IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2014-KA-01478-COA

TIMOTHY ALLEN WILSON a/k/a Timothy Wilson — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

MOTION FOR REHEARING

COMES NOW Timothy Allen Wilson, by and through counsel, pursuant to MRAP Rule 40, and files this Motion For Rehearing, and in support thereof, would most respectfully show unto the court the following, to-wit:

1. On March 22, 2016, the Court Of Appeals (COA) rendered its opinion in this case affirming Wilson's receiving stolen property conviction and ten year sentence.

2. Wilson respectfully seeks rehearing on all issues.

Issue No. 1

3. Wilson respectfully requests rehearing based on misapprehension of law and facts under Issue Number 1 wherein the COA ruled that it was not plain error to grant jury instruction S-4 nor was trial counsel ineffective for failing to object to S-4.

4. Instruction S-4 which informed the jury that proof that Wilson stole the property "shall be prima facie evidence that the defendant had knowledge that the property was stolen," in language lifted from Miss. Code Ann. §97-17-70(3)(b) (Rev. 2014), was prejudicially defective because it does not indicate that the proof that the defendant stole the property must be beyond a reasonable doubt which unconstitutionally

reduced the state's burden of proof on a statutory element of the offense charged contrary to *Reith v. State*, 135 So. 3d 862, 865 (¶ 6) (Miss. 2014). [R. 24; RE 14; T. 408-09].

5. In its use of the legal term "prima facie evidence," S-4 was also confusing to the jury and violated the ruling in *Booker v. Pettey*, 770 So. 2d 39, 44 (¶ 30) (Miss. 2000), that trial courts should not give instructions which quote statutes or reported opinions "without any direction as to how it may be applied to the disputed facts." See also *Graves v. Hamilton*, 184 So. 56, 58, 184 Miss. 239 (1938).

6. S-4 was likewise a forbidden comment on the evidence. *Duckworth v. State*, 477 So. 2d 935, 938 (Miss. 1985); *Voyles v. State*, 362 So. 2d 1236 (Miss. 1978); *Williams v. State*, 354 So. 2d 266 (Miss. 1978).

7. Since Wilson's trial counsel failed to object to the improper instruction S-4, counsel was constitutionally ineffective. *Blunt v. State*, 55 So. 3d 207, 211 (¶ 16) (Miss. Ct. App. 2011); *McTiller v. State,* 113 So. 3d 1284, 1291-92 (¶¶ 22-24) (Miss. Ct. App. 2013); *Taylor v. State*, 167 So. 3d 1143, 1146-47 (¶¶ 5-8) (Miss. 2015).

Issue No. 2

8. Wilson respectfully requests rehearing based on misapprehension of law and facts under Issue Number 2 wherein the COA found that the jury was properly and adequately instructed on Wilson's alibi defense and that defense counsel was not ineffective for failing to request a proper alibi instruction.

9. The only instruction given at Wilson's trial on alibi pertained to the state not

being required to disprove any alibi in S-3.

10. However, S-3 did not cover key aspects of an alibi defense such as the fact that Wilson was not required to establish the truth of his alibi per se. *Holmes v. State*, 481 So. 2d 319, 321 (Miss. 1985).

11. S-3 in effect shifted the burden of proof to Wilson to prove his alibi defense which clearly is not the law. *Cochran v. State*, 913 So. 2d 371, 375 (¶ 14) (Miss. Ct. App. 2005); *Young v. State*, 451 So. 2d 208, 210 (Miss. 1984).

12. Wilson's trial counsel was constitutionally ineffective for failing to request a proper alibi defense instruction. *Blunt v. State*, 55 So. 3d 207, 211 (¶ 16) (Miss. Ct. App. 2011); *McTiller v. State,* 113 So. 3d 1284, 1291-92 (¶¶ 22-24) (Miss. Ct. App. 2013); *Taylor v. State*, 167 So. 3d 1143, 1146-47 (¶¶ 5-8) (Miss. 2015).

Issue No. 3

13. Wilson respectfully requests rehearing based on misapprehension of law and facts under Issue Number 3 in which the COA found that Wilson's sentence is legal.

14. The COA majority erred in finding that the elements of receiving stolen property were modified by HB 585, 2014 Miss. Law. Ch 457, §22. (Op. ¶ 29). The elements of receiving stolen property did not change. The old version and new version of section 97-17-70(1) are identical and state:

> (1) A person commits the crime of receiving stolen property if he intentionally possesses, receives, retains or disposes of stolen property knowing that it has been stolen or having reasonable grounds to believe it has been stolen, unless the property is possessed, received, retained or

disposed of with intent to restore it to the owner.

15. The only changes were to the punishment subsections. The old 97-17-70 (3) and (4) were replaced by subsections (4) through (7).

16. The COA majority did not even reference subsection (1) in its opinion. By ignoring the unchanged legislative elements of our receiving stolen property statute, the COA majority clearly violated the rule that "[r]elated statutes should be read together in a harmonious manner and a legislative purpose deduced from a consideration of the whole." *Wiltcher v. State*, 785 So. 2d 1083, 1085 (Miss. Ct. App. 2001), citing *Roberts v. Mississippi Republican Party State Executive Committee,* 465 So. 2d 1050, 1052 (Miss. 1985).

