



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HAZEL L. CUMMINGS

APPELLANT

FILED

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SUPREME COURT
COURT OF APPEALS

V.

NO. 2009-KA-1896-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

Justin T Cook, MS Bar No. [REDACTED]

301 North Lamar Street, Suite 210

Jackson, Mississippi 39201

Telephone: 601-576-4200

Counsel for Hazel L. Cummings

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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 17th day of March, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Justin T Cook

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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ISSUE TWO:

WHETHER CUMMINGS' SENTENCE OF RESTITUTION WAS ILLEGAL.

ISSUE THREE:

IN THE ALTERNATIVE, WHETHER THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE FACTORS SET FORTH IN MISSISSIPPI CODE ANNOTATED § 99-7-3 WHEN DETERMINING WHETHER RESTITUTION WAS APPROPRIATE.

ISSUE FOUR:

WHETHER CUMMINGS' SENTENCE WAS IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101**.

STATEMENT OF THE CASE

This appeal proceeds from the Second District Circuit Court of Jones County, Mississippi, and a judgment of conviction on one count of embezzlement against Hazel Cummings, following a trial on June 4, 2009, the honorable Billy Joe Landrum, Circuit Judge, presiding. Cummings was subsequently sentenced to ten years in the custody of the Mississippi Department of Corrections.

FACTS

According to the testimony presented at trial, Ellen Stinson (Ms. Stinson) and her husband, Leon Stinson, owned three convenience stores: the BP Station at Daphne (the "Daphne Store") on 928 West Sixth Street, Laurel, Mississippi, Interstate BP on Chantilly Street in Laurel, and Convenience Corner, located on Highway 15 North and Trace Road. (T. 25-26). All these stores are located in the Second District of Jones County, Mississippi. (T. 26). Hazel Cummings was the manager of these three stores.

During the course of her testimony, Ms. Stinson outlined a list of daily sheets (Exhib. S-1) which, when compared to bank statements (Exhib. S-2), show what she said were discrepancies in the amount that should have been deposited in the bank from the Daphne Store and what was actually deposited. (T. 27-37). A composite list of the missing deposits was prepared by the State and testified to as accurate by Ms. Stinson. (T. 37-38, Exhib. S-3). The total amount in missing

deposits from the Daphne Store was seven-thousand three-hundred and nine dollars and fifty-nine cents (\$7309.59). There was never any testimony or evidence admitted at trial detailing the amount of money alleged to have been missing from the other two (2) stores.

Ellen Stinson testified she was present at a meeting when her husband had a conversation with Cummings. During that conversation, Cummings told her husband that she did not take the money in question. (T. 39). Cummings, however, never, according to Ms. Stinson, put the blame on another party. (T. 39). On direct examination, Stinson testified that her son had no involvement with the store(s) (T. 26-27). However, on cross-examination, she testified that her son often signed checks for the store(s) and had more of an involvement than she previously testified to. (T. 42-43).

Leon Stinson testified that Cummings was responsible for taking the deposits out of the safe and turning them into the bank. (T. 50). Cummings also had hiring and firing authority. (T. 49). Stinson testified that, during his conversation with Cummings, she attempted to put the blame on the Stinsons' son, Ralph, stating that he was getting the deposits out of the safe. (T. 51).

Mr. Stinson testified that Ralph Stinson did not have a key to the safe and was not involved in the "money situation" at the store. (T. 51). Leon Stinson, however, testified that keys to the safes were kept in the drawers in the main office and that Ralph had a key to the main office. (T. 54).

Ralph Stinson testified that the safe at the Daphne Store was a combination lock. (T. 62). Ralph Stinson further testified that he had been into a safe at one of the stores and cashed a check for 300 dollars (\$300) and closed it back. (T. 66). However, he testified that he did not have the ability to open the safes. (T. 66).

Rudy Milsap testified that she worked at the Stinson's store at Convenience Corner and Ralph Stinson entered the store and opened the safe. (T. 69-70). Kim Smith also testified that at one point she managed the Convenience Corner store and that on numerous occasions Ralph Stinson

took deposits from the safe to the bank. (T. 72-73).

