

MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 21, 2019**SUPREME COURT - CIVIL CASES****HINTON V. PEKIN INS. CO.****CIVIL - WRONGFUL DEATH**

INSURANCE - WITHDRAWAL OF DEFENSE - ESTOPPEL - An insurer who withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured; but it is not estopped to do so if its action does not result in any prejudice to the insured

CIVIL LAW - EQUITY - JUDICIAL ESTOPPEL - Judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation

FACTS

On November 18, 2012, Timothy Hinton fell out of a tree stand and died. At the time of his fall, he was wearing a fall-arrest system purchased through The Sportsman's Guide and manufactured by C&S Global Imports, Inc. ("C&S"). Pekin Insurance Company ("Pekin") provided business insurance to C&S at the time of Timothy's death. Timothy's parents, Marsha and Thomas Hinton, brought a wrongful-death suit against C&S and Pekin. The Hintons moved for partial summary judgment, and Pekin moved for summary judgment. The Hintons alleged in their motion that Pekin failed to provide a defense to C&S, failed to obtain a judicial determination that it did not owe C&S a defense, and failed to protect C&S from a default judgment. The Hintons relied on Pekin's review of the claim against C&S, arguing that there was a genuine issue of material fact as to whether C&S had tree stand liability coverage excluded from their policy. Pekin alleged there was no genuine issue of material fact regarding the liability exclusion and that The Sportman's Guide was not an additional insured under the policy. The trial court granted dismissed Pekin from the suit with prejudice. The Hintons appealed.

ISSUES

Whether (1) Pekin's insurance coverage excluded liability for tree stands; (2) The Sportman's Guide was an additional insured under the policy; (3) the trial court erred in denying the Hinton's motion for summary judgment because Pekin was estopped from raising coverage defenses; (4) Pekin waived their coverage defenses; and (5) Pekin was judicially estopped from offering any evidence that C&S did not tender a defense to Pekin.

HOLDING

(1) Because the insurance policy and amended policy consistently included tree-stand coverage liability exclusions, there was no genuine issue of material fact about whether such exclusion was part of the policy. (2) Because there was no genuine issue of material fact regarding the policy, the argument that The Sportman's Guide was additional insured under the policy was moot. (3) Because Pekin made a limited offer of coverage defense and timely withdrew such defense, Pekin was not estopped. (4) Because there was no evidence in the record that Pekin waived its right to assert coverage defenses, and in fact denied coverage, the argument for waiver was without merit. (5) Because Pekin did not intentionally self-contradict itself, Pekin was not judicially estopped from relying on testimony by a C&S officer regarding its offer of coverage defense. Therefore, the Supreme Court affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2018-CA-00383-SCT (Feb. 21, 2019)

En Banc Opinion by Justice Chamberlin

Hon. Dal Williamson (Jones County Circuit Court)
Lawrence E. Abernathy III, Leslie D. Roussell, & Samuel S. McHard for Appellants - Dorance Aultman for Appellee
Briefed by [Michael Lambert](#)

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SUPREME COURT - CRIMINAL CASES

JOHNSON V. STATE

CRIMINAL - FELONY

WEIGHT OF THE EVIDENCE - TESTIMONY - CORROBORATION - Two impeached witness' testimony may corroborate each other and become sufficient to uphold a conviction

EVIDENCE - IMPEACHMENT - JUVENILE ADJUDICATIONS - Impeachment based on juvenile adjudications is generally prohibited unless an adult's conviction for that offense would be admissible to attack the adult's credibility and admitting the evidence is necessary to fairly determine guilt or innocence

FACTS

Jayvius Johnson was tried for two counts of capital murder with a firearm enhancement, one count of kidnapping with a firearm enhancement, and one count of conspiracy. During trial, two witnesses' testimony was brought into question based on prior inconsistent statements given to police. Defense attempted to introduce evidence of juvenile adjudications of one witness and photographs of the witness with guns. Neither the photos nor the adjudications were allowed in, but defense was allowed to cross-examine on whether the witness had ever taken photos with guns. Johnson was found guilty of all charges. Johnson appealed.

