

MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 14, 2019***SUPREME COURT - ORDERS*****DAVIS V. STATE****COURT ORDER**

POST-CONVICTION RELIEF - PETITION - MERIT - Frivolous petitions for post-conviction relief can result in monetary sanctions and restrict the ability to file future petitions for post-conviction collateral relief

ORDER

Elbert Davis was convicted of sexual battery of his ten-year-old cousin and appealed. The Court of Appeals affirmed his conviction. Davis applied for leave, arguing the verdict was against the overwhelming weight of the evidence, the evidence collected from the scene should have been suppressed for failure to file a warrant, and that he received ineffective assistance of counsel. Davis again applied for leave, raising the same issues and the same arguments. The Supreme Court found the application should be denied as a subsequent writ. The Supreme Court also found the application frivolous and warned future frivolous filings could result in monetary sanctions or restrictions in his ability to file petitions for post-conviction collateral relief.

OBJECTION

Presiding Justice King agreed that the application for post-conviction relief should have been denied, but he disagreed with the Court's classification of the claim as frivolous and with its warning of future sanctions and restrictions.

Denied - 2017-M-01493 (Feb. 13, 2019)

En Banc Order by Chief Justice Randolph - Objection by Presiding Justice King

Briefed by [Nathaniel Snyder](#)

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HOLLINS V. STATE**COURT ORDER**

POST-CONVICTION RELIEF - TIME BAR - LIMITATIONS - A motion for relief shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi

ORDER

In this order, the Supreme Court found that Gregory Hollins presented no arguable basis for his claims, that no exception to the procedural bars existed, and that the petition should be denied. The Supreme Court further found that the present petition was frivolous, and warned Hollins that future filings deemed frivolous could result in monetary sanctions or restrictions on his ability to file petitions for post-conviction collateral relief.

OBJECTION

Presiding Justice King wrote separately, agreeing that Hollins's petition lacked merit but disagreeing with the finding that the petition was frivolous because Hollins made reasonable arguments. Presiding Justice King further disagreed with the warning that future filings may result in monetary sanctions or restrictions on filing applications for post-

conviction collateral relief because the imposition of monetary sanctions upon a criminal defendant proceeding in forma pauperis only serves to punish or preclude that defendant from his lawful right to appeal.

Denied - 2015-M-01601 (Feb. 14, 2019)

En Banc Order by Chief Justice Randolph - Objection by Presiding Justice King

Briefed by [Catherine Pettis](#)

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WILLIS V. STATE

COURT ORDER

ORDER

Derrick Willis’s “Application for Leave to Proceed in Trial Court with Post Conviction Relief” was denied by the Supreme Court. Willis was convicted of capital murder, armed robbery, and conspiracy; he was sentenced to two life terms and five years, respectively. Willis has filed three applications for post-conviction relief. Willis claimed that his due-process and equal-protection rights were violated because no competency hearing was held. He also alleged newly discovered evidence. A claim alleging a violation of one’s right not to be convicted while incompetent has been recognized as an exception to the successive-writ bars, but the claim must have some arguable basis. Willis’s claims lacked any arguable basis and did not meet the newly-discovered-evidence standard. Willis was also warned that future filings deemed frivolous may result in monetary sanctions and restrictions on filing post-conviction relief *in forma pauperis*. Willis’s application, therefore, was denied.

OBJECTION

Presiding Justice King agreed with the majority in denying Willis’s application, but disagreed with the warning that future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for post-conviction relief collateral relief *in forma pauperis*. He argued that the imposition of monetary sanctions upon a criminal defendant proceeding *in forma pauperis* only serves to punish or preclude that defendant from his lawful right to appeal, and to restrict an indigent defendant’s right to proceed *in forma pauperis* is to cut off his access to the courts and violates a defendant’s constitutional rights.

Denied - 2012-M-01775-SCT (Feb. 13, 2019)

En Banc Opinion by Chief Justice Randolph - Objection by Presiding Justice King

Briefed by [Zachary Flowers](#)

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SUPREME COURT - CRIMINAL CASES

NUNN V. STATE

CRIMINAL - FELONY

POST-CONVICTION RELIEF - LINDSEY BRIEF - APPELLATE REVIEW - When sufficient evidence exists at the trial court level to uphold a conviction, and appellate counsel submits a *Lindsey* brief, the Supreme Court has a duty to conduct an independent review of the record

FACTS

Timothy Nunn was convicted of unlawful possession of a firearm by a convicted felon. Officers stopped Nunn when they observed him driving a vehicle without a seatbelt. Before the vehicle stopped, officers observed Nunn leaning into the back seat of the car. After stopping the vehicle, the officers noticed a firearm in the backseat of the vehicle. Nunn told the officers he had possessed the firearm and given the firearm to the passenger in the backseat of the vehicle. At trial, a tape of Nunn admitting to knowledge and possession of the firearm was played for the jury. After Nunn's conviction, Nunn's appellate counsel complied with the Court's procedure set forth in *Lindsey*. Nunn's counsel found no issue at the trial level providing grounds for appeal and requested that Nunn be allowed to submit a *pro se* brief. The Court granted the request, but Nunn failed to file a *pro se* brief.

