

**MISSISSIPPI SUPREME COURT DECISIONS – MARCH 29, 2018*****SUPREME COURT - CIVIL CASES*****TOMMY BROOKS OIL CO. V. WILBURN & WILBURN OIL CO., INC.****CIVIL - CONTRACTS**

**CONTRACTS - SUMMARY JUDGMENT - UNDISPUTED FACTS** - Summary judgment is inappropriate where there are undisputed facts which are susceptible to more than one interpretation

**CONTRACTS - MUTUAL MISTAKE - REFORMATION** - Reforming the agreement is justified when the mistake is in the drafting of the agreement but not in the making of the agreement

**CONTRACTS - UNILATERAL MISTAKE - REFORMATION** - A unilateral mistake justifying reformation is one where there is a mistake of one of the parties to the contract and fraud or inequitable conduct related to the mistake on the part of the other

**FACTS**

Brooks Oil supplied Wilburn Oil fuel for its gas stations for a number of years. Brooks Oil claimed that Wilburn Oil failed to pay invoices since late 2012, and owed nearly one million dollars in unpaid fuel bills by 2013. Wilburn signed two personal guaranties that totaled two hundred and fifty thousand dollars in order for Brooks Oil to resume selling fuel products. The language of the guaranties was identical, and provided that Wilburn would be personally liable for Wilburn Oil's debt, now existing or hereafter arising. Wilburn Oil also agreed to a two-cent-per-gallon increase in the purchase price for fuel products, which was to be applied to Wilburn's outstanding invoices. In 2014, Brooks Oil sued Wilburn for not paying the outstanding invoices. Wilburn answered the complaint and claimed he had not defaulted on the guaranties' obligations, arguing ambiguities in the agreement should be resolved in his favor. After the start of discovery, Wilburn moved for summary judgment and argued neither party meant for the guaranties to apply to past debt, showing testimony in his and Brooks's depositions. Brooks Oil presented evidence of the contract language, which included existing debts. Brooks Oil tried to clarify Brooks's deposition through two affidavits, one from Brooks and one from Lee Murphree, the secretary and treasurer for Brooks Oil. Wilburn argued to strike both of the affidavits in his motion for summary judgment. The trial court struck both affidavits, granted Wilburn's motion for summary judgment, and dismissed Brooks Oil's suit against Wilburn with prejudice. Shortly after, Brooks Oil filed suit against Wilburn individually and also filed a complaint against Wilburn Oil for the unpaid fuel invoices. Wilburn never answered the complaint and Brooks Oil was awarded a default judgment of \$1,184,272.52. Wilburn filed a motion to set aside the judgment. The trial court consolidated the open-accounts suit with the guaranties suit, and set aside the default judgment. Brooks Oil filed this interlocutory appeal.

**ISSUES**

Whether the trial court erred in granting summary judgment because of (1) mutual mistake or (2) unilateral mistake.

**HOLDING**

(1) Because there was more than one possible interpretation of what debt the parties intended to cover, there was insufficient evidence that no genuine issue of material fact existed. (2) Because Wilburn failed to show any fraud by Brooks Oil, and Wilburn signed both agreements, the trial court erred in granting summary judgment. Therefore, the Supreme Court reversed and remanded the judgment of the Lee County Circuit Court.

**Reversed & Remanded - 2016-IA-01356-SCT (consolidated with 2016-CA-01400-SCT) (Mar. 29, 2018)**

Opinion by Justice Chamberlin

Hon. James Seth Andrew Pounds (Lee County Circuit Court)  
Walter D. Willson, Randy L. Dean, & Kevin A. Rogers for Appellant - William C. Spencer Jr., William C. Spencer, Michael D. Greer, & Michael P. Mills Jr. for Appellee  
Briefed by [Sarah Raben](#)

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## MISSISSIPPI COURT OF APPEALS DECISIONS – MARCH 27, 2018

### COURT OF APPEALS - CIVIL CASES

#### ESTATE OF SOJOURNER V. CAMPBELL

##### CIVIL - WILLS, TRUSTS, & ESTATES

**WILLS & ESTATES - CONFIDENTIAL RELATIONSHIP - FACTORS** - The factors to consider in determining whether a confidential relationship existed include whether: (1) the person has been taken care of by others, (2) a person maintains a close relationship with another, (3) a person has their medical care and transportation provided by another, (4) a person maintains joint accounts with another; and (5) a person is physically or mentally weak, a person is of advanced age or health, or a power of attorney exist between the two people

