E-Filed Document Aug 28 2015 16:09:05 2015-KA-00207-SCT Pages: 17

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LESTER DARRELL MOORE **APPELLANT**

V. **NO. 2015-KA-00207-SCT**

STATE OF MISSISSIPPI **APPELLEE**

REPLY BRIEF OF THE APPELLANT

Hunter N Aikens, MS Bar No. 102195
INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4290

Counsel for Lester Darrell Moore

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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. Lester Darrell Moore, Appellant
3. Honorable Joel Smith, District Attorney
4. Honorable Lisa P. Dodson, Circuit Court Judge

This the 28th day of August, 2015.

Respectfully Submitted,

INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER

BY: /s/Hunter N. Aikens
Hunter N. Aikens
COUNSEL FOR APPELLANT

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REPLY ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO APPLY THE AMELIORATIVE AMENDED PROVISIONS OF MISSISSIPPI CODE ANNOTATED SECTION 97-23-93 .

The State first relies on the general rule that "[t]he statute in effect at the time an offense is committed is the one that must control the prosecution of the offense." Appellee's Brief at p. 8 (quoting *Flowers v. State*, 35 So. 3d 516, 518 (¶5) (Miss. 2010)). The State overlooks that the purpose of this general rule is "[t]o ensure the constitutional proscription against an ex post facto law." *Flowers*, at 518 (¶5) (citing U.S. Const. art. I, § 9, cl. 3; Miss. Const. art. 3, § 16). Because the changes to Mississippi Code Annotated Section 97-23-93 (5) and (7) are ameliorative, their retroactive application to Moore's case poses no ex post facto problem. *See, e.g., Conley v. State*, 790 So. 2d 773, 803 (¶120) (Miss. 2001); *West v. State*, 725 So. 2d 872, 879 (Miss. 1998); *Johnston*

v. State, 618 So. 2d 90, 95 (Miss. 1993). Thus, the general rule that the statute in effect at the time of the offense does not control this case.

The State also asks, "Why should Moore be given the benefit of a sentence prescribed for a misdemeanor when the offense he actually committed at the time he committed it was, under the law, a felony?" Appellee's Brief at p. 8. The answer: Our legislature's ameliorative amendment to the punishment provisions of our shoplifting statutes (Sections 97-23-93 (5) and (7)), reflects a societal determination that the prior sentencing scheme for shoplifting was unjustifiably harsh and disproportionate to the degree of culpability. Why should Moore–on the arbitrary basis that an act was committed on one day rather than another–be punished under a prior sentencing scheme that our society now views as excessive and unfair?

"A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance." *People v. Oliver*, 1 N.Y.2d 152, 160, 134 N.E.2d 197 (1956). "Where the change is ameliorative and reflects a judgment that the earlier law was unduly harsh or unjust, a court should not withhold the benefits of the new statute to one tried after its passage, merely because it is powerless to extend them to those already convicted." *Id*., at163, 134 N.E.2d 197.

The rationale of *Oliver* is inherent in Mississippi Code Annotated Section 99-19-33[1] and this Court's decision in *Daniels v. State*, 742 So. 2d 1140 (Miss. 1999). Moore submits that Section 99-

[1] Section 99-19-33 provides in relevant part that, "If any statute shall provide a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law, then such milder punishment may be imposed by the court . . . ." Miss. Code. Ann. § 99-19-33.

19-33 and *Daniels* should control over the case of *Wilson v. State*, 967 So. 2d 32 (Miss. 2007), the holding of which warrants reexamination.

