

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 27 2002

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

SHIHEE HASON DAUGHRITY,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
No. F-2001-230

SUMMARY OPINION

STRUBHAR, J.:

Shihee Hason Daughrity, Appellant, was tried by jury with his co-defendant, Antonio Brooks, and convicted of two counts of Robbery with a Dangerous Weapon (Counts 1 and 2) and one count of False Personation (Count 3) in the District Court of Tulsa County, Case No. CF-99-6179, District Judge Thomas C. Gillert presiding. The trial court followed the jury's recommendation and sentenced Appellant to forty years imprisonment and a \$2,500.00 fine on Count 1, thirty years imprisonment and a \$2,500.00 fine on Count 2 and one year imprisonment and a \$1,000.00 fine on Count 3. The trial court ordered the sentences to be served consecutively. From this judgment and sentence, Appellant appeals.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm in part and reverse in part. The following propositions of error were considered:

- I. There was insufficient evidence to sustain a conviction for false personation;

- II. The trial court erred by failing to instruct the jury on the lesser included offense in the false personation charge; and
- III. The trial court erred in admitting in-court identifications of the defendant which were tainted by suggestive pretrial identification procedures in violation of the defendant's Fourteenth Amendment right to due process.

As to Proposition I, we find the evidence was insufficient to prove Count 3 – False Personation. At trial, the only evidence in support of this crime came from an officer who transported Appellant to booking who testified Appellant told him that his name was Adam Houston Smith and from one other officer who testified she was told Appellant's name was Adam Smith.

In *Friday v. State*, 833 P.2d 1257 (Okl.Cr.1991) a case factually similar to this one, this Court reversed Friday's conviction for insufficient evidence and held that the elements of false personation require there be an actual person who is impersonated and evidence of actual harm to the person impersonated and/or of the benefit accruing to the impersonator by impersonating the actual person. *Id.* at 1258-59. In a later case challenging the sufficiency of the evidence for the crime of false personation, the Court revisited the required elements and partially overruled *Friday*. We held the elements of false personation are: 1) the assumption by one person of another person's character; 2) the intentional personation of that character; and 3) such person either (i) does any act whereby, if it were done by the person falsely personated, he might become liable to any suit or prosecution, or to pay any sum of money,

or to incur any charge, forfeiture, or penalty; or (ii) accrues any benefit as a result of the personation. *Barkus v. State*, 926 P.2d 312, 313 (Okl.Cr.1996). We take this opportunity to clarify *Barkus* and its effect on Friday. We hold that evidence of the existence of an actual person is not required in every case as long as the evidence showed the accused used a false name intentionally and received a benefit.

Here, Appellant intentionally gave a false name following his arrest for two robberies while en route to booking. A fair inference is he gave the false name to avoid liability for the robberies and a criminal record in his name, clearly a benefit to him. Under the *Barkus* elements, the evidence would seem sufficient. However, the problem in this case is that the trial court only gave part of the *Barkus* elements and instructed the jury as follows:

No person may be convicted of the felony of false personation unless the State has proved beyond a reasonable doubt each element of the crime. They are:

First, the defendant falsely assumed the identity of another person;

Second, the impersonation of that identity was intentional;

Third, under that false identity the defendant did any act that might have made the other person liable to any lawsuit or prosecution or incur any charge, forfeiture or penalty;

Fourth, as a result of impersonating the other person.

(O.R. 94)

When the basis for the false personation is that the defendant's acts might have subjected the person impersonated to potential liability in some fashion, there must necessarily be a real person who might have been harmed. Accordingly, in that instance, proof of an actual person would be required.

Inasmuch as there was no evidence Adam Houston Smith was an actual person, we find the evidence was insufficient to sustain Appellant's conviction based on the jury instruction given for false personation in this case.

Given the resolution of proposition one, the claim raised in Proposition II is moot.

As to Proposition III, we find Aschoff's in-court identification was not tainted from the photographic lineup or from his viewing of Appellant prior to preliminary hearing. We further find Hope's in-court identification was independently reliable and admissible. *Young v. State*, 12 P.3d 20, 34 (Okl.Cr.2000). Therefore, no relief is required.

DECISION

The Judgment and Sentence of the trial court on Counts 1 and 2 is **AFFIRMED**. Count 3 is **REVERSED with instruction to DISMISS**.

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OPINION BY: STRUBHAR, J.

LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART

JOHNSON, V.P.J.: CONCUR

CHAPEL, J.: CONCUR IN RESULT

LILE, J.: CONCUR IN PART/DISSENT IN PART

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision however I write separately to address the opinions available under our current uniform instruction on false personation. OUJI-CR 2d 5-50 sets out alternative methods for proving the crime of false personation. This instruction provides:

No person may be convicted of the felony of false personation unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant falsely assumed the identity of another person;
Second, the impersonation of that identity was intentional;
Third, under that false identity the defendant subscribed/verified/published/ acknowledged/proved a written instrument;
Fourth, with the intent that the instrument be delivered/used as true].

OR

Third, under that false identity the defendant did any act that might have made the other person liable to (any lawsuit or prosecution)/(pay any money)/(incur any charge/forfeiture/penalty);
Fourth, if the act had been done by the other person].

OR

Third, under that false identity the defendant obtained/received any benefit;
Fourth, as a result of impersonating the other person].
(emphasis added).

In the present case, the evidence in Count III supported the last alternative as Appellant gave a false name in order to avoid criminal liability, clearly a benefit to him. Further, proof of an actual person harmed is not

required under this alternative. However, as the trial court did not give this portion of the instruction, reversal of the conviction is required but the case should be reversed and remanded for a new trial under a proper instruction to the jury.