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Weekly Newsletter

Mississippi Cases Editor: Katie Humphries

MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 18, 2019

COURT OF APPEALS - CIVIL CASES

BAILEY V. WELLS FARGO BANK, N.A.

CIVIL - PERSONAL INJURY

APPELLATE PROCEDURE - NOTICE OF APPEAL - TIME LIMIT - Unless the time for filing a notice of appeal is tolled, notice of appeal must be filed within thirty days of the entry of a final judgment

APPELLATE PROCEDURE - FINAL JUDGMENT - ELEMENTS - Generally, a final judgment is one that adjudicates the merits of the controversy and settles all issues between all parties; an order is considered final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment

APPELLATE PROCEDURE - FINAL JUDGMENT - MERGING - Generally, prior interlocutory rulings "merge" with the final judgment and may be considered on appeal from the final judgment

CIVIL PROCEDURE - SUMMARY JUDGMENT - COMPETENT EVIDENCE - The non-moving party must provide competent evidence showing that a genuine issue of material fact remains in dispute

CIVIL PROCEDURE - SUMMARY JUDGMENT - COMPETENT EVIDENCE - Absent an affidavit supporting its authenticity, an unauthenticated document is not competent summary judgment evidence

FACTS

Jenifer Bailey bought a house from Jeremiah and Marie Schroeder. The Schroeders completed and signed a property condition disclosure statement, in which they denied any prior history of meth labs in the house, among other things. Bailey alleged that she later discovered that a former rental occupant of the house had been arrested for operating a meth lab in the house. Bailey filed a complaint against the Schroeders, alleging that they failed to disclose that there had once been a meth lab in the house. The complaint also named Wells Fargo Bank N.A. ("Wells Fargo) as an additional plaintiff. The complaint asserted that Wells Fargo was a necessary and indispensable party because it held a deed of trust on the subject property. Wells Fargo filed a motion to dismiss, arguing that it should be dismissed from the case because no claims were asserted against it and because it no longer held a deed of trust on the property. The Schroeders filed a motion for summary judgment, supported by affidavits and deposition testimony, arguing that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law because there was no evidence that there had been a meth lab in the house or evidence that they knew or should have known about it. In Bailey's response to the motion, she submitted a purported memorandum to the Schroeders from Detective Aaron Fore. The memorandum stated that a meth lab was discovered in and about the residence owned by the Schroeders. Bailey did not provide an affidavit from Fore, nor anyone with personal knowledge, who could attest that the memorandum was authentic and that it was delivered to the Schroeders. Bailey also submitted a purported email from her attorney, Michael Crosby, to Detective Fore, which attempted to confirm that Fore delivered the memorandum to the Schroeders. The record did not contain a response to Crosby's email or even make clear that Crosby sent the email to Fore's email address. On December 8, 2016, the Harrison County Circuit Court stated it would grant Wells Fargo's motion to dismiss "with prejudice" and grant the Schroeders' motion for summary judgment. On December 14, 2016, the circuit court entered a judgment in favor of the Schroeders. On January 6, 2017, the circuit court entered a final order and judgment granting Wells Fargo's motion to dismiss. On February 3, 2017, Bailey filed a notice of appeal.

ISSUES

Whether (1) there was jurisdiction to decide the appeal and (2) the circuit court properly granted summary judgment in favor of the defendants.

HOLDING

(1) Because the circuit court's December 14, 2016 judgment in favor of the Schroeders did not settle all issues between all parties, because the final appealable judgment in this case was the January 6, 2017 final order and judgment granting Wells Fargo's motion to dismiss, and because Bailey filed a timely notice of appeal less than thirty days later, there was jurisdiction to decide the appeal. (2) Because Bailey did not provide competent evidence to support her argument, the circuit court properly granted summary judgment in favor of the defendants. Therefore, the Court of Appeals affirmed the Harrison County Circuit Court.

DISSENT

Presiding Judge Carlton disagreed with the finding that the circuit court's January 6, 2017 final order and judgment was the final appealable judgment in this case. She argued that the December 14, 2016 grant of summary judgment resolved all issues between the parties because allegedly no claims were asserted against Wells Fargo, and therefore Bailey's February 3, 2017 notice of appeal was time-barred. Thus, she found that the court lacked jurisdiction and should have dismissed Bailey's appeal.