**WILLS & ESTATES - CONFIDENTIAL RELATIONSHIP - UNDUE INFLUENCE** - The mere existence of a confidential relationship will not raise a presumption of undue influence; however, where the beneficiary has an active role in the preparation of the will, obtaining under it a substantial benefit, there will be a presumption of undue influence

##### FACTS

Many years prior to her death, Lisa Sojourner prepared a will leaving her assets to several members of her family. Shortly before her death, however, Lisa was diagnosed with colon cancer, and she came to rely on her sister Karen as her primary caregiver, moving into Karen's home in January of 2014. In April of 2014, Lisa had a new will prepared, which left a nominal amount to much of her family and the majority of her assets to Karen and Karen's daughter, Claire. After Lisa's death, Karen filed a petition to probate the will. Lisa's other sister, Susan, subsequently filed a complaint to contest the validity of the will. At trial, it was revealed that Lisa had an IQ of 74. Evidence was adduced to suggest that Karen, being Lisa's primary caregiver when the last will was created, exercised undue influence in the creation of the last will. Karen stipulated at trial that a confidential relationship existed, and that there was a presumption of undue influence. The attorney who drafted the will was called to testify to rebut the presumption of undue influence. The attorney, however, was not aware of Karen and Lisa's relationship or any of Karen's acts in the preparation of the last will. Karen's friend testified that, prior to Lisa's death, Karen made Lisa feel as if Karen was the only person who would take care of her, that Karen stole the prior will from their mother's house, and that Karen drove Lisa to the attorney's office and parked somewhere that they would not be seen. The Copiah County Chancery Court found that there was a presumption of undue influence and that Karen was unable to rebut that presumption. Karen appealed.

##### ISSUE

Whether the testimony of the attorney who prepared the will was sufficient to rebut the presumption of undue influence.

##### HOLDING

Because the attorney had no knowledge or reason to believe that Lisa was being unduly influenced, that testimony alone was not sufficient to rebut the presumption of undue influence. Further, the attorney had no knowledge of Karen's orchestration of the procurement of Lisa's will. Therefore, the Court of Appeals affirmed the judgment of the Copiah County Chancery Court.

**Affirmed - 2016-CA-01681-COA (Mar. 27, 2018)**

Opinion by Presiding Judge Griffis

Hon. Edward E. Patten Jr. (Copiah County Chancery Court)

John W. Christopher for Appellants - Olen C. Bryant Jr. & Timothy L. Rutland for Appellee

Briefed by [Zachary Harper](#)

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## HARDEN V. SCARBOROUGH

### CIVIL - CUSTODY

**FAMILY LAW - CUSTODY - ALBRIGHT FACTORS** - The chancellor must address each *Albright* factor that is applicable to the case to identify the custody arrangement that would be in the child's best interest

**FAMILY LAW - CHILD SUPPORT - STATUTORY GUIDELINES** - The statutory child support award guidelines shall be a rebuttable presumption in all proceedings regarding the awarding or modifying of child support awards and shall apply unless the judge makes a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate

**EVIDENCE - HEARSAY - STATE OF MIND** - Testimony is not hearsay if it is offered to explain why the witness circumstantial evidence of the witness's state of mind and not to prove the truth of the matter asserted

**FAMILY LAW - PARENTAL DECISIONS - RESTRICTIONS** - In the absence of conduct harmful to children, a court cannot dictate what would normally be parental decisions about a child's health, education, and welfare

### FACTS

Sean Harden and Danielle Scarborough had a son in October 2014. The couple never married, but cohabitated from June 2014 until May 2015. In May 2015, Scarborough and her son moved out of Harden's home. In June 2015, Scarborough filed a complaint to establish paternity, custody, and child support. After moving out, Scarborough enrolled their son in a new daycare and did not allow Harden to see their son until July 2015. In July 2015, the court entered a temporary restraining order granting Scarborough and Harden joint legal custody, Scarborough temporary physical custody, and Harden weekend visitation. The court also ordered Harden to pay child support in the amount of \$541.50 per month. At trial in March 2016, Scarborough testified that her former attorney, who died prior to trial, told her that he could "not guarantee that [Harden] would bring [the child] back to [her]" and "suggested that until [they] went to court and got some paperwork," she should not permit visitation. Harden objected to this testimony as hearsay, but the chancellor overruled the objection, stating that Scarborough was only "giving the reason why she did what she did." The chancellor ruled from the bench at the conclusion of the trial and subsequently entered a written judgment establishing custody, visitation, and support. The chancellor made findings under *Albright* and awarded Scarborough physical custody of the child with joint legal custody and visitation for Harden. The chancellor also awarded Harden visitation consisting of alternating weekends, alternating Thursday afternoons, most of the summer, and specified holidays. Further, the chancellor ruled that child support would remain at \$541.50 per month. The final judgment also prohibited both Harden and Scarborough from posting pictures of their son on social media. Finally, the judgment provided that neither party should "routinely visit any daycare or school, for lunch or otherwise," or without "a specific purpose for such visit." Harden appealed.

