IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHELBY LEROY CHISHOLM — APPELLANT

V. — NO. 2009-KA-0913-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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CERTIFICATE OF INTERESTED PERSONS

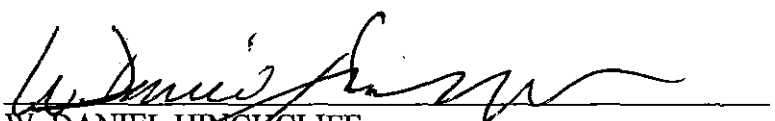
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Shelby Leroy Chisholm, Appellant
3. Honorable Ronnie Harper, District Attorney
4. Honorable Forrest A. Johnson, Circuit Court Judge

This the 17th day of September, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE COURT ERRED IN CONSIDERING APPELLANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO A TRIAL IN SENTENCING.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Amite County, Mississippi, and a judgement of conviction for the crime of sexual battery against Shelby Leroy Chisholm following a jury trial commenced on May 21, 2009, honorable Forrest A. Johnson, Jr., Circuit Judge, presiding. Upon a verdict of guilty, Chisholm was sentenced to serve a term of thirty (30) years. He is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

Prior to trial, the court heard a motion to suppress Chisholm's statements to law enforcement. Chisholm had asked to speak with law enforcement after having been appointed an attorney. The trial court ruled the statement could not used in the States case in chief, but could be used for impeachment. (C.P. 7, T. 30-33). After explaining the factual and legal reasoning for it's decision on the motion to suppress, the trial court addressed the defendant. The court advised Chisholm that

by exercising his right to go to trial, he was forcing a nine-year-old girl to testify to testify to personal matters in front of "a lot of people." Chisholm was warned that if he went to trial the court would "take [that] into consideration" at sentencing. (T. 35) At this juncture, the District Attorney noted for the record that Chisholm had been offered a plea to a lesser charge. (T. 35-36)

At trial the State's proofs began with Donna Shipman["Shipman"], adoptive mother and grandmother of the victim "Jane Doe."[1] The defendant, Shelby Chisholm, was married to her daughter, Jennifer Chisholm. Around January 1, 2009, Shipman was at a restaurant with Jane and Shipman's grandmother. After Jane made a comment about sex, Shipman followed her to the bathroom and inquired of Jane to what she had been referring. The reply was "I said my daddy sexed me." When asked to explain, Jane advised how she had been taken to a bed room and what had happened. (T. 42-45)

Jane was taken to the Southwest Mississippi regional Medical Center where she was examined. She was informed that the examining doctor found 'no hymen." (T.45) Jane spoke with detectives and the next day with a representative of the Department of Human Services. A video interview was done at the Children's Advocacy Center in McComb. (T. 46)

Shipman also had a meeting with Chisholm after his arrest. "He admitted to me right then and there when I asked him that he had done this." (T. 48) Shipman told the jury she was close to Chisholm, that he was the "[b]est son-in-law [she] had ever met up until this happened."

The defense brought out that Jane had not been feeling well immediately prior to having been taken to the hospital. She was given a Pepcid AC and reported no further discomfort. (T. 48-49)

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[1] "Jane Doe",["Jane"], is a pseudonym adopted to protect the name of the minor victim.

Jane Doe then testified. She was nine years old at trial and at the time of the incident. She explained that telling the truth meant not lying. She said that Chisholm lived next door to her grandmother. She was at Chisholm's house, making birthday cards for her grandmother, whose birthday was November 8th. According to Jane, Chisholm took her into his room where "[h]e sexed me" and "[h]e tried to hurt me." (T. 55) Chisholm told her to take her pants and underwear down. His pants were down. She said Chisholm "hurt [her] with his dick." He pushed it hardier (sic) and hardier until it hurts." (T. 56) The pushing had been in her "hiney and butt." Viewing pictures of body parts used during the forensic interview she clarified that "hiney" was her vagina. (T. 56-57) Chisholm instructed her to not tell.