17. Since the elements of receiving stolen property were not changed, *Wilson v. State*, 967 So. 2d 32, 42 (Miss. 2007), does not apply and the COA is required by Miss. Code Ann. § 99-19-33 (1972) and *Daniels v. State*, 742 So. 2d 1140, 1145 (¶17) (Miss. 1999) to order resentencing.

18. Courts from other jurisdictions have considered similar amendments and held that they apply retroactively. *State v. Austin*, 503 N.W. 2d 604 (Iowa 1993), (modified by *State v. Chrisman*, 514 N.W. 2d 57 (Iowa 1994)); *People v. Behlog*, 74 N.Y. 2d 237, 543 N.E. 2d 69 (1989). The Court in *Austin* considered amendments to Iowa's theft statutes, which, like those here, increased the threshold values and reclassified the degrees of the crime of theft. *Austin*, 503 N.W. 2d at 605. In holding that the defendant–who

committed the offense before the amendments became effective and was sentenced after–was entitled to have the ameliorative punishments amendments applied to his case, the *Austin* court reasoned as follows:

> An examination of our statutory framework concerning theft shows that Iowa Code section 714.1[1] (1991) defines theft and specifies the acts constituting the offense. This section was not amended in 1992. Iowa Code section 714.2[2] classifies the degrees of the offense of theft by specifying the value of the stolen property but does not define the crime. In a different context, we have observed that 'specifying the degrees of theft does not change theft into a different offense; it merely provides a system of categorizing degrees of theft in order to classify the crime for sentencing.' *State v. Garr*, 461 N.W. 2d 171, 174 (Iowa 1990).
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> Stated otherwise, section 714.2 does not define the crime of larceny; it merely provides criteria for determining punishment, one criteria being the value of the property. While the State must meet its burden to establish the dollar value of the stolen property in order to designate the crime for sentencing, the proof of the property's value is relevant only to the punishment. We conclude the provision of section 4.13(4) concerning a mitigated penalty is applicable in this case. *Austin*, 503 N.W. 2d at 606.

19. Like Iowa's theft statute, Mississippi's receiving stolen goods statute defines

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1 "Appropriate to the present charge section 714.1(1) provides a theft is committed when a person '[t]akes possession or control of the property of another . . . , with the intent to deprive the other thereof." *State v. Austin*, 503 N.W. 2d 604, 606 n.1 (Iowa 1993).

2 "The 1991 Code version provides in subsection 3: The theft of property exceeding one hundred dollars but not exceeding five hundred dollars in value . . . , is theft in the third degree. Theft in the third degree is an aggravated misdemeanor. The 1992 amendment changes the amounts in subsection 3 to 'five hundred dollars, but not exceeding one thousand dollars . . .' and changes subsection 4 to include amounts between one hundred and five hundred dollars and constitute theft in the fourth degree, a serious misdemeanor." *State v. Austin*, 503 N.W. 2d 604, 606 n.2 (Iowa 1993) (quoting 1992 Iowa Acts ch. 1060, § 1).

the offense in 97-17-70 (1) without regard to the value of the stolen goods and the definition of the crime remained unchanged. Like Iowa's theft statute, our receiving stolen goods statute separately classify the degrees of the crime for sentencing by introducing value as a criteria for determining punishment.

20. Similarly, the Court in *Behlog, supra,* considered whether an amendment increasing from $250 to $1,000 the required minimum value of stolen property required for the crime of grand larceny was an ameliorative change in punishment that should be applied retroactively to a defendant sentenced after the amendment's effective date. *Behlog*, 74 N.Y. 2d 237, 239, 543 N.E. 2d 69, 70 (1989). In holding that the amendments were ameliorative changes in punishment that should apply retroactively, the Court held in part as follows: "We reject the People's contention that the amendment here (L. 1986, ch. 515) is not ameliorative in nature.[] It reclassifies certain criminal conduct as a class A misdemeanor rather than a class E felony and thereby reduces the penalties that can be imposed." *Behlog*, 74 N.Y. 2d at 241, 543 N.E. 2d at 72 (footnote omitted).

21. The amendments to section 97-17-70 accomplished an ameliorative change in punishment through reclassification of criminal conduct and a reduction of sentence. The amendments provided "a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law." Miss. Code Ann. §99-19-33. Under Section 99-19-33 and *Daniels*, Wilson was entitled to have the ameliorative amendments applied to his case. If the court does not reverse the conviction outright, Wilson

respectfully requests this Court to grant rehearing and issue a new opinion reversing his sentence as illegal.

WHEREFORE, PREMISES CONSIDERED, Wilson respectfully requests that the Court review its findings, and, upon such reconsideration, reverse his conviction herein and remand the case for a new trial or reverse his sentence and order resentencing by the trial court.

Respectfully submitted,

TIMOTHY ALLEN WILSON, Appellant

By: /s/ George T. Holmes
George T. Holmes, His Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 24th day of March 2016, electronically filed the foregoing motion with the Clerk of the Court using the MEC system which issued electronic notification of such filing to Hon. Alicia Marie Ainsworth, Assistant Mississippi Attorney General.

/s/ George T. Holmes
GEORGE T. HOLMES

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