Affirmed - 2017-CA-00156-COA (June 18, 2019)
En Banc Opinion by Presiding Judge J. Wilson - Dissent by Presiding Judge Carlton
Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, First Judicial Dist.)
Michael W. Crosby for Appellant - Frederick N. Salvo III, Adria H. Jetton, Samuel D. Gregory, & Donald Rafferty for Appellees
Briefed by Luke Phillips

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BUTLER V. PHC-CLEVELAND INC.

CIVIL - WRONGFUL DEATH

MEDICAL MALPRACTICE - STATUTE OF LIMITATIONS - DISCOVERY RULE - The discovery rule tolls the statute of limitations period until a claimant, using reasonable diligence, could have first known of the injury itself, its cause, and the causative relationship between the injury and the conduct of the medical practitioner
CIVIL PROCEDURE - STATUTE OF LIMITATIONS - DISCOVERY RULE - The question of whether a statute of limitations is tolled by the discovery rule turns on the factual determination of what the plaintiff knew and when; and in cases where there is a strong dispute over the applicability of the discovery rule, the issue should be determined by a jury
CIVIL PROCEDURE - WRONGFUL DEATH - NOTICE OF CLAIM - While not every death certificate will initiate the running of the statute of limitations in a wrongful-death action, evidence that a potential claimant had notice that something was amiss, combined with the death certificate, is an example of notice sufficient to trigger the statute of limitations period

FACTS

Amelia Butler was a seventy-year-old, long-term-care patient first admitted to Bolivar Medical Center ("Bolivar") following a stroke. Medical records did not indicate any skin ailment upon admission; however, she developed multiple stage III and stage IV decubitus ulcers over the next seven months. Her death certificate listed multiple decubitus ulcers as one of the causes of her death on January 7, 2013. Her son, Jonathan, photographed her injuries at the funeral home and collected her medical records. He then hired an attorney, who enlisted a medical expert to determine Amelia's cause of death. The expert concluded in a June 1, 2015 report that Bolivar had breached the standard of care owed to Amelia, and the complaint was filed on December 15, 2015. The court granted Bolivar's motion for summary judgment, finding that because Amelia's wounds were not latent injuries, the statute of limitations began to run on the date of her death on January 7, 2013. Jonathan appealed.

ISSUE

Whether the trial court erred in ruling that Jonathan's wrongful death claim was time-barred by the statute of limitations.

HOLDING

Because the discovery rule tolls the statute of limitations period until a claimant, using reasonable diligence, could have first have known of the injury itself, its cause, and the causative relationship between the injury and the conduct of the medical practitioner, and because the combined evidence showed that Jonathan's knowledge of the ulcers his mother developed while hospitalized and their listing on her death certificate as a cause of death provided him sufficient notice to trigger the two-year statute of limitations period, the trial court did not err in ruling that Jonathan's wrongful-death claim was time-barred by the statute of limitations. Further, Jonathan's failure to obtain an expert opinion for more than two-and-a-half years after Amelia died does not comport with the "reasonable diligence" requirement of the discovery rule. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Circuit Court.

Affirmed - 2018-CA-00261-COA (June 18, 2019)
Opinion by Judge McCarty
Hon. Charles E. Webster (Bolivar County Circuit Court)
Azki Shah for Appellants - Kimberly Nelson Howland & Charles Edward Cowan for Appellee
Briefed by Tucker Hood

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ELLISON V. WILLIAMS

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - *FERGUSON* FACTORS - The factors to be considered by a chancellor when dividing marital estates include the following: (1) substantial contribution to the accumulation of the property; (2) the degree to which each spouse has expended, withdrawn, or otherwise disposed of marital assets; (3) the market value and the emotional value of the assets subject to distribution; (4) the value of assets not ordinarily subject to such distribution; (5) tax and other economic consequences, as well as contractual or legal consequences to third parties, of the proposed distribution; (6) the extent to which property division may, with equity to both parties, be utilized for periodic payments and other potential sources of future friction between the parties; (7) the need of the parties for financial security; and (8) any other factor which in equity should be considered
FAMILY LAW - DIVORCE - ATTORNEY'S FEES - Determining whether to award attorney's fees in a divorce action is a matter largely entrusted to the discretion of the chancellor
FAMILY LAW - DIVORCE - MARITAL MISCONDUCT - Within Mississippi, courts shall take into consideration a party's extramarital affair when deciding on property division