### ISSUES

Whether the trial court erred by (1) awarding physical custody of the parties' son to the mother; (2) applying the statutory guidelines in determining child support; (3) considering hearsay; and (4) enjoining the parties from visiting their son at daycare and sharing pictures of their son on social media.

### HOLDING

(1) Because the chancellor applied the *Albright* factors and made appropriate findings of fact, the custody decision was proper. (2) Because the chancellor applied statutory support guidelines to Harden's adjusted gross income shown on

his financial statement, the child support order was affirmed. (3) Because the evidence was offered to prove “state of mind,” it was not considered hearsay and was therefore admissible. (4) Because there was no evidence that either party harmed or threatened harm to their son through daycare visitations and sharing photos, the court erred when it enjoined the parties from doing so. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Harrison County Chancery Court.

**Affirmed in Part/Reversed & Rendered in Part - 2016-CA-01393-COA (Mar. 27, 2018)**

Opinion by Judge Wilson

Hon. Sanford R. Steckler (Harrison County Chancery Court, First Judicial Dist.)

Harold O. Grissom Jr. & Preston Andrew Grissom for Appellant - Dianne Herman Ellis for Appellee

Briefed by [Katie Berry](#)

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## HARDY V. HARDY

### CIVIL - REAL PROPERTY

**REAL PROPERTY - EASEMENT BY NECESSITY - STRICT-NECESSITY STANDARD** - An easement by necessity requires meeting a strict-necessity standard, showing that (1) the easement is necessary; (2) the dominant and servient estates were once part of a commonly owned parcel; and (3) the implicit right-of-way arose at the time of severance from the common owner

**REAL PROPERTY - EASEMENT BY NECESSITY - EVIDENCE** - Where one seeks to obtain a ‘way of access’ easement by necessity but submits no evidence as to the allegedly higher costs of an alternative route, a trial court will not err in declining to award an easement

#### FACTS

In 1977, W.H. Hardy sold an eighty-acre parcel to his sons, Hamp and Gene, along with their wives. In February 1992, Hamp and Gene divided the eighty-acre parcel equally between themselves into two forty-acre parcels. They used a road designated as “Hardy Lane” as the access point to the properties. The county never adopted Hardy Lane as a county road, maintained, or improved it. The parties and their families lived on these two forty-acre parcels and all mutually used Hardy Lane as the ingress and egress to their homes. In 2006, Hamp and his wife moved, but continued to maintain the property for a few years. More recently, however, he had let it become overgrown and desired to sell it. Meanwhile, Gene had begun to park his trailer across Hardy Lane to stop others from proceeding down the road to Hamp’s property. When Hamp told Gene he wanted to sell, Gene said he would always be willing to allow Hamp and his wife an easement, but that he would not allow the next owners to use Hardy Lane. Hamp filed suit in chancery court seeking an order declaring an implied easement or easement by necessity. After a bench trial, the chancellor held that there was an alternative route that could be used to reach the property and, therefore, there was not an easement by necessity. Hardy appealed.

#### ISSUES

Whether (1) the chancellor applied the wrong legal standard for an easement by necessity and (2) all the elements of an easement by necessity were met.

#### HOLDING

(1) Because Hamp argued that he had an implied easement by necessity, the standard of proof that applies to an implied easement for the purpose of ingress and egress over another landowner’s property is the strict-necessity standard. (2) Because Hamp offered no evidence into the record about the prohibitive cost associated with making the available driveway reach to the homestead, his claim that all the elements of an easement by necessity were met was without merit. Therefore, the Court of Appeals affirmed the judgment of the Marshall County Chancery Court.

**Affirmed - 2016-CA-01668-COA (Mar. 27, 2018)**

Opinion by Chief Judge Lee  
Hon. Robert Q. Whitwell (Marshall County Chancery Court)  
Kent E. Smith for Appellants - Jennifer Lee Shackelford for Appellees  
Briefed by [Nikki Breeland](#)

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## THORNTON V. FREEMAN

### CIVIL - PERSONAL INJURY

**CIVIL PROCEDURE - SERVICE OF PROCESS - SECONDARY SERVICE** - Miss. R. Civ. P. 4(d)(1)(B) requires leaving a copy of the summons and complaint at the defendant's address with a person of the defendant's family and, thereafter, mailing a copy of the summons and complaint to the defendant's address.