Jane had been staying with Chisholm and her biological mother at that time in November. She answered the question of why she waited two months to come forward by explaining she "got tired of it" and she feared she would not be believed. (T. 59)

Outside the presence of the jury the court made a record of allowing Mrs. Shipman testify on what she had been told by Jane. The Court stated that Jane was clearly of tender years. The statements were spontaneous. Verbatim details were not allowed. (T. 61-62) This apparently referred back to the court's overruling a defense objection to hearsay (T. 44) While still outside the presence of the jury, forensic interviewer Lori Tate explained how she conducted her interview with Jane. She used the "RATAC" protocol, allowing the child to identify body parts and tell her story with anatomically correct dolls. The trial court made a finding that the tender years exception applied, that the interviewer was qualified and followed proper procedures. The court found strong indications of reliability. (T. 70-71)

The court further ruled that if the video of the interview was to be shown, that the interviewer "lay the basics" and then let the video speak for itself. (T. 72)

Lori Tate, ["Tate"], was then called as a witness, qualified as an expert, and the jury heard testimony of the forensic interview; then viewed the video. Her opinion was that Jane's behavior and story was consistent with a child who has been sexually abused. (T. 73-79)

Dr. Brett Tisdale was the examining physician at Southwest Regional Medical Center. He examined Jane on January 7, 2009. He found her genitalia normal, but noted her hymen was not intact. After cross examination, the State rested. (T. 84)

The defense motion for directed verdict was denied and after a Culverson advisory, Chisholm chose to not testify. The jury then returned a verdict of guilty. The trial court then imposed it's sentence, stating that his sentence was premised on several factors, including that Chisholm had not done "the right thing" that he had put the victim through a trial: rather than "be[ing] a man about it" and admitting guilt. (T. 108-109)

SUMMARY OF THE ARGUMENT

The trial court committed reversible error when it included Chisholm's exercise of his constitutional right to go to trial as a factor in sentencing.

ARGUMENT

ISSUE NO. 1: WHETHER THE COURT ERRED IN CONSIDERING APPELLANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO A TRIAL IN SENTENCING.

Appellant Chisholm was warned prior to trial by the trial judge that if he went to trial, his exercise of his Sixth Amendment right, his failure to plea would be held against him at the time of sentencing. The trial judge made no secret of his feelings if Chisholm chose to go to trial:

> BY THE COURT: Now, I just want to make sure you understand one thing, and I want you to listen to me.
>
> BY THE DEFENDANT: Yes, sir.
>
> BY THE COURT : Because there is no plea bargaining in this

district, and this is a very serious charge.

BY THE DEFENDANT : I know.

BY THE COURT : And it puts a lot on the Court because in a district where they have plea bargaining, the DA can come to you and say, well, if you plead guilty, we'll recommend. This would be our recommendation of sentence. One of the primary things that's involved in this case from everybody's viewpoint, clearly the State's, the idea of a nine-year-old child having to get up on the witness stand in front of a lot of people here in court and relate things of a very personal nature to people, and I just want to make you understand that in the event that your found guilty, that's clearly one of the things that I take into consideration.

BY THE DEFENDANT : Yes, sir. I understand.

BY THE COURT : I hope you understand what I'm saying here because we are fixing to cross a bridge that can't be uncrossed. I don't know what the evidence is going to show in this case or what the jury is going to do, but I just want you to understand and let me say this. It's not a matter of– you have an absolute right to go to trial, but in the event you are found guilty, that will be one of the things I take into consideration. Do you understand that? (T. 34-35)

Thus, the court trenchantly informed Chisholm, that if he did exercise his right to a trial, if he chose not to enter a plea, he would be penalized for it. At this point, the District Attorney informed the trial judge that, in fact, there had been a plea offer, to plea to a lesser offense with a maximum sentence of twenty years. (T. 35)

The constitutional right to a trial, and to be confronted by one's accusers, is a fundamental right under both the Sixth Amendment of the Constitution of the United States and the Mississippi Constitution, Article 3, Section 29. Mississippi, along with multiple other States, has long recognized that it is improper to penalize a defendant for exercising such a fundamental right.