FACTS

Eleanor Ellison and Stephen Williams married on April 23, 2007. At the beginning of their marriage, the couple resided in a home deeded to Ellison by her parents (the "Ingomar Property"). The couple resided in the home for almost eight years. Later, they decided to purchase another home in a different school district so that Ellison's grandson could attend school there (the "Highway 348 Property"). Together, Ellison and Williams took out an equity loan on the Ingomar Property to purchase the Highway 348 Property and an additional loan to cover the amount that the equity loan did not. They resided at the Highway 348 Property and rented the Ingomar Property from January 2015 until their separation in September 2016. While residing in the home, Williams took on many repair projects, such as painting rooms, putting down hardwood floors, installing a hot tub, and laying a brick paver around the home. After Williams left the marital home, Ellison was solely responsible for the finances of both the Ingomar Property and the Highway 348 Property with the exception of two months. Shortly after Williams's departure, he began an extramarital relationship. In January 2017, Ellison filed a complaint for divorce and cited Williams' adultery as the cause. After a hearing in November 2017, the chancellor granted the divorce and awarded Ellison sixty percent of the marital estate. Williams was granted forty percent. The chancellor also found that the $35,000 loan from Ellison's son was not marital debt, and the chancellor did not award either party attorney's fees. In 2018, Ellison filed a motion to reconsider, which was denied by the chancellor. Ellison appealed.

ISSUES

Whether the chancellor erred by (1) misapplying the *Ferguson* factors; (2) not finding the loan from Ellison's son to be marital debt; and (3) denying Ellison's request for attorney's fees.

HOLDING

(1) Because Mississippi courts must take into consideration a party's extramarital affair when deciding on property division, and because the chancellor did not consider Williams's extramarital relationship when equitably dividing the marital estate, the chancellor erred by failing to apply a full *Ferguson* analysis. (2) Because Ellison failed to affirmatively prove that the loan was not wages earned, the chancellor did not err in finding that the loan was not marital debt. (3) Because Ellison provided no proof of the amounts paid or her inability to pay attorney's fees, the chancellor did not abuse his discretion in denying Ellison's request for attorney's fees. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the decision of the Union County Chancery Court.

DISSENT

Judge Tindell agreed that the court did not err in finding that the loan from Ellison's son was not marital debt and that Ellison should not have been awarded attorney's fees. However, he argued that the chancellor's final judgment did address Williams's adultery. He stated that after conducting a full *Ferguson* analysis, the chancellor properly awarded a greater portion of the marital estate to Ellison.

Affirmed in Part; Reversed & Remanded in Part - 2018-CA-00330-COA (June 18, 2019)
Opinion by Judge Westbrooks
Hon. C. Michael Malski (Union County Chancery Court)
Joe M. Davis for Appellant - Richard Shane McLaughlin for Appellee
Briefed by Whitney Jackson

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GIBSON V. SHOEMAKE

CIVIL - CONTRACT

CONTRACTS - VALIDITY - REFORMATION - Reformation of a contract is justified only if there has been a mutual mistake or the mistake is one party's fault and the other party has engaged in fraud or inequitable conduct
CONTRACTS - PROPERTY - HOMESTEAD EXEMPTION - A deed shall not be valid or binding unless signed by the spouse of the owner if the owner is married and living with the spouse
CONTRACTS - ACCORD AND SATISFACTION - ELEMENTS - The elements of accord and satisfaction are (1) something of value offered in full satisfaction of a demand; (2) the offer is accompanied by acts which declare acceptance; (3) the party offered the thing of value understands he takes subject to the conditions offered; and (4) the party offered the item actually accepts the item

FACTS

Mark Gibson entered into a contract with Randy Shoemake in 2004 for the sale and purchase of a tract of land and a mobile home. The terms of the 2004 contract stated that the $39,400 balance on the transaction had to be paid in monthly installments of $426.12 for 120 months at a 5.42% interest rate, and upon satisfaction of the full purchase price, the deed would be delivered. In 2010, Gibson requested that Shoemake sign a deed of trust and two promissory notes, which reflected payments of $426.12 for 240 months at 11.79% interest. Shoemake's wife did not sign the deed or the notes. Shoemake continued making payments until 2014 when he issued Gibson a final check with the note, "Our Contract agreement fully met, it's been nice doing business you." Gibson notated that the check was received and that he would get in touch with Shoemake within two weeks. Gibson then deposited the check. In 2015, Gibson, relying on the 2010 contract terms, foreclosed on the relevant property claiming there was an outstanding balance. The Shoemakes filed suit, and the trial court found in favor of the Shoemakes. Gibson appealed.

