

FILED

03/26/2018

Clerk of the  
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
October 10, 2017 Session

**STATE OF TENNESSEE v. CALVIN LYNDELL DIBRELL**

**Appeal from the Criminal Court for Knox County  
No. 105374 Steven Wayne Sword, Judge**

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**No. E2016-02279-CCA-R3-CD**

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ROBERT L. HOLLOWAY, JR., J., concurring.

I agree with the majority that the defendant was searched without reasonable suspicion, that the evidence should have been suppressed by the trial court,<sup>1</sup> and that the judgment of conviction must be vacated and the case dismissed.

I also agree that the trial court erred by granting the State's Rule 609 request made *after* the defendant testified on direct examination. I write separately to express my opinion that this error was non-structural constitutional error, rather than non-constitutional error, and therefore the burden was on the State to demonstrate beyond a reasonable doubt that the error was harmless. *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008). I agree with the majority that the error was not harmless, albeit because the State, rather than the defendant, failed to meet its burden of proof.

Tennessee Rule of Evidence 609(a)(3) provides:

If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court *upon request* must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court *may* rule on the admissibility of such proof prior to the trial but *in any event shall rule prior to the testimony of the accused*. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

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<sup>1</sup> A different trial judge conducted the hearing and denied the defendant's motion to suppress.

Tenn. R. Evid. 609(a)(3) (emphasis added).

Pursuant to the Fifth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution, a criminal defendant has a fundamental right not to testify. *See State v. Jackson*, 444 S.W.3d 554, 586 (Tenn. 2014). Likewise, “[i]t is now a well established principle in both state and federal law that a criminal defendant has a constitutional right to testify at trial.” *Momon v. State*, 18 S.W.3d 152, 157 (Tenn. 1999), *on reh’g* (Tenn. 2000).

How a trial court rules on a Rule 609 request has a direct and major impact on the accused’s decision to testify or not to testify. Rule 609 appears to acknowledge the importance of that ruling on the accused’s decision to testify or not testify by mandating that the ruling be made before the accused testifies.

A trial court *upon request* of the State or the accused must make a ruling on the admissibility of prior convictions. Because Rule 609(a)(3) mandates that the ruling *in any event* be made prior to the accused testifying, a trial court commits error if it grants the request to admit a defendant’s prior convictions under Rule 609 *after* the accused has taken the witness stand to testify. In my opinion, that error is non-structural constitutional error, and the State’s burden to demonstrate that the error is harmless is “quite stringent.” *Rodriguez*, 254 S.W.3d at 371.

For the reasons stated above, I concur in the majority opinion.

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ROBERT L. HOLLOWAY, JR., JUDGE