> A majority of the jurisdictions in the United States have upheld the principle that a criminal defendant may not receive a harsher sentence solely, or even partially, because he refuses to plead guilty and proceeds to require the prosecution to prove his guilt. The rationale

> behind the principle is that the coercion or the inducement casts a chill over the exercise of guaranteed fundamental constitutional rights. The sentencing court may consider only legitimate factors and cannot base the sentence, either in whole or part, upon the defendant's exercising his constitutional rights to a jury trial.

Fermo v. State, 370 So.2d 930, 932 (Miss.,1979)

The trial court did not forget it's promise. After the jury had returned it's verdict, the court immediately sentenced Chisholm. But as it prepared to pass sentence, it again reminded Chisholm of it's earlier promise and rebuked Chisholm for not entering a plea:

> BY THE COURT : . . . That is disgusting enough, and that's horrifying enough for a child to go through, but you know what a lot of people think is worse than that, and that's when the child has to come up here and sit up here in public upon a witness stand in front of a bunch of strangers on a jury and people in their family that they know out there in the courtroom and have to go through it in detail. That's what's just as bad, and . . . I firmly believe that when you commit an act, you ought to be given a chance to do right after it and a second chance, and a lot of people sitting in your situation do the right thing afterwards, and you know what they do? They come up here and be a man about it, and they save a child from having to go through the second trauma which is coming up here and testifying, but you chose not to do that. . . So I'm sitting up right here and trying to find a reason to cut your sentence down and be lenient with you, and I can assure you if you had been straight forward with this Court as apparently you were willing to do at one time and admit your guilt and come forward and done that and had saved that child from going through that, I would be looking at you as far as a sentence a lot differently. . .

(T. 108-109) There is no question that the trial court imposed a vastly harsher sentence because Chisholm chose to go to trial. The court told him he would have had a very different sentence had he been a man about it and admitted his guilt. This the sentencing court cannot do.

> This Court has held numerous times that "it is absolutely impermissible for a trial judge to impose a heavier sentence based in whole or in part upon a defendant's exercise of his constitutionally protected right to trial by jury." Gillum v. State, 468 So.2d 856, 864 (Miss.1985); Pearson v. State, 428 So.2d 1361, 1365 (Miss.1983);

> Williamson v. State, 388 So.2d 168, 170 (Miss.1980); and Fermo v. State, 370 So.2d 930, 933 (Miss.1979)

Temple v. State, 498 So.2d 379, 381 (Miss.1986)

No objection was made at sentencing and so Chisholm must proceed under a plain error analysis. However, it is inarguable that a persons liberty is a substantive and fundamental right.[2] Every day of incarceration founded on error is a miscarriage of justice. Accordingly, Chisholm is entitled to have this matter reviewed under plain error. *Hubbard v. State,* 886 So. 2d 12, 21 (Miss. App. 2004) , cert. denied Nov. 18, 2004.

Therefore, Chisholm is entitled to have his cause reversed and remanded for re-sentencing. Further, his new sentence cannot exceed the twenty years or less to which he could have entered a plea.

> However, a trial court may not impose a heavier sentence because the defendant exercised his right to a trial by jury than that which the defendant was offered in the plea bargaining process. Johnson, 666 So.2d at 797 (citing Temple v. State, 498 So.2d 379, 381 (Miss.1986)). A sentence must be based only on legitimate factors. Id. (citing Fermo v. State, 370 So.2d 930, 932-33 (Miss.1979)).

Hughes v. State, 983 So.2d 270, 283 (Miss. 2008)

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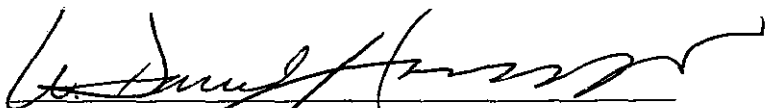
[2]*Watkins v. State*, 350 So. 2d 1384 (Miss. 1977)

CONCLUSION

Chisholm is entitled to have this cause reversed and remanded for re-sentencing for the reasons set forth above.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. [redacted]

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Shelby Leroy Chisholm, 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:

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This the 17th day of September, 2009.

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