ISSUES

Whether (1) the verdict was against the overwhelming weight of the evidence; (2) the court erred in excluding the photographs; and (3) the court erred in excluding the juvenile adjudications.

HOLDING

(1) Because the two impeached witnesses' testimony corroborated each other, the testimony was not uncorroborated and unreasonable, self-contradictory, or substantially impeached, and was sufficient to uphold a conviction. (2) Because the photographs were undated and defense made no attempt to authenticate them, the photos were not admissible, so it was not error to exclude them. (3) Because defense planned to use these adjudications to attack the witness' credibility via general impeachment purposes, which is prohibited by Miss. R. Evid. 609, the evidence was properly excluded. Therefore, the Supreme Court affirmed the judgment of the Bolivar County Circuit Court.

Affirmed - 2017-KA-00534-SCT (Feb. 21, 2019)

Opinion by Presiding Justice King

Hon. Albert B. Smith III (Bolivar County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [James Adamoli](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 19, 2019

COURT OF APPEALS - POST-CONVICTION RELIEF

GREEN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURE - GUILTY PLEAS - A post-conviction relief motion challenging a guilty plea must be filed within three years of the entry of the judgment of conviction

POST-CONVICTION RELIEF - PROCEDURAL BAR - FUNDAMENTAL RIGHTS - A violation of a defendant's fundamental rights is an exception to the procedural time-bar; the only rights found to be fundamental include double jeopardy, an illegal sentence, denial of due process at sentencing, and ex-post-facto claims

POST-CONVICTION RELIEF - GUILTY PLEA - FACTUAL BASIS - The court must determine that a plea is voluntarily and intelligently made and that there is a factual basis for the plea

FACTS

In January of 2008, a grand jury charged Jess Green with two counts of kidnapping, two counts of sexual battery, and one count of armed robbery. Green pled guilty to all charges. Green filed a motion for post-conviction relief seven years later, but the court found that the request was both time-barred and lacked merit. He filed a second motion for post-conviction relief in September of 2017, but the trial court dismissed it as time-barred, successive, and without merit. Green appealed.

ISSUES

Whether (1) Green's motion was time-barred; (2) the trial court erred in accepting Green's guilty plea without a factual basis; and (3) the trial court should have ordered a competency hearing before accepting Green's guilty plea.

HOLDING

(1) Because a PCR motion for a guilty plea must be filed within three years of the entry of judgment, and Green's fundamental rights were not violated, the motion seven years later is procedurally barred. (2) Because the transcript of Green's guilty plea contained sufficient factual evidence including descriptions of the crimes with which he was charged, the court correctly accepted his guilty plea. (3) Because the defendant bears the burden of proof that he is incompetent to stand trial, and Green did not meet that burden, the trial court properly accepted his guilty plea without a competency hearing. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2017-CP-01285-COA (Feb. 19, 2019)

En Banc Opinion by Chief Judge Barnes

Hon. Dale Harkey (Jackson County Circuit Court)

Pro se for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Andie Szabo](#)

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COURT OF APPEALS - CRIMINAL CASES

JARVIS V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - EVIDENCE - PREJUDICIAL EFFECT - Under Miss. R. Evid. 403, the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice

FACTS

On September 12, 2016, two men forcibly entered Christopher and Hilda Crawford's home in Madison County, Mississippi, and robbed the Crawfords at gunpoint. The assailants stole various pieces of jewelry, including Rolex

watches and a gold-coin necklace, along with \$7,500 in cash. Mr. Crawford described the assailants as two African-American men, one about 6'1" and the other approximately 5'7", and stated that the two men used Glock-style pistols during the robbery. Police determined that the assailants' car was a white, two-door car with a specialty Reservoir license plate. Police were ultimately able to identify Thaddeus Jarvis as one of the assailants based on two videos posted on his Facebook account. The videos showed Jarvis and another man next to the car matching the description. The car had a roll of cash on the console, and Jarvis and the other party were flaunting a gold-coin necklace and a Rolex matching the Crawfords' stolen goods. The video also depicted that both Jarvis and the other man were in possession of Glock-style pistols. These two Facebook videos were admitted into evidence over the defense's objections that the videos' probative value was outweighed by their prejudicial effect. Subsequently, Jarvis was found guilty of armed robbery, kidnapping, burglary of a dwelling, and conspiracy to commit armed robbery. Jarvis appealed.