Cummings was subsequently found guilty and sentenced to a “ten year sentence with the Mississippi Department of Corrections, to be suspended upon successful completion of the Restitution Center and the completion of five years on post-release supervision and the successful completion of the Circuit Court Community Service Program.” (C.P. 35-36, R.E. 8-9). Cummings was further assessed with Court Costs of two-hundred and seventy-one dollars and fifty cents (\$271.50), attorney fees of seven-hundred and fifty dollars (\$750) and restitution in the amount of thirty-four thousand, four hundred and eleven dollars and four cents (\$34,411.04). (C.P. 36, R.E. 9).

On August 27, 2009, the Cummings filed a Motion for New Trial. (C.P. 32-33, R.E 10-11). The motion was denied by the trial court on November 17, 2009. (C.P. 37, R.E. 12). On November 23, 2009, feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 39, R.E. 14).

SUMMARY OF THE ARGUMENT

The State of Mississippi failed to prove that Cummings converted the money alleged to have been embezzled for her own personal use. The sole evidence presented at trial was that there was money missing from the deposits at the Daphne Store. There was no evidence, be it circumstantial or direct to show the element of conversion. The failure for the State to present this evidence warrants reversal.

Secondly, the trial court’s imposition of over thirty-four thousand dollars in restitution was not supported by the law and plainly violates the language of the Mississippi State Code.

Thirdly, the trial court erred in sentencing Cummings to an exorbitant amount of restitution without fully considering her *in forma pauperis* status. The proper remedy for the trial court's error in Issues II and III is remand to the trial court for a reimposition of appropriate restitution.

Lastly, the trial court's imposition of thirty-four thousand dollars was in violation of Cummings' sixth amendment right to a trial by jury. This imposition warrants remand and re-sentencing to an appropriate amount of restitution.

ARGUMENT

ISSUE ONE: WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF GUILTY OF EMBEZZLEMENT WHEN THE STATE PROVIDED NO EVIDENCE OF THE ESSENTIAL ELEMENT OF CONVERSION.

In the instant case, the State failed to prove the three essential elements of embezzlement by credible evidence beyond a reasonable doubt, instead relying upon unreasonable inferences. In challenging the verdict of the jury, the standard of review applicable to addressing the legal sufficiency of evidence "is whether the evidence shows beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and there the evidence fails to meet this test, it is insufficient to support a conviction." *Dilworth v. State*, 909 So. 2d 731, 736 (Miss. 2005) (citing *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (emphasis added)). "Should the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render [, i.e. reverse and discharge]." *Id.* (citations omitted).

Under Mississippi Law, embezzlement is defined as follows:

If any person shall embezzle or fraudulently secrete, conceal or convert to his own

use, or make way with, or secrete with intent to embezzle or convert to his own use, any goods, rights in action, money, or other valuable security, effects or property of any kind or description which shall have come or been entrusted to his care or possession by virtue of his office, position, place or employment, either in mass or otherwise, with a value of Five Hundred Dollars (\$500.00) or more, he shall be guilty of felony embezzlement, and, upon conviction thereof, shall be imprisoned in the custody of the Department of Corrections not more than ten (10) years, or fined not more than Twenty-five Thousand Dollars (\$25,000.00), or both. If the value of such goods, rights in action, money or other valuable security, effects or property of any kind is less than Five Hundred Dollars (\$500.00), he shall be guilty of misdemeanor embezzlement, and, upon conviction thereof, shall be imprisoned in the county jail not more than six (6) months, or fined not more than One Thousand Dollars (\$1,000.00), or both.

Miss. Code Ann. §97-23-19.

Cummings contends that the prosecution's case-in-chief lacks the necessary legal sufficiency in the essential elements of the offense when compared to the proof offered at trial.

The recent case of *Champluvier v. State*, 942 So.2d 145 (Miss. 2006) (citing *May v. State*, 240 Miss. 361; 127 So.2d 423 (Miss. 1961)), sets out the essential elements that must be proven to establish the crime of embezzlement as: "1) an agent or trustee. . . 2) embezzling or converting to his own use; 3) . . . money or other valuable . . . property of any kind, 4) entrusted to his care or possession by virtue of his position or employment." *Champluvier*, 942 So.2d at 155.