ISSUES

Whether the chancellor erred in finding that (1) the 2010 contract was not a reformation of the 2004 contract, but rather, a new contract; (2) because Shoemake's wife had a homestead interest in the subject property, her lack of signature on the 2010 Deed of Trust voided the Deed of Trust; and (3) Gibson accepted Shoemake's final check in 2014 and thereby satisfied their indebtedness pursuant to the doctrine of accord and satisfaction.

HOLDING

(1) Because there was no clear expression by both parties to alter the 2004 contract and Gibson accepted Shoemake's payments according to the 2004 contract for six years without reformation, the chancellor did not err in finding the 2010 agreement was a new contract instead of a reformation. (2) Because Mississippi homestead law requires the signature of both spouses in a married couple living together in order to execute a deed, the chancellor did not err in finding the 2010 deed signed only by Shoemake was void. (3) Because Gibson accepted Shoemake's final check and deposited it, the chancellor did not err in finding the elements of accord and satisfaction were present and that the Shoemakes' debt was settled. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Chancery Court.

Affirmed - 2017-CA-01704-COA (June 18, 2019)
Opinion by Judge Tindell
Hon. Johnny Lee Williams (Pearl River County Chancery Court)
G. Gerald Cruthird for Appellants - Nathan S. Farmer for Appellees
Briefed by Karen Lott

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KIMBLE V. KIMBLE

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - EQUITABLE DISTRIBUTION - VALUATION OF MARITAL PROPERTY - The foundational step to make an equitable distribution of marital assets is to determine the value of those assets based on competent proof; it is incumbent on the parties to prepare evidence touching on matters pertinent to the issues to be tried, and when a party fails to provide accurate information in the valuation of assets, the chancellor is entitled to proceed on the best information available
EVIDENCE - WITNESS TESTIMONY - CREDIBILITY - The chancellor possesses sole authority to assess both the credibility and the weight of witness testimony

FACTS

Stepidy Kimble and Rodney Kimble Sr. married in August 2003 and separated in January 2016. Stepidy filed a complaint for divorce and other relief soon thereafter. In July 2017, the chancellor entered a decree granting Stepidy a divorce on the ground of adultery, awarding Stepidy sole legal and physical custody of the parties' two minor children, and granting Rodney visitation. At the hearing, both parties provided the chancellor with Uniform Chancery Court Rule 8.05 financial statements and testified at the bench hearing. During the hearing, the chancellor determined Rodney's testimony to be fraught with misstatements, untruths, and statements made in an effort to conceal Rodney's assets and, thus, awarded little credibility to Rodney's testimony. Based upon the Rule 8.05 statements and testimony, the chancellor valued the eleven marital assets of the estate at $154,996.47, awarding Stepidy $68,996.47 and Rodney $86,000. To achieve an even split of the marital assets, the chancellor ordered Rodney to pay Stepidy $8,501.76. Rodney appealed.

ISSUE

Whether the trial court erred in its valuation of three of the eleven marital assets.

HOLDING

Because Rodney lacked credibility in providing his Rule 8.05 financial statement and testimony, and because the

chancellor is entitled to proceed on the best information available when a party fails to provide accurate information in the valuation of assets, the trial court did not err in its valuation of the marital estate. Therefore, the Court of Appeals affirmed the judgment of the Tate County Chancery Court.

Affirmed - 2017-CA-01190-COA (June 18, 2019)
Opinion by Judge Tindell
Hon. Percy L. Lynchard Jr. (Tate County Chancery Court)
Terrence Ladwayne High for Appellant - *Pro se* for Appellee
Briefed by Carson Phillips

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MARTIN V. BORRIES

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CHILD SUPPORT - MODIFICATION - There can be no modification of a child support decree absent a substantial and material change in the circumstances of one of the interested parties that (1) arises subsequent to the entry of the decree sought to be modified; (2) is unanticipated at the time the of the entry of the decree; and (3) is not the result of a party's voluntary behavior

APPELLATE PROCEDURE - REMEDIES - ATTORNEY'S FEES - An appellate court will not award attorney's fees for an appeal when the basis of the award would be a prior ruling of contempt and when the contemnor has not appealed the ruling of contempt