**EVIDENCE - ATTORNEY'S STATEMENT OF FACT - PERSONAL KNOWLEDGE** - If an attorney does not represent that he had personal knowledge of an assertion of fact, the assertion lacks any evidentiary value

#### FACTS

Brenda Thornton attempted to serve a summons and complaint regarding a personal injury suit upon Andy Freeman. The process server executed an affidavit stating that he effected "personal service" upon Freeman's father, but the affidavit did not state that the process server had mailed the summons and complaint to the address afterwards. At the hearing, Thornton's attorney claimed that the summons and complaint were mailed, but he did not claim to have personal knowledge to that effect. The circuit court, finding defects in service and that the statute of limitations ran following the defective service, awarded summary judgment in favor of Freeman. Thornton appealed.

#### ISSUE

Whether service of the summons and complaint was sufficient.

#### HOLDING

Because Thornton did not mail copies of the summons and complaint to Freeman's address following the service on his father, service was insufficient. Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit Court.

**Affirmed - 2016-CA-01804-COA (Mar. 27, 2018)**

Opinion by Judge Fair  
Hon. David H. Strong Jr. (Pike County Circuit Court)  
Dennis C. Sweet III & Dennis Charles Sweet IV for Appellant - Mark C. Carlson & Price Wilson Donahoo for Appellee  
Briefed by [Nathan Simpson](#)

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## *COURT OF APPEALS - POST-CONVICTION RELIEF*

## BRITTON V. STATE

### CIVIL - POST-CONVICTION RELIEF

**PROBATION - REVOCATION - VIOLATION OF TERMS** - Probation may be revoked upon a showing that the defendant more likely than not violated the terms of probation; a conviction is not necessary to revoke probation

**POST-RELEASE SUPERVISION - TERMINATION - PROCEDURE** - Post-release supervision termination procedure shall be conducted in the same manner as procedures for the revocation of probation and imposition of a suspended sentence

### **FACTS**

Meika Britton was convicted of child exploitation and sentenced to serve five years in the custody of the Mississippi Department of Corrections (MDOC), followed by ten years of post-release supervision (“PRS”). After Britton was released from prison, he was charged with committing child exploitation and contributing to the delinquency of a minor. The state moved to revoke Britton’s PRS based upon these new crimes and his failure to pay court-ordered fees. The trial court revoked Britton’s PRS over a two day revocation hearing and ordered Britton to serve ten years in MDOC custody. Britton filed a motion to reinstate his PRS. The trial court treated Britton’s motion to reinstate his PRS as a motion for post-conviction relief and denied it without merit. Britton appealed.

### **ISSUES**

Whether (1) minimum due-process requirements were not met at Britton’s revocation hearing; (2) Britton received ineffective assistance of counsel; (3) insufficient evidence was presented to support the revocation; and (4) Britton’s cell phone was searched without a valid search warrant.

### **HOLDING**

(1) Because Britton was notified of the charges against him as he filed several motions in advance of the revocation, and because Britton failed to show any prejudice from the lack of a preliminary revocation hearing, Britton’s revocation hearing met minimum due-process standards. (2) Because the trial court did not officially appoint an attorney to represent Britton, and because Britton never asked for appointed counsel and never complained about the performance of his stand-by counsel, Britton did not receive ineffective assistance of counsel. (3) Because the trial court relied upon the Investigating Officer’s interview with the victim along with evidence gathered during the investigation containing messages between Britton and several minors, the trial court did not err in finding that Britton more likely than not had violated his PRS by contributing to the delinquency of a minor and committing child exploitation. (4) Because Britton never raised the issue of his cell phone being searched without a valid warrant before the trial court and, the Investigating Officer’s testimony indicated that he did obtain a search warrant, this issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Circuit Court.