Both this case and *Wilson* involve(d) interpretation of our shoplifting statute Section 97-23-93 and, more specifically, amendments to subsections (5) and (7)–which pertain to the punishment scheme for the crime of shoplifting.[2] "The interpretation of a statute 'is a question of law subject to de novo review.'"[3] *Tipton v. State*, 41 So. 3d 679, 682 (¶10) (Miss. 2010) (quoting *Arceo v. Tolliver*, 19 So. 3d 67, 70 (Miss. 2009)). "In considering the arguments advanced by the State, we must apply the 'bedrock law in Mississippi that criminal statutes are to be *strictly* construed against the State and *liberally* in favor of the accused." *Id.*, at (¶11) (quoting *Coleman v. State*, 947 So. 2d 878, 881 (Miss. 2006)) (emphasis in original); *see also, United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 522 (1971) ("'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (quoting *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059 (1971)).

In *Daniels* this Court interpreted Section 99-19-33 and *West v. State*, 725 So. 2d 872 (Miss. 1998), and clarified "[t]hat 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." *Daniels v. State*, 742 So. 2d 1140, 1145 (¶17) (Miss. 1999). As *West* instructs, the relevant "[i]nquiry in this case is whether the [statutory amendment] *ameliorates the previous sentencing scheme*.[]" *West*, 725 So. 2d at 879 (¶17) (footnote omitted)(emphasis added).

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[2] In *Wilson*, the Court addressed the 2003 amendments to Section 97-23-93(5) and (7). *See Wilson v. State*, 967 So. 2d 32, 41-42 (¶¶20-22) (Miss. 2007).

[3] Because the trial court's interpretation of the statutes at issue is reviewed de novo, the State's reliance on trial counsel's imprecise argument at trial is misplaced. Appellee's Brief at pp. 10-11.

The 2014 amendments to Section 97-23-93 (5) and (7) ameliorate the previous sentencing scheme for the crime of shoplifting. The *West* opinion overlooked that Section 97-23-93(1) defines *the crime* of shoplifting without regard to the stated price of merchandise and specifically states that *punishment* for one convicted of shoplifting is provided elsewhere:

> (1) Any person who shall willfully and unlawfully take possession of *any merchandise* owned or held by and offered or displayed for sale by any merchant, store or other mercantile establishment with the intention and purpose of converting such merchandise to his own use without paying the merchant's stated price therefor shall be guilty of the crime of shoplifting and, upon conviction, *shall be punished as is provided in this section*.

Miss. Code Ann. §97-23-93 (1) (emphasis added). This definition existed in its current form long before Moore's alleged offense and remained unchanged by the 2014 amendments.[4] Thus, the elements of the crime of shoplifting were not altered by either the 2003 amendments (at issue in *West*) or the 2014 amendments at issue in this case.

As alluded to in Section 97-23-93(1), *punishment* for the crime of shoplifting is provided for in Sections 97-23-93(5) through (9), which set forth the sentencing scheme for shoplifting. *See* Miss. Code Ann. §§ 97-23-93(5) through (9). Subsections (5) and (7) are relevant to this case. Effective July 1, 20014, subsections (5) and (7) were amended[5] to provide in relevant part that:

> (5) A person convicted of shoplifting merchandise for which the merchant's stated price is less than or equal to One Thousand Dollars ($1,000.00) shall be punished as follows:

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[4] The 2014 amendment changed subsection (1) only to correct the spelling of the word "willfully."

[5] From July 1, 2003, until July 1, 2014, subsections (5) and (7) provided that a first shoplifting offense was punishable as a misdemeanor where the merchandise's stated price is $500 or less, and punishable as a felony where the merchandise's stated price was over $500. *See* Miss. Code Ann. §§97-23-93 (5)(a),(7) (Supp. 2013).

> (a) Upon a first shoplifting conviction the defendant shall be guilty of a misdemeanor and fined not more than One Thousand Dollars ($1,000.00), or punished by imprisonment in the county jail not to exceed six (6) months, or by both . . . .
>
> . . .
>
> (7) A person convicted of shoplifting merchandise for which the merchant's stated price exceeds One Thousand Dollars ($1,000.00) shall be guilty of a felony and, upon conviction, punished as provided in Section 97-17-41 for the offense of grand larceny.