FACTS

David Martin and Wendy Borries were divorced in the Jackson County Chancery Court in 2007. Borries was awarded custody of the couple's minor children, and Martin was ordered to pay $1,000 per month in child support, to pay half the cost of the children's extracurricular or school activities, and to provide medical insurance for the children and pay half the cost of procedures not covered by the insurance. In 2009, Borries filed a motion for contempt against Martin, and the trial court found Martin to be $5,000 in arrears for child support. The trial court ordered Martin to pay the entire arrearage to Borries, and the parties' agreed to modify the previous decree, requiring Martin to pay an extra $300 per month for the children's extracurricular activities. In 2013, Borries filed a second motion for contempt against Martin and a request for modification of child support. The parties agreed in 2014 to an order of modification that required Martin to pay $1,700 in child support and $300 for activities per month. In 2015, Martin's contract as a project-consultant manager ended, and while awaiting a new assignment, he moved his wife and stepdaughter from China to Mississippi. However, rather than obtain comparable employment, he instead lived off his savings before taking a job as an electrician, resulting in a significant decrease in his salary. In 2016, Martin file a petition for modification of child support, alleging a substantial and material change in his income. According to Martin, obtaining comparable employment would require him to move overseas. The chancellor denied Martin's petition, finding that his decrease in salary was a voluntary reduction of income. Martin appealed.

ISSUES

Whether (1) the chancellor erred in denying Martin's petition for a modification in child support payments and (2) the appellate court should award Borries attorney's fees for the appeal.

HOLDING

(1) Because there can be no modification of a child support decree absent a substantial and material change in the circumstances of one of the interested parties that arises subsequent to the entry of the decree sought to be modified, is unanticipated at the time the of the entry of the decree, and is not the result of a party's voluntary behavior, and because the chancellor determined that Martin's reduction in income was anticipated at the time the decree was entered and was voluntary, the chancellor did not err in denying Martin's petition for a modification in child support payments. (2) Because an appellate court will not award attorney's fees for an appeal when the basis of the award would be a prior

ruling of contempt and when the contemnor has not appealed the ruling of contempt, and because Martin did not appeal the chancellor's prior ruling of contempt, the court declined to award attorney's fees to Borries for the appeal. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

Affirmed - 2018-CA-00068-COA (June 18, 2019)
Opinion by Chief Judge Barnes
Hon. Michael H. Ward (Jackson County Chancery Court)
William Carl Miller for Appellant - Calvin D. Taylor & Wendy Walker Borries for Appellee
Briefed by Jon-Paul Bushnell

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SINGLETON V. BUFORD

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CHILD CUSTODY - BEST INTEREST STANDARD - The polestar consideration in child custody cases is the best interest and welfare of the child
CIVIL PROCEDURE - JUDICIAL DISCRETION - ABUSE OF DISCRETION - An abuse of discretion means clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing

FACTS

Terrie Singleton and Orlando Buford are the parents of three-year-old Marion. When Marion was born, there was no judicial determination of custody or visitation, but Singleton and Buford worked out an arrangement where Singleton received visitation on the weekends because she had moved for her job. There was a dispute between the parents, and Buford filed for custody and child support, while Singleton counterclaimed for custody and relief. However, on the day of the hearing, neither Singleton nor her attorney were present because they had both mixed up the date of the hearing. At the hearing, Buford and his wife testified, and the judge awarded Buford custody and child support. Within seven days, Singleton filed a motion for a new trial or for reconsideration; both were denied. Singleton appealed.

ISSUE

Whether the chancery court abused its discretion by denying Singleton's motion for a new trial or for reconsideration.

HOLDING

Because relief was sought within the ten-day time period of Miss. R. Civ. P. 59, and because the judge would have been better equipped to assess the child's best interest if he had received evidence from both parents, rather than one, the chancery court abused its discretion in denying the motion for a new trial or for reconsideration. Therefore, the Court of Appeals reversed and remanded the judgment of the Pearl River County Chancery Court.

DISSENT

Presiding Judge Carlton argued that the chancellor did not abuse his discretion by denying Singleton's motion for reconsideration or new trial. Under Rule 59, the movant must show (1) an intervening change in controlling law; (2) availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice. Judge Carlton argued that mistaking when the hearing was scheduled does not rise to the standard needed for a new trial or reconsideration under Rule 59.

