. [Tr. 354]. The defense can find no evidence in the court's record that Oubre was a law enforcement officer. [Tr. 354-356] This concession by the State that Oubre was a law enforcement officer, however, has placed the issue of Street's uncontested statement squarely in the realm of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

In *Crawford*, the Supreme Court held that, in order for out-of-court testimonial statements to be admitted, the Sixth Amendment's Confrontation Clause requires that the declarant is both unavailable and that the defendant had the prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. at 68, 124 S. Ct. at 1374; *Burchfield v. State*, 892 So. 2d 191, 202 (¶41) (Miss. 2004).

Although the *Crawford* Court declined to define testimonial statements, it announced that, at a minimum, the confrontation clause applies to police interrogations. *Crawford*, 541 U.S. at 68. In Mississippi, the Courts have found that a statement is testimonial, "when it is given to the police or individuals working in connection with the police for the purpose of prosecuting the accused." *Hobgood v. State*, 926 So. 2d 847, 852 (¶12) (Miss. 2006).

Charles Street's statements to the district attorney's investigator regarding Owen plans to evade prosecution were testimonial statements. Although the court declared Street an unavailable witness at trial, the court erred in admitting Street's statements because Owen had no opportunity to cross-examine Street. [Tr. 369].

The court's error in admitting Street's testimony is an egregious error and cannot be

classified as harmless error. Street's testimony was the only testimony offered that indicated he had personal knowledge that Owen received the questionable tattoo while in jail and that Owen sought Street's assistance in devising a plan to avoid in-court identification during trial. Owen had no opportunity to exercise his constitutional rights to confront his accuser. The defense prays that this Court reverse this case, accordingly.

II. THE ONE-PERSON SHOW UP IDENTIFICATION WAS IMPERMISSIBLY SUGGESTIVE AND, BASED ON THE TOTALITY OF THE CIRCUMSTANCE, THERE WAS INSUFFICIENT EVIDENCE TO SUBSTANTIATE THE COURT'S FINDING THAT NO PREJUDICE OCCURRED.

The State argues that, despite the police participation in the highly-condemned practice of "show-up" identifications, there was still sufficient evidence to suggest that the one-person identification was reliable in this case. [Appellee's Brief, 3]. The State argues that "the detail the witness remembered were very exacting down to the stripe on the bottom of the robber's shoes." [Appellee's Brief, 4]. The State also mentions that the clerk gave, "an exacting and detailed description and correlated facts he witnessed to the man in the back of the patrol car." [Appellee Brief, 2].

To the contrary, the court record indicates that there were many inconsistencies in the store clerk's description of the robber and Kevin Owen's appearance when he was arrested by police. First, Paul Holmes, the store clerk, testified that he did not get a look at the robber's face. [Tr. 159]. Holmes gave a statement to police that he could not identify the store's robber. [Id.] However, during trial, Holmes was able to identify Kevin as the person in the back of the patrol car that evening. [Tr. 154]. This identification is indicative of the prejudicial nature of the show-up identification.

Holmes description of the robber's clothing also varied from the clothing Owen's wore when he was arrested. According to the surveillance video in the store, the robber wore a white shirt and

blue shorts. [Tr. 166] When taken to the store for identification, Owen wore a gray shirt and gray shorts. [Tr. 180] Likewise, Holmes did not see Owen's height when identifying him in the back of the patrol car as Owen remained in the car the entire time during the identification. [Tr. 183] Holmes had no opportunity to compare Owen's height with that of the robbers.

The State mentions the surveillance video that showed the robber wore a short-sleeved shirt and small tattoo on forearm. [Appellee's Brief, 2]. There is inconclusive evidence in the record to support the assertion that the robber had a small tattoo in the surveillance video. The store clerk testified that he did not remember seeing any tattoos on the robber. [Tr. 176] Even after reviewing the surveillance tape, Holmes testified that he did not see any tattoo and would have informed the police if he had seen a tattoo. [Tr. 177]. Likewise, photos taken of Owen's arm prior to trial show Owen had a visibly large tattoo on the forearm. [Tr. 35]

Considering the totality of the circumstances, there is insufficient evidence to find that the "show-up" identification was permissible.

CONCLUSION

Based on the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, Kevin Owen, contends that the trial judge committed reversible error by denying his constitutional right to confront his accuser. Owen was also denied due process when the police subjected him to an impermissibly suggestive “show-up” identification procedure. Owen prays that this Court reverse and render the trial court’s decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Erin E. Pridgen, Counsel for Kevin Eugene Owen, 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 **REPLY BRIEF OF THE APPELLANT** to the following:

Honorable Robert Helfrich
Circuit Court Judge
Post Office Box 1914
Hattiesburg, MS 39403-0309

Honorable John Mark Weathers
District Attorney, District 12
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This the 8th day of June, 2009.


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