ISSUE

Whether any reversible error existed at the trial court level to provide grounds for appeal.

HOLDING

Because Nunn's appellate counsel properly followed *Lindsey* protocol, and the Court found no grounds for appeal at the trial level, Nunn's conviction and sentence were affirmed. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2018-KA-00198-SCT (Feb. 14, 2019)

Opinion by Justice Coleman

Hon. Christopher Louis Schmidt (Harrison County Circuit Court)

Justin T. Cook & George T. Holmes (Pub. Def. Office) for Appellant - Alicia Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Yance Falkner](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 12, 2019

COURT OF APPEALS - CIVIL CASES

EDWARDS V. EDWARDS

CIVIL - DOMESTIC RELATIONS

CIVIL PROCEDURE - SERVICE OF PROCESS - SUMMONS - Miss. R. Civ. P. 4(d)(1)(B) provides that if service of a summons by the sheriff or process server cannot be made with reasonable diligence upon the individual or his appointed agent, service may be made by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service

CIVIL PROCEDURE - SERVICE OF PROCESS - CONTEMPT - Miss. R. Civ. P. 81 mandates that in certain actions, including contempt, special notice be served on a respondent for a hearing with a date, time, and place specified

CIVIL PROCEDURE - SERVICE OF PROCESS - NOTICE REQUIREMENTS - The only information for a summons under Miss. R. Civ. P. 81 is that a party be told the time and place for the hearing; no answer is needed

FACTS

Johnny and Nancy Edwards divorced in 2013 and the Lowndes County Chancery Court awarded Johnny the marital home. As part of the award, Johnny was required to refinance the mortgage within ninety days of the judgement to free Nancy from any mortgage obligation, and, if unable to do so, Johnny was to sell the home. Johnny appealed the decision, which was affirmed by the Court of Appeals in 2016. While the appeal was pending, Nancy filed a petition for contempt, claiming that Johnny had refused to sell the home and defaulted on the mortgage payments, which adversely affected Nancy's credit standing. Johnny filed a motion for continuance, which was granted and continued to March of 2016 in the Chickasaw County Chancery Court. Before the hearing, Johnny's attorney withdrew as counsel and the chancery court found Johnny in contempt of the 2013 judgement and ordered the home to be sold within sixty days. If the home

was not sold, it would be auctioned off by the Lowndes County Chancery Clerk. Johnny filed a Rule 59 motion to alter or amend the contempt order, arguing that Nancy's actions prevented him from selling the house. A fiat was filed on March 22, 2017, setting a review hearing for April 11. On April 11, 2017, another fiat was entered, re-setting the hearing for May 15, 2017, at the Oktibbeha County Courthouse in Starkville. On April 11, a Rule 81 summons was issued to Johnny Jerome Edward (not Edwards) directing him to appear on May 15, 2017 at the Oktibbeha County Courthouse in Columbus. The proof of service of summons indicated the summons was delivered to Johnny's "daughter" Hazel Harris on April 19, 2017 and mailed to Johnny's residence on April 27. On May 15, the hearing was continued by the chancery court until June 19, 2017. Neither Johnny nor his attorney appeared at the hearing and on August 24, 2017, the chancery court found Johnny in contempt of the court's prior order and ordered Johnny to vacate the marital residence within thirty days, and the home was to be sold at a public auction. Johnny appealed.

ISSUES

Whether the (1) summons directed to Johnny was defective; and (2) service of process was improper.

HOLDING

(1) Because the Rule 81 summons for the May 15 hearing failed to specify the correct place for the hearing, and Johnny would not have known whether to appear at the Oktibbeha County Courthouse in Starkville or the Lowndes County Courthouse in Columbus, the summons was defective. (2) Because the summons was defective, the issue of improper service of process was moot and the Court declined to adopt Johnny's contention that he does not have a daughter. Therefore, the Court of Appeals reversed and remanded the judgment of the Lowndes County Chancery Court.

