

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

APPELLANT'S REPLY BRIEF

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STATUTES

none

OTHER AUTHORITIES

none

REPLY ARGUMENT

ISSUE NO. 1: WAS IT ERROR TO INSTRUCT THE JURY REGARDING PRIMA FACIE PROOF, OR WAS COUNSEL INEFFECTIVE?

The state's first argument under this issue that other instructions besides S-4 adequately informed the jury that the burden of proof was beyond a reasonable doubt is unpersuasive because all of the other instructions applied to the crime charged in the indictment, that is, receiving stolen property. Instruction S-4 states that proof that the defendant committed the crime of theft, not charged in the indictment, is prima facie proof of knowledge that the items were stolen which is one of the elements of the indicted charge.

The jury could conclude that the burden of proof on the elements of the indicted charge were, therefore, different from the instruction on actual theft which was not charged. The jury was not informed of the burden of proof of actual theft component which renders the instruction constitutionally, prejudicially, defective. *Reith v. State*, 135 So. 3d 862, 865 (¶ 6) (Miss. 2014).

As to the instruction being confusing because the legal term "prima facie" is used, the state cites *Schankin v. State*, 910 So. 2d 1113, 1118 (¶ 14) (Miss. Ct. App. 2005), which in no way counters Timothy Wilson's arguments nor suggests that the principles of *Booker v. Pettiey*, 770 So. 2d 39, 44 (¶ 30) and (Miss. 2000) and *Graves v. Hamilton*, 184 So. 56, 58, 184 Miss. 239 (1938), do not control the court's decision under this issue.

Otherwise, under this issue, Timothy Wilson relies on the arguments originally

presented that S-4 is an improper comment on the evidence and that the issue is reviewable as plain error and as ineffective assistance of counsel. *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). The ineffective assistance of counsel argument goes more than to a mere failure to object, but goes to counsel's duty to have the jury properly instructed on a defendant's defenses. Timothy Wilson's defense was that he did not steal the trailer. However, the jury was told that mere prima facie proof suffices as proof of one of the elements of the crime of receiving the stolen property. Having the state's burden of proof drastically reduced does not fit into any defense strategy as suggested by the state.

ISSUE NO. 2: WAS THE JURY PROPERLY INSTRUCTED ON TIMOTHY WILSON'S ALIBI DEFENSE, OR WAS COUNSEL INEFFECTIVE?

Timothy Wilson relies on his initial arguments under this issue.

ISSUE NO. 3: IS TIMOTHY WILSON'S SENTENCE ILLEGAL?

According to *Daniels v. State*, 742 So. 2d 1140, 1145 (¶17) (Miss. 1999), the milder sentence is mandatory, "when a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court **must** sentence according to the statute as amended." The state fails to persuade that must does not mean must.

CONCLUSION

Therefore, Timothy Allen Wilson respectfully requests a new trial or resentencing.

Respectfully submitted,

TIMOTHY ALLEN WILSON

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

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 26th day of June 2015 electronically filed the foregoing Reply Brief with the Clerk of the Court using the MEC system which issued electronic notification of such filing to Hon. Alicia Ainsworth, Assistant Mississippi Attorney General; and, counsel also this day mailed a hard copy to the following persons not notified by the MEC system by U. S. Mail, first class postage prepaid Hon. Isadore W. Patrick, Circuit Judge, P. O. Box 351, Vicksburg MS 39181, and to Hon. Angela Carpenter, Asst. Dist. Atty., P. O. Box 648, Vicksburg MS 39181.

/s/ George T. Holmes

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