Conversion, the second essential element of embezzlement, occurs when a person, who has been lawfully entrusted with another's property, converts it to his or her own and uses it for his or her own purpose. *Temple v. State*, 288 So.2d 835 (Miss. 1974). The question of whether one possesses the intent to convert property or something of value to his own "must be determined from the facts and circumstances in the case." *Id.* at 838-39. The burden of proving intent rest on the shoulders of the State. *Id.* Circumstantial evidence may be used to prove intent to convert, "if it is sufficient to prove a wilful and unlawful conversion." *Id.*

In the instant case, however, there was no evidence, be it circumstantial or direct of the

element of conversion. Cummings respectfully contends that the simple fact that there is money missing is not circumstantial evidence of the element of conversion.

ISSUE TWO: WHETHER CUMMINGS' SENTENCE OF RESTITUTION WAS ILLEGAL.

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).

At trial, the state proceeded only on the alleged embezzlement at the “Daphne Store.” The State presented, through its exhibits and testimony, evidence of alleged embezzlement from said store. No evidence whatsoever was testified to regarding the alleged embezzlement at the other two stores. Therefore, while the indictment only charged Cummings with having embezzled an amount in excess of the statutory amount, no reasonable jury could have possibly convicted Cummings of the total alleged amount embezzled, for no evidence of the other stores was provided at trial.

Therefore, it follows that, for the purposes of restitution, and the definitions provided in the Mississippi Code, the only “criminal activity” that warrants restitution was that which Cummings was ultimately convicted of – the embezzlement of funds from the “Daphne Store.”

If the restitution amount in the instant case is allowed to stand, it would create significant public policy concerns. The following hypothetical illustrates such concerns: If the State were to proceed on an embezzlement trial against Person A for embezzling six hundred dollars (\$600) from

Store X, then, after conviction, Person A was sentenced for restitution for embezzling from Stores X, Y, and Z, Person A would, in essence be sentenced to restitution for an amount she was never ultimately convicted of. Cummings contends that it is the public policy of this fair State that criminal defendants be punished not for what they are alleged to have done, but for the criminal activity determined by a jury or admitted to by defendants themselves. Anything else renders proof beyond a reasonable doubt “proof beyond a reasonable doubt some of the time.” Cummings respectfully believes that the demands of justice require more.

For whatever reason, the State failed to fully present evidence of the other counts of alleged embezzlement. No jury could have convicted Cummings of embezzlement from the other two stores; therefore, the total amount of restitution is in violation of **Mississippi Code Annotated §§ 99-37-1 and 99-37-3**. Cummings was ordered to pay restitution on “criminal activities” she neither was convicted of nor admitted. Therefore, the appropriate relief would be for this Honorable Court to remand this matter to the trial court for a restitution hearing for the appropriate amount proven by the State at trial, rather than the alleged total amount not supported by a scintilla of evidence.

ISSUE THREE: IN THE ALTERNATIVE, WHETHER THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE FACTORS SET FORTH IN MISSISSIPPI CODE ANNOTATED § 99-7-3 WHEN DETERMINING WHETHER RESTITUTION WAS APPROPRIATE.

So long as the sentence imposed is within the statutory limits, sentencing is generally a matter of trial court discretion. *Wallace v. State*, 607 So. 2d 1184, 1188 (Miss. 1992).

The trial judge ordered the Cummings pay restitution to the Stinsons in the amount of thirty-four thousand, four hundred and eleven dollars and four cents (\$34,411.04). Cummings was convicted of criminal activities which resulted in pecuniary damages, therefore, the trial court had authority to order restitution to the victim’s family in addition to a sentence in the Mississippi

Department of Corrections pursuant to **Mississippi Code Annotated § § 99-37-3(1) and 97-37-1(a), (b), and (c).**

Mississippi Code § 99-37-3 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).