**Affirmed - 2017-CP-00046-COA (March 27, 2018)**

Opinion by Chief Judge Lee

Hon. Gerald W. Chatham Sr. (DeSoto County Circuit Court)

*Pro se* for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Michael Farese](#)

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## **REEVES V. STATE**

### **CIVIL - POST-CONVICTION RELIEF**

**POST-CONVICTION RELIEF - GUILTY PLEA - WAIVER** - The entry of a valid guilty plea waives the right to an initial appearance, a preliminary hearing, and any ex post facto claims

**POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF** - To prove ineffective assistance of counsel, a defendant must show that his counsel’s performance was deficient and that this deficiency prejudiced the defendant

### **FACTS**

Edmond Reeves was indicted on charges of murder, first-degree arson, and possession of a weapon by a convicted felon. The circuit court ordered a mental evaluation to determine Reeves’s sanity and competency to stand trial.

Reeves was evaluated by a doctor, who opined that he was sane at the time of the alleged crimes. Reeves subsequently plead guilty to second-degree murder, first-degree arson, and possession of a weapon by a convicted felon. Reeves was sentenced to forty years in the custody of the MDOC. On October 16, 2016, Reeves filed a PCR motion, which the circuit court dismissed. Reeves appealed.

### ISSUES

Whether (1) Reeves was deprived of due process because he did not receive an initial appearance or a preliminary hearing; (2) Reeves received ineffective assistance of counsel; (3) Reeves was not served with the indictment and capias; (4) Reeves should not have been allowed to plead guilty to second-degree murder; and (5) the circuit court should have ensured that a court reporter was present at the hearings.

### HOLDING

(1) Because Reeves entered valid guilty pleas, his right to an initial appearance and a preliminary hearing was waived. (2) Because Reeves failed to show that his counsel's performance was deficient, and that the alleged deficient performance prejudiced his defense, his ineffective assistance of counsel claim failed. (3) Because Reeves advised the circuit court that he had received a copy of his indictment during a plea hearing, this issue was without merit. (4) Because the record showed that Reeves was advised of, understood, and waived his ex post facto rights, his ex post facto claim failed. (5) Because the record showed that a court reporter was present at both of the hearings, this issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the George County Circuit Court.

**Affirmed - 2016-CP-01785-COA (Mar. 27, 2018)**

Opinion by Presiding Judge Griffis

Hon. Dale Harkey (George County Circuit Court)

*Pro se* for Appellant - Abbie E. Koonce (Att'y. Gen. Office) for Appellee

Briefed by [Luke Kelly](#)

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## ***COURT OF APPEALS - CRIMINAL CASES***

### **JOHNSON V. STATE**

#### **CRIMINAL - FELONY**

**EVIDENCE - ADMISSIBILITY - PRIOR CONVICTIONS** - Evidence of prior crimes may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

**EVIDENCE - JURY VERDICT - SUFFICIENT EVIDENCE** - There is sufficient evidence to support a jury verdict if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

**EVIDENCE - NEW TRIAL - WEIGHT OF EVIDENCE STANDARD** - A new trial will be granted based on an objection to the weight of evidence if the evidence is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

### FACTS

Tawana Johnson was pulled over by Deputy Thomas Brea for a traffic violation. Brea discovered marijuana, cash, plastic bags, and a digital scale in Johnson's car. Johnson was arrested for drug possession with intent to sell. During trial, the court allowed evidence of Tawana's prior convictions for possession of marijuana and hydrocodone with intent to sell. Johnson was found guilty of possession with intent to sell. Johnson appealed.

### ISSUES

Whether (1) the trial court erred in allowing the state to introduce evidence of Johnson's prior drug convictions; (2) the jury's verdict was supported by legally sufficient evidence; and (3) the jury's verdict was against the overwhelming weight of the evidence.

### **HOLDING**

(1) Because intent is an essential element of proving a charge of possession with intent to sell, the prior conviction evidence was admissible under Miss. R. Evid. 404(b). (2) Because there was sufficient evidence presented that Johnson possessed and intended to sell marijuana, this issue was without merit. (3) Because when viewing the evidence in the light most favorable to the prosecution the verdict did not cause an unconscionable injustice, this issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

**Affirmed - 2016-KA-01319-COA (Mar. 27, 2018)**

Opinion by Presiding Judge Griffis

Hon. Robert P. Chamberlin (Desoto County Circuit Court)

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

Briefed by [Tyler Alcorn](#)

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## **JONES V. STATE**

### **CRIMINAL - FELONY**

**CRIMINAL PROCEDURE - PROBABLE CAUSE - CONFIDENTIAL SOURCES** - A magistrate judge need only examine the veracity and basis of knowledge of the persons supplying hearsay information to determine probable cause

**CRIMINAL PROCEDURE - EVIDENCE - CONTROLLED SUBSTANCE** - When a defendant owns or controls the premises where contraband is found, there is a presumption of constructive possession of contraband

### **FACTS**

Police entered Lonnie Jones's home to execute a search warrant for guns, magazines, and ammunition stolen in a local burglary approximately five days before and found, in plain view and in the process of a search, synthetic marijuana in Jones' bedroom. The search warrant was based upon information obtained by a confidential source. Jones was convicted of possession of synthetic cannabis with the intent to distribute and child endangerment based on his four-year-old daughter's presence in the home where the drugs were located. Jones appealed.