Miss. Code Ann. §§97-23-93 (5)(a) and (7) (Rev. 2014).

In summary fashion the *Wilson* decision broadly concluded that Section 99-19-33 and *Daniels* were "totally irrelevant" because "[w]e are not dealing with an amended sentencing statute, but instead an amended statute as it relates to the elements of the criminal offense." *Id*. at (¶22). The *Wilson* decision's interpretation of the statutes at issue failed to "[a]pply the 'bedrock law in Mississippi that criminal statutes are to be *strictly* construed against the State and *liberally* in favor of the accused.'" *Tipton*, 41 So. 3d at 682 (¶11) (quoting *Coleman*, 947 So. 2d at 881). *Wilson* failed to acknowledge that Section 97-23-93(1) defines the *crime* of shoplifting without regard to the stated price of the merchandise and specifically states that *punishment* for the crime is provided for elsewhere in the section; namely, in subsections (5) through (9), which set forth the sentencing scheme for shoplifting.

Moore submits that the *Wilson* decision also represents an unduly narrow view of what constitutes an ameliorative change in penalty, warranting retroactive application under Section 99-19-33. To this end, several commentators have observed that an ameliorative change in penalty can be –and often is–accomplished not only by simply reducing the sentence, but also by simultaneously reducing a sentence and reclassifying or redefining criminal conduct. As one commentator has explained:

> Ameliorative changes occur when a legislature amends a penal statute to lessen the penalty attached to certain criminalized conduct *or to decrease the scope of criminalized conduct*. A legislature can ameliorate a penalty through decriminalizing conduct, *reclassifying conduct*,[6] *redefining criminal responsibility, or reducing a sentence*.

Eileen L. Morrison, *Resurrecting the Amelioration Doctrine: A Call to Action for Courts and Legislatures*, 95 B.U. L. Rev. 335, 338 (2015) (citing Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 120 (1972) (emphasis added).

Another commentator has similarly observed:

> When a legislature changes the previous categorization of conduct from a higher class felony to a lower one or from a felony to a misdemeanor and reduces the punishment attached to a specific criminal offense, it is the reclassification of conduct. This type of ameliorative change often occurs in two steps. Initially, the conduct is reclassified to a lower degree and then the sentence is reduced accordingly so that it is proportional to the other categories.
>
> . . .
>
> When a legislature amends a statute and the change can be categorized as either the decriminalization or the reclassification of conduct or a sentence reduction, the change is therefore ameliorative and should be given retroactive effect.

S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 19 (2009) (citing Comment, *Today's Law and Yesterday's Crime*, at 120).

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[6] "Both [reclassification of criminal conduct and reducing a sentence] generally involve a decision by the legislature that particular acts, though wrongful, may have been punished too severely, and that therefore an adjustment in penalty–and here [with reclassification] also an adjustment in some of the substantive elements of the original crime–is required." Comment, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 139 (1972).

Both the 2003 and 2014 amendments to subsections (5) and (7) represent an ameliorative change in penalty through a reduction in sentence and an attendant reclassification of criminal conduct that decreases the scope of criminal culpability by increasing the misdemeanor/felony amount. Moore submits that the amendments to subsections (5) and (7) constitute ameliorative changes in penalty under a plain meaning reading of Section 97-23-93. To the extent that Section 97-23-93 ambagious on this point, it is well-settled that ambiguities in criminal statutes are construed strictly against the State and in favor of criminal defendants. *See, e.g., McLamb v. State*, 456 So. 2d 743, 745 (Miss. 1984) ("[t]he long standing rule [is] that penal statutes are to be interpreted strictly against the state and construed liberally in favor of the accused."); *State v. Traylor*, 100 Miss. 544, 56 So. 521, 523 (1911) ("The law is that criminal statutes must be strictly construed. Such has been the law from time immemorial.").