(2) In determining whether to order restitution which may be complete, partial or nominal, the court shall take into account:

(a) The financial resources of the defendant and the burden that payment of restitution will impose, with due regard to the other obligations of the defendant;

(b) The ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court; and

(c) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.

(3) If the defendant objects to the imposition, amount or distribution of the restitution, the court shall, at the time of sentencing, allow him to be heard on such issue.

(4) If the court determines that restitution is inappropriate or undesirable, an order reciting such finding shall be entered, which should also state the underlying circumstances for such determination.

Mississippi Code § 99-37-3 (emphasis added).

Cummings had a right to object to the order of restitution during sentencing and be heard on the issue. **Miss. Code Ann. § 99-37-3(3)**. The Mississippi Supreme court has previously held that a failure to object to an order of restitution during sentencing bars appeal on that point. *Shook v. State*, 552 So.2d 841, 851. (Miss. 1989). However, the Supreme Court has held,

We have previously held that failure to object to an order of restitution during sentencing bars appeal on that point. It follows that this Court would not need to

further examine [the issue of restitution] but for the question regarding [the defendant's] status as an indigent.

Green v. State, 631 So. 2d 167, 176 (Miss. 1994)(internal citations omitted).

In interpreting **Mississippi Code Annotated § § 99-37-1(a), (b), and (c)**, the **Green** Court further stated:

“In determining whether to order complete, partial, or nominal restitution, the court is required to consider the defendant’s financial resources and the burden restitution will impose upon him, his ability to pay on installment or other basis, and the rehabilitative effect of payment of restitution on the defendant.”

Id.

The Court further elaborated that a defendant’s affidavit accompanying a motion for leave to appeal *in forma pauperis* should have triggered a consideration of the above factors by the trial judge. **Id.**

At arraignment, Cummings was declared indigent and appointed counsel for trial. (C.P. 6, R.E. 6). Moreover, the trial court made a ruling on November 20th, 2009 that the defendant “is financially unable to provide prepayment of fees or costs on appeal.” (C.P. 38, R.E. 13). Cummings was declared *in forma pauperis*. Under **Green**, this should have triggered a consideration by the trial court to determine whether restitution was appropriate under **99-37-1(a), (b), and (c)**. Accordingly, Cummings respectfully requests remand to the lower Court for a determination as to the appropriate amount of restitution to be ordered.

ISSUE FOUR: WHETHER CUMMINGS’ SENTENCE WAS IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” **Apprendi v. New Jersey**, 530 U.S. 466, 490 (2000).

The trial court, in sentencing Cummings to over thirty four thousand dollars in restitution allowed on facts that were not in record, not supported by evidence, and not proven beyond a reasonable doubt by the jury.

i. The plain error doctrine is applicable.

A defendant cannot bring a point of error for the first time on appeal. *Savannah v. State*, 840 So. 2d 717, 720 (Miss. App. 2002). Any assignment of error otherwise procedurally barred is appealable only when the trial court committed plain error. *Foster v. State*, 639 So. 2d 1263, 1288-89. (Miss. 1994).

Application of the plain error doctrine requires not only the existence of error, but that the error either: 1.) Resulted in a manifest miscarriage of justice, *Gray v. State*, 549 So. 2d 1316, 1321 (Miss. 1989), or 2.) “Seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Furthermore, even a plain error is only recognized “when it affects a defendant’s substantive/fundamental rights.” *Snow v. State*, 800 So. 2d 472, 483 (Miss. 2001).

Freedom from physical restraint is a fundamental right. *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992). Substantial increases in sentence also implicate due process to such a degree as to avoid procedural bars. See *Smith v. State*, 477 So. 2d 191, 195 (Miss. 1984) (holding “the comparison of a seven year sentence, as opposed to a life sentence, without probation or parole is too significant a deprivation of liberty to be subjected to a procedural bar.”).