Reversed & Remanded - 2017-CA-01448-COA (June 18, 2019)
En Banc Opinion by Presiding Judge J. Wilson - Dissent by Presiding Judge Carlton
Hon. M. Ronald Doleac (Pearl River County Chancery Court)
Wendy Walker Borries for Appellant - Marcus Alan McLelland & Glenn Louis White for Appellee
Briefed by Brandon H. Wilson

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STRAUSBAUGH V. LUMPKIN

CIVIL - CONTRACT

CIVIL - APPELLATE PROCEDURE - STANDARD OF REVIEW - Appellate courts have the authority to order supplementation of the record on its own motion if anything material to either party is omitted from the record by error or accident

CIVIL - APPELLATE PROCEDURE - RECORD - Mississippi appellate courts may not consider information that is outside the record

FACTS

Steven Strausbaugh filed suit against Brenda Lumpkin and Diane Mars, claiming they sold him property with undisclosed termite damage. Lumpkin and Mars filed a motion for summary judgment, which the Pearl River County Circuit Court granted. Strausbaugh appealed.

ISSUE

Whether the trial judge erred in granting summary judgment to Lumpkin and Mars.

HOLDING

Because Strausbaugh failed to provide an adequate record including, *inter alia*, the plaintiff's complaint, defendants' answer, the motion for summary judgment, and trial transcripts necessary for the court to determine if there was a genuine issue of material fact, the court presumed the circuit court's ruling was correct. Therefore, the Court of Appeals affirmed the judgment of the Pearl River County Circuit Court.

Affirmed - 2018-CP-00389-COA (June 18, 2019)
Opinion by Judge Lawrence
Hon. Prentiss Greene Harrell (Pearl River County Circuit Court)
Pro se for Appellant - Nathan S. Farmer for Appellees
Briefed by Jack Schultz

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COURT OF APPEALS - POST-CONVICTION RELIEF

ROBY V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - GUILTY PLEA - INVOLUNTARY - Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made, and that there is a factual basis for the plea; to determine whether the plea is voluntarily and intelligently given, the trial court must advise the defendant of his rights, the nature of the charge against him, as well as the consequences of the plea

POST-CONVICTION RELIEF - GUILTY PLEA - FACTUAL BASIS - A factual basis can be established by a statement of the prosecutor, the testimony of live witnesses, and prior proceedings, or an actual admission by the defendant

FACTS

In April 2012, a Clay County jury indicted Thomas Roby for two counts of armed robbery. In March 2015, Roby filed a notice of an alibi defense. On the original trial date, Roby failed to appear in court because he checked into a hospital, but the next day, the trial was scheduled to go forward. Before proceedings commenced, Roby changed his plea to guilty, and a plea hearing ensued. The trial judge questioned Roby in detail about his plea and discussed, at length, the ramifications of his guilty plea. The trial judge concluded that Roby knowingly and voluntarily entered his plea and released him to await sentencing. Before the sentencing hearing, Roby made an oral motion through his attorney to withdraw his guilty plea, arguing he had unknowingly entered the plea because he was under the influence of morphine and not in his "right state of mind." Roby's request to set aside his guilty plea was denied, and he was sentenced on August 5, 2016. In 2017, Roby, appearing pro se, filed a motion for post-conviction relief ("PCR") raising seven issues. The trial court entered an order discussing each issue but ultimately dismissed Roby's PCR motion. Roby appealed, raising issues related to only his guilty plea.

ISSUES

Whether (1) Roby's right to due process was violated because he entered a guilty plea involuntarily and (2) a factual basis existed for the plea.

HOLDING

(1) Because, at the plea hearing, Roby declared he understood the proceedings and testified under oath that his attorney reviewed the plea petition with him and he understood it, in addition to the trial judge's detailed remarks about Roby's mental status during the hearing, the court found his plea to be voluntary. (2) Because the State's presented testimony was a sufficient factual basis to meet all the elements of robbery for both victims, and because Roby's guilty plea waived his right to challenge the State's evidence, the court found there was a sufficient factual basis. Therefore, the Court of Appeals affirmed the judgment of the Clay County Circuit Court.