Moore submits that the *Wilson* decision was wrongly decided, and this Court should instead apply Section 99-19-33 and this Court's prior decision in *Daniels* to hold that the trial court erred in failing to apply the ameliorative changes to sentencing scheme for shoplifting that were in effect at the time of Moore's trial and sentencing.

As further support that Section 99-19-33 and *Daniels* should control this case, Moore would note that the Harrison County District Attorney had previously requested an opinion from the Attorney General's Office on this issue and received a response that the course of action it took at trial did not comport with Section 99-19-33 and *Daniels*. Miss. Att'y Gen. Op., 2014-00185, 2014 WL 3572779, *Smith* (June 4, 2014). The request for an opinion specifically asked the following question:

> [A] first-offense shoplifting of $800 presently carries a sentence of up to ten years and/or a fine of up to $10,000. After July 1, 2014, a first-offense shoplifting of $800 will carry a sentence of up to six months and/or a fine of up to $1,000. If a new

> shoplifting case occurs prior to July 1, 2014, and is not resolved by plea or trial before July 1, 2014, how will the new law effect it?

Id. The Attorney General's Opinion cited Section 99-19-33 and *Daniels* and informed the District Attorney that "[i]n a new shoplifting case which occurs prior to July 1, 2014 and is not resolved by plea or trial before July 1, 2014 the court should apply the lesser penalty provided in House Bill 585." *Id*. "'While an attorney general's opinion is not binding on this Court, it is persuasive. . . .'" *Tunica County. v. Gray*, 13 So. 3d 826, 831 (¶26) (Miss. 2009) (quoting *DuPree v. Carroll*, 967 So. 2d 27, 31 (Miss. 2007)); *see also, Dialysis Solution, LLC v. Mississippi State Dep't of Health*, 31 So. 3d 1204, 1215 (¶36) (Miss. 2010) ("While Attorney General's Opinions are not binding, this Court certainly may consider them.") (citation omitted).

In light of the foregoing, Moore submits that the trial court erred in failing to apply the ameliorative amendments to Section 97-23-93(5) and (7). Accordingly, Moore requests this Honorable to Court to reverse his conviction and sentence and remand this case for a new trial.

II. THE TRIAL COURT ERRED IN ALLOWING OFFICER OWENS TO TESTIFY AS TO THE PRICE OF THE WALLETS.

The State argues at length that a trial court has discretion in as to the admissibility of evidence and will not be reversed absent an abuse of that discretion. Appellee's Brief at pp. 15-16. Moore does not dispute that a trial court has great discretion in ruling on evidentiary issues; however, the State overlooks that "[t]his discretion must be exercised within the confines of the Mississippi Rules of Evidence." *Ross v. State*, 954 So. 2d 968, 996 (¶56) (Miss. 2007) (citing *Cox v. State*, 849 So. 2d 1257, 1268 (Miss. 2003)).

The trial court's discretion in ruling to allow Officer Owens to testify as to the price of wallets was not exercised within the boundaries of the Mississippi Rules of Evidence. The trial court's decision was contrary to Rules 103, 104, 602 and 701.

Rules 602 and 701; Personal Knowledge Requirement

Moore's objection was that Officer Owens lacked the requisite personal knowledge to testify as to the stated price of the wallets, (Tr. 68-69), which implicates Rule 602 and Rule 701. Rule 602 provides that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." M.R.E. 602. Similarly, Rule 701addresses lay opinion testimony and provides in relevant part that "[i]f the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) [and] helpful to the clear understanding of the testimony or the determination of a fact in issue . . . ." M.R.E. 701.

The State incorrectly suggests that Officer Owens possessed personal knowledge "derived from what he learned" from Correa. Appellee's Brief at p. 14. Prior cases from this Court establish that the personal knowledge required by Rules 602 and 701 must be "first-hand knowledge." *Bower v. Bower*, 758 So. 2d 405, 413 (¶37) (Miss. 2000); *K-Mart Corp. v. Hardy ex rel. Hardy*, 735 So. 2d 975, 984 (¶¶25-26) (Miss. 1999); *Jones v. State*, 678 So. 2d 707, 710 (Miss. 1996).