The critical inquiry focuses not on the result reached through the flawed procedure, but on the procedure itself. In the instant case, the trial court’s error constituted a failure to afford a criminal defendant the Sixth Amendment right to a jury. Denial of a jury trial undoubtedly

implicates “the fairness, integrity or public reputation of judicial proceedings.” *Atkinson*, 297 U.S. at 160.

ii. The error is not harmless

The repeated holdings of the United States Supreme Court show that the proper harmless error analysis for a constitutional violation is not a review of whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the appropriate analysis is whether the constitutional error “might have contributed to the conviction” or “possibly influenced the jury.”

In *Payne v. Arkansas*, the state of Arkansas asked the United States Supreme Court to affirm a conviction despite the admission of a coerced confession into evidence. *Payne v. Arkansas*, 356 U.S. 560, 568 (1958). The State asserted that the conviction should be affirmed because “there was adequate evidence before the jury to sustain the verdict.” *Id.* at 567-68. However, the Supreme Court rejected the State’s assertion recognizing that “no one can say what credit and weight the jury gave to the confession.” *Id.* at 568.

In *Fahy v. Connecticut*, the Court revisited this issue ultimately holding, “[W]e are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction.” *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)(emphasis added).

Four years later, the Court recognized that the state of California applied a “miscarriage of justice” rule with “emphasis, and perhaps overemphasis, upon the court’s view of ‘overwhelming evidence.’” *Chapman v. California*, 386 U.S. 18, 23 (1967). There, the Supreme Court rejected the

California rule, preferring instead the *Fahy* approach: “whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” *Id.* The court reasoned that this analysis “emphasizes an intention not to treat as harmless those constitutional errors that ‘affect substantial rights’ of a party.” *Id.* Thus, an “error in admitting plainly relevant evidence which *possibly influenced* the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless.” *Id.* at 23-24 (emphasis added).

These cases show that, for at least fifty years, the United States Supreme Court has rejected a harmless error analysis which simply questions whether there was overwhelming evidence of guilt properly before the jury upon which the jury could have convicted. Rather, the reviewing court should look at the facts and evidence of the case to determine whether the constitutional error “might have contributed to the conviction” or “possibly influence[d] the jury.”

In the immediate case, the evidence contained in the record simply supports an imposition of seven-thousand three-hundred and nine dollars and fifty-nine cents (\$7309.59) in restitution. The jury convicted Cummings based upon an alleged embezzlement of seven-thousand three-hundred and nine dollars and fifty-nine cents (\$7309.59). The state provided evidence of seven-thousand three-hundred and nine dollars and fifty-nine cents (\$7309.59) in missing deposits. It was improper for the trial court to impose a sentence of restitution based upon evidence that had never been presented to the jury.

Under *Apprendi*, Cummings possesses a Sixth Amendment right to have the determination of restitution based on the evidence presented to the jury. The failure to do so was plain error, and the outcome did not amount to harmless error.

CONCLUSION

Based on the above issues brief In this case, together with any plain error noticed by the Court which has not been specifically raised, the Appellant contends that the assertion made and the authority cited hereinabove establishes that she was sentenced to an inappropriate and illegal amount of restitution. Therefore, the Appellant submits that the restitution portion of the sentenced imposed by the trial court should be reversed and the matter remanded to the trial court for an appropriate determination of restitution. The Appellant further submits that the State failed to provide evidence of the element of conversion as required by law. Therefore, the Appellant's conviction for embezzlement should be reversed and rendered for want of legal sufficiency.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


Justin T Cook

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

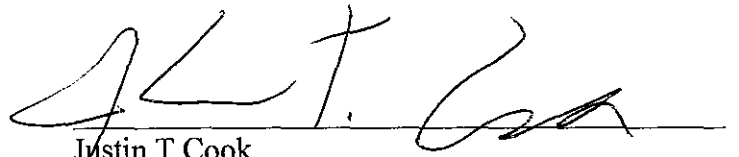
I, Justin T Cook, Counsel for Hazel L. Cummings, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Billy Joe Landrum
Circuit Court Judge
543 Commerce Street
Laurel, MS 39441

Honorable Anthony J. Buckley
District Attorney, District 18
Post Office Box 313
Laurel, MS 39441

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

This the 17th day of March, 2010.


Justin T Cook
COUNSEL FOR APPELLANT

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