Affirmed - 2018-CP-00313-COA (June 18, 2019)
Opinion by Chief Judge Barnes
Hon. James T. Kitchens Jr. (Clay County Circuit Court)
Pro se for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee
Briefed by Natalie McCarty

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COURT OF APPEALS - CRIMINAL CASES

BOSTIC V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - RIGHT TO COUNSEL - INTERPRETATION - Regardless of whether the defendant's request for an attorney is explicit or equivocal, the court must give a broad, rather than narrow, interpretation to a defendant's request for counsel
CRIMINAL PROCEDURE - RIGHT TO COUNSEL - EXCEPTIONS - Once an accused has invoked his right to counsel, any statements given by the defendant in response to further police questioning are admissible only where (1) the defendant initiated further discussions with the police and (2) knowingly and intelligently waived the rights he had invoked
CRIMINAL PROCEDURE - CONSTITUTIONAL RIGHTS - HARMLESS ERROR - Errors involving a violation of an accused's constitutional rights may be deemed harmless beyond a reasonable doubt where the weight of the evidence against the accused is overwhelming

FACTS

Micah Bostic was convicted of capital murder and sentenced to life imprisonment without eligibility of parole. After his arrest and during his interrogation, Bostic clearly invoked his right to counsel, but the officers continued questioning him. Bostic requested an attorney several times throughout the interrogation, yet it lasted nearly fifty-two minutes. The trial court denied Bostic's motion to suppress his statements. After the trial, Bostic filed a motion for a judgment notwithstanding the verdict, and alternatively requested a new trial. The trial court also denied these motions. Bostic appealed.

ISSUE

Whether the trial court erred in failing to suppress Bostic's statements made to the officers after he requested an attorney.

HOLDING

Because the evidence against Bostic was overwhelming, the Fifth Amendment violation was harmless, despite the trial court erring in denying the motion to suppress. Therefore, the Court of Appeals affirmed the judgment of the Alcorn County Circuit Court.

Affirmed - 2017-KA-01698-COA (June 18, 2019)
Opinion by Judge McDonald
Hon. Paul S. Funderburk (Alcorn County Circuit Court)
Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd & Joseph Scott Hemleben (Att'y Gen. Office) for Appellee
Briefed by Baxter Geddie

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CRAIG V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - A new trial will not be ordered unless the court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice; this high standard is necessary because any factual disputes are properly resolved by the jury, not by an appellate court
CRIMINAL LAW - FELONY - KIDNAPPING - The crime of kidnapping is committed whenever any person, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be confined or imprisoned against his or her will
CRIMINAL LAW - FELONY - SEXUAL ASSAULT - A person is guilty of sexual assault if he or she engages in sexual penetration with another person without his or her consent

FACTS

Dontrey Craig was tried for kidnapping and sexual assaulting his ex-wife, Sabrina. Sabrina moved to Biloxi following their separation. Craig forced himself into her home shortly thereafter and proceeded to do the same to her physical person. After a night of being held in her home against her will, physically abused, and sexually assaulted, Sabrina finally managed to escape her apartment. During this time, Sabrina's neighbor, Mitchell, hearing the abuse through the wall, called the police who were ultimately unable to aid. Falling short of rescue at the time of the battery, Mitchell served as a witness at the trial and detailed what she heard and saw. At trial, Craig was convicted of kidnapping and sexual assault for which he was sentenced to consecutive terms of ten years for kidnapping and fifteen years for sexual assault. Craig appealed.

ISSUES

Whether (1) there was insufficient evidence to sustain Craig's conviction and (2) the jury's verdict was against the overwhelming weight of evidence.

HOLDING

Because testimony corroborated the fact that Craig repeatedly and forcibly prevented Sabrina from escaping her apartment, and because there was evidence of numerous bruises and dried blood on Sabrina's face and clothes, both issues were without merit.

Affirmed - 2018-KA-00452-COA (June 18, 2019)
Opinion by Presiding Judge J. Wilson
Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial Dist.)
George T. Holmes (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd & Joel Smith (Att'y Gen. Office) for Appellee
Briefed by Drey Russell

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PAYNE V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - INDICTMENTS - PARTICULARITY - Indictments which merely allege unlisted pseudonyms for controlled substances actually listed are defective as to substance
APPELLATE PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - STANDARD OF PROOF - Assuming no stipulations, if the record does not show ineffectiveness of constitutional dimensions, it is not proper for appellate review

FACTS

Irving Payne and Latrevia Donwell were pulled over after failing to use a turn signal. After pulling them over, one of the officers smelled marijuana and began to search the car. They found Payne in the driver's seat with a rifle in the car and with drugs in his pocket; both of which Payne admitted were his. Payne was indicted for unlawful possession of a firearm by a convicted felon and for possession of a controlled substance. The indictment listed the substance as ethylone. At trial, the State's expert witness testified that ethylone went by many names, listing specifically methylenedioxymethcathinone and beta keto MDEA. Payne was found guilty of both counts. Payne appealed.