The trial court overruled Moore's objection without questioning Officer Owens as to his personal knowledge, and Officer Owens testified that price of the wallets was "over $1,700." (Tr. 69). Owens then admitted to defense counsel that he was not present when Dillard's employees scanned the price tags to document their value, and he did not have personal knowledge of the wallets' price. (Tr. 70-71). Thus, according to Owens himself, he did not have personal knowledge of the wallets' price. Owens' testimony of the wallets' price was therefore inadmissible under Rules 602 and 701, and the trial court erred in allowing him to testify on that point.

Rues 103 and 104; Preliminary Questions and Hearing of the Jury

The trial court erred in allowing Owens to testify to the value of the wallets without first determining outside of the hearing of the jury the preliminary question of whether Owens possessed the personal knowledge required to testify as to the wallets' value. Rule 104(a)[7] mandates that the trial court make such preliminary questions of admissibility. M.R.E. 104(a). And Rule 103(C)[8] mandates that a trial court resolve such evidentiary issues outside the hearing of the jury where practicable. M.R.E. 103(C).

Upon Moore's objection that Officer Owens lacked knowledge of the wallets' value, Rules 103 and 104 required the trial court, before allowing Officer Owens to testify as to value, to determine whether he had the personal knowledge required to offer testimony or an opinion as to the wallets' price. The trail court's failure to do so prejudiced Moore's case because Owens' provided inadmissible testimony as to the wallets' price, when he admittedly did not have personal knowledge of the price.

Finally, the State suggests that any error in allowing Owens' testimony of the wallets' price was harmless "because the same testimony had already been admitted without objection during the testimony of Andre Correa." Appellee's Breif at p. 15. Correa was the proper witness to testify to the wallets' price, as he had the requisite personal knowledge; as such, Moore properly did not object to Correa's testimony. However, Moore's acquiescence to Correa's testimony as a licence to parade

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[7] "Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence *shall be determined by the court*. . . ." M.R.E. 104(a) (emphasis added).

[8] "In jury cases, proceedings *shall* be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." M.R.E. 103(C) (emphasis added).

additional evidence of the wallets' value by inadmissible means. Additional inadmissible evidence of the wallets' value, such as Owens' testimony, constitutes improper bolstering of Correa's testimony and credibility. *Bitner v. State*, 293 So. 2d 339, 341 (Miss. 1974); *Ellis v. State*, 254 So. 2d 902, 903 (Miss. 1971). Because the price of the wallets was a critical issue in this case, Moore submits that the error was not harmless beyond a reasonable doubt and a new trial is warranted.

CONCLUSION

Based upon the foregoing, as well as the arguments raised in his initial brief, the Appellant, Lester Darrell Moore, respectfully requests this Honorable Court to reverse his conviction and sentence for felony shoplifting and remand this case for a new trial.

Respectfully submitted,

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
For Lester Darrell Moore, Appellant

BY: /s/ Hunter N. Aikens
Hunter N. Aikens, MSB#102195
COUNSEL FOR APPELLANT

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
P.O. Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4200
Fax: 601-576-4205
email: haike@ospd.ms.gov

CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Lester Darrell Moore, do hereby certify that I have this day electronically filed the forgoing **REPLY BRIEF OF THE APPELLANT** with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable John R. Henry, Jr.
Attorney General Office
Post Office Box 220
Jackson, MS 39205-0220

Further, 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 to the following non- MEC participants:

Honorable Lisa P. Dodson
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

Honorable Joel Smith
District Attorney, District 2
Post Office Box 1180
Gulfport, MS 39502

This the 28th day of August, 2015.

/s/ Hunter N. Aikens
Hunter N. Aikens, MSB#102195
COUNSEL FOR APPELLANT

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
P.O. Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4200
Fax: 601-576-4205
email: haike@ospd.ms.gov