Reversed & Remanded - 2017-CA-01346-COA (Feb. 12, 2019)

En Banc Opinion by Chief Judge Barnes

Hon. Kenneth M. Burns (Lowndes County Chancery Court)

David S. Van Every Sr. for Appellant - *Pro Se* for Appellee

Briefed by [Ryan Overturf](#)

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COURT OF APPEALS - CRIMINAL CASES

KNIGHT V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - PRO SE LITIGANTS - COUNSEL - Forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so

CRIMINAL PROCEDURE - JURY VERDICT - STANDARD OF REVIEW - The reviewing court will not disturb the jury's verdict unless it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

EVIDENCE - ADMISSIBILITY - PHOTOGRAPHS - Photographs are admissible as long as they have an evidentiary purpose; photographs that are gruesome, lack an evidentiary purpose, and serve only to inflame the passions of the jury should not be admitted

FACTS

In 2007, John Knight took his step-daughter Jane to stay at a hotel. A Sexual Assault Nurse Examiner concluded that Jane had injuries consistent with recent sexual assault, and Jane told detectives that Knight raped her. Knight was indicted for sexual battery of a minor and retained attorney Casey Lott. In an initial hearing, Lott pointed to the fact that Jane was sexually molested by a cousin three to four years prior. The circuit judge disallowed any irrelevant evidence that Jane's cousin had molested her years prior. Knight and Lott's relationship deteriorated. Lott moved to withdraw as

counsel, stating that Knight was directing him to pursue imprudent objectives and threaten law enforcement. The circuit court assigned Knight a second attorney and ordered Knight to undergo a mental evaluation. The psychologist found that Knight was mentally competent. Knight told Judge Kitchens he wanted to represent himself. Judge Kitchens cautioned otherwise, and Knight accepted the second attorney as standby counsel. The jury found Knight guilty of sexual battery of a minor. He was sentenced as a violent habitual offender to life without eligibility for parole or early release. Knight appealed.

ISSUES

Whether (1) the trial court erred in failing to declare a mistrial *sua sponte* or forcing Knight to step aside and allow his counsel to take over; (2) the jury's verdict was contrary to the overwhelming weight of the evidence; and (3) the trial court erred in allowing the prosecution to introduce pictures taken during Jane's sexual assault examination.

HOLDING

(1) Because Knight chose to represent himself and the court cannot force a lawyer onto an unwilling defendant, the issue was without merit. (2) Because the jury's verdict was supported by the testimony presented at trial, it would not result in an unconscionable injustice to uphold Knight's conviction. (3) Because the pictures had some probative value and helped the jury understand Jane's injuries, the admission of the pictures was proper. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

Affirmed - 2015-KA-00372-COA (Feb. 12, 2019)

En Banc Opinion by Judge Westbrook

Hon. James T. Kitchens Jr. (Lowndes County Circuit Court)

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Davis Pigg](#)

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METCALF V. STATE

CRIMINAL - FELONY

APPELLATE REVIEW - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel's performance was deficient, and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail, and are assessed by the totality of the circumstances

EVIDENCE - WITNESSES - EXCLUSION - A trial court does not commit reversible error by excluding a witness who is stricken from the witness list, improperly subpoenaed, and diligently sought after for testimony

FACTS

Darryl Metcalf, who was twenty-four years old at the time, made sexual contact with M.W., a minor who was four years old at the time it occurred. Metcalf was indicted on two charges of sexual battery, one charge of attempted sexual battery, and one count of fondling in 2009. Metcalf's trial counsel successfully petitioned the court to conduct a mental competency evaluation, and the trial court delayed the trial until 2015 because of the pending evaluation. During trial, Metcalf's counsel made a motion to postpone in order to retrieve a witness. The witness was not properly subpoenaed, nor was the witness on the witness list. Metcalf's counsel also proposed to amend the fondling jury instruction so as to track the language of the statute under which Metcalf was charged. The State presented several witnesses, including Shirley Long, a psychotherapist that treated M.W. Metcalf was convicted on all four counts. Metcalf appealed.

ISSUES

Whether (1) the trial court erred in excluding one of Metcalf's witnesses; (2) the trial court erred in giving jury instructions that constructively amended two counts in the indictment; and (3) Metcalf received ineffective assistance of counsel.

HOLDING

(1) Because defense counsel did not work diligently to locate the witness and the witness's name was struck from the witness list, and because Metcalf did not suffer a manifest injustice, the witness exclusion was proper. (2) Because Metcalf did not raise an objection to the jury instruction for Count 1 at trial, and because Metcalf's counsel asked for the jury instruction to be amended to track the language of the statute, the trial court did not err in giving the jury instructions. (3) Because Metcalf did not receive objectively deficient counsel nor did he suffer prejudice as a result, Metcalf did not receive ineffective counsel. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

Affirmed - 2016-KA-01083-COA (Feb. 12, 2019)

En Banc Opinion by Judge Greenlee

Hon. Linda F. Coleman (Coahoma County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Joseph Scott Hemleben (Att'y Gen. Office) for Appellee

Briefed by [David Wellen](#)

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