ISSUES

Whether (1) the controlled substance count was defective and (2) Payne received ineffective assistance of counsel.

HOLDING

(1) Because neither ethylone nor either of the other names for the drugs in Payne's possession are listed as controlled substances in Miss. Code Ann. § 41-29-113, the indictment failed to charge a crime due to a defect of substance and the charge was dismissed. (2) Because the record did not affirmatively show ineffectiveness of constitutional dimensions, the issue was denied without prejudice. Therefore, the Court of Appeals affirmed in part, and reversed and rendered in part, the judgment of the Harrison County Circuit Court.

CONCURRENCE IN PART/DISSENT IN PART

Judge Lawrence argued that, because Payne admitted to believing he possessed MDMA, a controlled substance, and the indictment charged unlawful possession of a controlled substance, the particularities of which substance was possessed is not at issue. He also pointed out that the expert witness named beta keto MDEA as another name for ethylone and that MDEA is listed in Miss. Code Ann. § 41-29-113, albeit without discussion of whether beta keto MDEA and MDEA are one and the same.

Affirmed in Part and Reversed & Rendered in Part - 2018-KA-00292-COA (June 18, 2019)

Opinion by Judge C. Wilson - Concurrence in Part/Dissent in Part by Judge Lawrence
Hon. Roger T. Clark (Harrison County Circuit Court [First Judicial Dist.])
Hunter Nolan Aikens & George T. Holmes (Pub. Def. Office) for Appellant - Katy Taylor Gerber, Joseph Scott Hemleben, Jason L. Davis, & Barbara Byrd (Att'y Gen. Office) for Appellee
Briefed by James Adamoli

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PHILLIPS V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - CONFRONTATION CLAUSE - SURROGATE TESTIMONY - Surrogate testimony is only admissible when the testifying witness has intimate knowledge of the particular report sought to be admitted and the testifying witness was intimately involved in producing that report
CONSTITUTIONAL LAW - CRUEL AND UNUSUAL PUNISHMENT - MANDATORY SENTENCING - Sentences within the statutorily defined limits cannot be cruel and unusual
EVIDENCE - ADMISSIBILITY - RELEVANCE - Evidence is relevant if it tends to make a fact more or less probable and that fact is consequential in determining the case

FACTS

Donald Phillips was found guilty of aggravated assault, kidnapping, and sexual battery. The conviction arose out of an attack on a woman in which Phillips stabbed her repeatedly, barred her escape from her home, and assaulted her sexually. A forensic analyst tested the victim for DNA and found seminal fluid that was a genetic match to Phillips. The analyst could not testify at the trial because she was on maternity leave, so the technical reviewer testified about the report instead. Phillips also attempted at trial to introduce into evidence pictures of his victim from her social media account following her attack, to attack her credibility and truthfulness about the attack. The trial court did not allow the photos into evidence after finding them irrelevant. Phillips was sentenced following his conviction, and he appealed.

ISSUES

Whether (1) the technical reviewer's testimony violated Phillips's rights under the confrontation clause; (2) the social-media photos of the victim should have been admitted into evidence; (3) the trial court abused its authority in its sentencing; (4) the trial court erred in denying Phillips's post-trial motions for judgment notwithstanding the verdict and for a new trial; and (5) the prejudicial effect of cumulative errors warranted a new trial.

HOLDING

(1) Because the technical reviewer participated in the DNA report's production and possessed intimate knowledge of the analyses rendered, his testimony was properly admitted and did not violate Phillips's rights under the confrontation clause. (2) Because the question at trial was whether Phillips had assaulted her (the fact that she had been assaulted having been established), the social media photos of her following the attack were not relevant to the question at trial and were properly excluded. (3) Because the sentences were within the statutory limits, they are presumptively valid and not an abuse of authority. (4) Because the evidence sufficiently supported the conviction, Phillips's motions for judgment notwithstanding the verdict and a new trial were properly denied. (5) Because the Court of Appeals did not find the errors that Phillips alleged, there was no accumulation of errors and prejudicial effect.

Affirmed - 2017-KA-00901-COA (June 18, 2019)
Opinion by Judge McCarty
Hon. Joseph H. Loper Jr. (Grenada County Circuit Court)
Luther Putnam Crull Jr. for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee
Briefed by Michael Lambert

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