ISSUE

Whether the trial court erred in admitting the two Facebook videos into evidence.

HOLDING

Because the Facebook videos were used to properly identify Jarvis, establish his relationship with the other assailant, and show him in possession of distinctive pieces of jewelry owned by the Crawfords, and because such use of the videos was proper under evidentiary rules, the trial court did not err in admitting the two Facebook videos into evidence. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2017-KA-01282-COA (Feb. 19, 2019)

En Banc Opinion by Judge Tindell

Hon. Steve S. Ratcliff III (Madison County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Corban Snider](#)

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JONES V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - LESSER-INCLUDED OFFENSES - Under *Downs*, a defendant has an absolute right to have the jury instructed on lesser-included offenses if the evidence supports such an instruction; there is reversible error in not giving the lesser-included offense instruction

LARCENY - PROSECUTION & PUNISHMENT - GRADE OF OFFENSE - Under *Clayton*, larceny is a lesser-included offense of robbery

ROBBERY - SUFFICIENCY OF EVIDENCE - FEAR OF IMMEDIATE INJURY - Under *Oliver*, testimony showing that the taking was effectuated through fear of immediate injury to the victim is sufficient evidence for a rational jury to find the taker guilty

FACTS

Zartavious Jones contacted Nicholas Brusseau about designer shoes and clothes Brusseau had posted for sale online. Jones agreed to trade two pairs of his \$400 jeans for Brusseau's shoes and clothes, and Jones later had his girlfriend, Alyssa Lagomarsino, drive him to Brusseau's home. During the exchange, Brusseau claimed that Jones pointed a gun at him as Jones got back into the car, taking the shoes and clothes from Brusseau. Brusseau took a picture of the car's license plate and reported the incident. The police found the shoes and clothes in Jones's and Lagomarsino's house but never recovered the alleged gun. At the grand jury hearing, Lagomarsino testified that Jones did not give Brusseau the jeans he had promised, but she never saw Jones with a gun. However, on cross-examination, Lagomarsino conceded that it was possible that Jones had a gun that he hid from her view. Jones was indicted for armed robbery, and at trial, he requested a jury instruction on petit larceny, which was refused. After being found guilty of armed robbery, Jones filed a motion for judgment notwithstanding the verdict, or a new trial, which was denied. Jones appealed.

ISSUES

Whether (1) Jones was entitled to a jury instruction on the lesser-included offense of petit larceny; (2) the evidence was insufficient to support Jones's conviction; and (3) Jones was entitled to a new trial because the jury's verdict was against the overwhelming weight of the evidence.

HOLDING

(1) Because larceny can be committed in the owner's presence, and there was sufficient evidence for a rational jury to have found Jones guilty of the lesser-included offense, Jones was entitled to an instruction of petit larceny. (2) Because Brusseau testified that Jones pointed a gun at him, Lagomarsino conceded that Jones could have displayed a gun that she did not see, and Jones effectuated the taking through fear of immediate injury to Brusseau, there was sufficient evidence for a rational jury to find Jones guilty of armed robbery. (3) Because there was evidence that would have permitted a rational jury to find that Jones committed only the lesser-included offense of petit larceny, Jones was entitled to a new trial. Therefore, the Court of Appeals reversed and remanded the judgment of the Desoto County Circuit Court.

Reversed & Remanded - 2017-KA-01718-COA (Feb. 19, 2019)

En Banc Opinion by Presiding Judge Wilson

Hon. Celeste Embrey Wilson (Desoto County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Billy L. Gore & John W. Champion (Att'y Gen. Office) for Appellee

Briefed by [Lauren Rogers](#)

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