



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HAZEL L. CUMMINGS

FILED

APPELLANT

JUL 30 2010

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SUPREME COURT
COURT OF APPEALS

V.

NO. 2009-KA-1896-COA

STATE OF MISSISSIPPI

APPELLEE

REPLY 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. Hazel L. Cummings, Appellant
3. Honorable Anthony J. Buckley, District Attorney
4. Honorable Billy Joe Landrum, Circuit Court Judge

This the 30th day of July, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Justin T Cook
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MISSISSIPPI OFFICE OF INDIGENT APPEALS

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REPLY ARGUMENT

REPLY ISSUE ONE: THE STATE'S RELIANCE ON THE SENTENCE BEING WITHIN THE LIMITS PRESCRIBED BY STATUTE IS IN ERROR.

The State asserts, "Mississippi courts have consistently ruled that "[s]entencing is within the complete discretion of the trial court and is not subject to appellate review if it is within the limits prescribed by statute'." *Nichols v. State*, 826 So. 2d 1288, 1290 (Miss. 2002). The State, however, presents no authority for its position that it is completely within the discretion of the trial court to sentence someone to pay an amount of restitution not proven by the facts presented at trial. **Mississippi Code Annotated §97-23-19**, Mississippi's embezzlement statute, does not reference restitution; therefore, it is appropriate to turn elsewhere in the code for guidance.

As stated in Cummings' initial brief before this Court, **Mississippi Code § 99-37-3(1)**

provides, in pertinent part:

(1) When a person is convicted of criminal activities which have resulted in pecuniary damages, in addition to any other sentence it may impose, the court may order that the defendant make restitution to the victim; provided, however, that the justice court shall not order restitution in an amount exceeding Five Thousand Dollars (\$5,000.00).

Miss. Code Ann. § 99-37-3(1)(emphasis added)

Miss. Code Annotated § 99-37-1(a) defines “criminal activities” as follows: “‘Criminal activities’ shall mean any offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant.” **Miss. Code Ann. § 99-37-1(a)**(emphasis added). While Cummings was convicted of embezzlement in an amount in excess of the statutory minimum, the only evidence presented at trial was of embezzlement from the Daphne store. Therefore, the only “criminal activities” Cummings was convicted of was from her alleged embezzlement of the Daphne Store. No other evidence from the other two stores was ever admitted, and the jury never considered any purported embezzlement from those two stores. Hence, Cummings was not sentenced in conformity with § 99-37-3; rather, she was sentenced based on “criminal activities” that were never proven nor admitted.

The Mississippi Supreme Court was clear in *Powell v. State*, 536 So. 2d 13 (Miss. 1988), when it stated that it was inappropriate for the trial court to consider facts not in evidence when sentencing a defendant to a particular amount in restitution. *Id.* at 16.

REPLY ISSUE TWO: THERE WAS AN OBJECTION TO THE AMOUNT OF RESTITUTION IMPOSED.

The State’s brief relies heavily on the assertion that Cummings did not object to the amount of restitution imposed. This argument is misplaced. During the sentencing proceeding, the following dialogue occurred:

[BY DEFENSE COUNSEL] Your Honor, the State only presented evidence of about \$6000. The State did not present evidence of \$34,000.

[BY THE PROSECUTION] We charged her with embezzlement of a sum in excess of \$500 and that's what she was convicted of.

[BY THE COURT] What were you able to show?

[BY THE PROSECUTOR] I'll have to look back at my notes, Your Honor. But that's the amount of restitution –

(T. 96)(emphasis added).

The trial court then continued to question Cummings. Cummings contends that the above dialogue sufficiently constitutes an objection to the imposition of \$34,000 of restitution. The trial court asked what the State was able to show, and, for whatever reason, the State could not answer. While this line of questioning was not produced fully, trial counsel's words were clearly heard by the trial court, and taken into consideration. Cummings respectfully contends that there is no thaumaturgic language that creates an objection.

The trial court was put on notice as to Cummings' opinion that the \$34,000 in restitution was not supported by the facts presented at trial. It cannot be reasonably argued that trial counsel's statements did not constitute an objection to the amount of restitution ordered. Therefore, the State is incorrect in asserting a procedural bar.

REPLY ISSUE THREE: THE STATE'S RELIANCE ON AND READING OF *POWELL* IS MISPLACED.

The State relies heavily on *Powell v. State*, 536 So. 2d 13 (Miss. 1988), for the proposition that failure to object to a restitution amount based on facts not in evidence results in the issue being waived for appellate review. (Brief for the Appellee P. 13). However, the facts, in the instant case are distinguishable from *Powell*.

In *Powell*, the defendant was convicted of aggravated assault and was assessed restitution in

the amount of the medical bills of the victim; these medical bills were never admitted into evidence. *Id.* at 13-16.

In the instant case, Cummings was convicted and the state brought forth evidence of embezzlement from one store. She was sentenced to restitution on three stores. For *Powell* to be analogous, *Powell* would have had to have been convicted of aggravated assault of one victim, and ordered to pay restitution in the amount of two additional alleged victim's medical bills. Cummings respectfully contends that the trial court violated her due process rights by ordering an amount in restitution that was not supported by any facts on the record.

In statutes which have statutory monetary minimums, the State should not be allowed to submit evidence of a particular amount in order to prove guilt, and, during sentencing, be allowed to greatly exceed that amount based upon evidence that was never presented before a jury or the trial court. Restitution should be based only on the proof brought before the court.

Regardless, a plain reading of *Powell*, combined with the fact that, as noted above, there was an objection to the amount of restitution ordered, warrants reversal. *Powell* unequivocally held that it was error for the trial court to rely on facts not in evidence when sentencing the defendant to a particular amount of restitution. *Id.* at 16. In the instant case, the trial court relied on the assertions of the prosecutor and not the evidence admitted at trial. This was in error and warrants reversal.

CONCLUSION

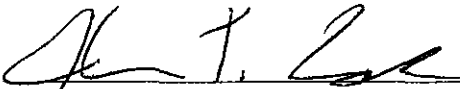
Cummings herein submits that based on the propositions cited and briefed hereinabove and in the Cummings' original brief, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Cummings' conviction and the unlawful imposition of excessive restitution should be reversed and vacated, respectively, and the

matter remanded to the lower court for a proper determination of restitution.. In the alternative, the Cummings would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



Justin T Cook

COUNSEL FOR APPELLANT, HAZEL CUMMINGS

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Hazel L. Cummings, 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 Billy Joe Landrum
Circuit Court Judge
543 Commerce Street
Laurel, MS 39441

Honorable Anthony J. Buckley
District Attorney, District 18
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Honorable Scott Stuart
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This the 30th day of July, 2010.


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