### **ISSUES**

Whether (1) the search warrant for his residence was issued without probable cause; and (2) Jones's convictions were unsupported by sufficient evidence.

### **HOLDING**

(1) Because probable cause is determined by a totality of the circumstances analysis, and the confidential source's testimony coupled with the police investigation gave the trial court a substantial basis for concluding that probable cause existed, the warrant was issued with probable cause. (2) Because there is a presumption of constructive possession of contraband when the defendant owns or controls the premises where contraband is found, Jones's convictions were supported by sufficient evidence.

**Affirmed - 2016-KA-01305-COA (March 27, 2018)**

Opinion by Judge Fair

Hon. Claiborne McDonald (Marion County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Lisa L. Blount & Joseph Scott Hemleben (Att'y Gen. Office) for Appellee

Briefed by [Andrew P. Cicero, III](#)



## LOWE V. STATE

### CRIMINAL - FELONY

**EVIDENCE - PRIOR CONVICTION ADMISSIBILITY - PROVING IDENTITY** - Miss. R. Evid. 404 (b) provides for the admissibility of prior convictions for the purpose of proving identity

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - FLIGHT INSTRUCTIONS** - An instruction that flight may be considered as a circumstance of guilt or guilty knowledge is appropriate only where that flight is unexplained and somehow probative of guilt or guilty knowledge

**CRIMINAL PROCEDURE - JURY INSTRUCTIONS - FLIGHT INSTRUCTIONS** - Evidence of flight is inadmissible where there is an independent reason for flight known by the court which cannot be explained to the jury because of its prejudicial effect up on the defendant

### FACTS

In 2009, the Jones County Sheriff's Department confiscated a laptop owned by John Lowe, a previously convicted sex offender. The laptop's hard drive stored five video files depicting child pornography. Lowe was charged with five counts of exploitation of a child for possession of child pornography as a habitual offender. In 2011, a Jones County jury found Lowe guilty of all five counts. Lowe was sentenced to five terms of life imprisonment. On appeal, the Court of Appeals upheld the convictions. In 2013, the Supreme Court granted certiorari, reversed the conviction, and remanded the case to the Jones County Circuit court for another trial, holding that Lowe was denied due process by the trial court's denial of funds to hire an expert witness. Lowe's 2013 retrial resulted in a jury finding Lowe guilty of five counts of exploitation of a child for possession of child pornography. Asserting a number of issues, Lowe appealed.

### ISSUES

Whether (1) the jury was properly instructed on circumstantial evidence; (2) trial counsel was ineffective regarding jury instructions on constructive possession and circumstantial evidence; (3) evidence was sufficient for convictions and the verdict was unsupported by the weight of the evidence; (4) the court erred in allowing introduction of Lowe's prior conviction for exploitation of a child; (5) the court erred in denying Lowe's motion to suppress jury instruction regarding his flight; (6) the court erred in denying Lowe's *pro se* motions; (7) the court constructively amended Lowe's indictment when it omitted the words "from the internet" from the jury instructions; (8) the court erred in denying Lowe's motion to dismiss based on testimony from the State's expert witness; and (9) the court erred in allowing the jury to view the child pornography retrieved from the laptop.

### HOLDING

(1) Because the totality of the evidence presented at trial served as direct evidence to show Lowe's dominion or control over the laptop and further established that Lowe possessed the child pornography, and because where there is direct evidence of a crime, a circumstantial evidence jury instruction need not be given, the trial court's omission of a circumstantial evidence jury instruction was proper. (2) Because a review of the record, standing alone, did not affirmatively show unconstitutional ineffectiveness, the appellate court declined to address Lowe's argument for ineffectiveness of counsel, but noted that Lowe was not precluded from raising the issue in a motion for post-conviction relief. (3) Because the appellate court, upon review of the evidence, could not find that reasonable and fair-minded jurors could only find Lowe not guilty, the evidence at trial was sufficient to support Lowe's conviction. Further, because the appellate court, upon review of the evidence, could not find that Lowe's guilty verdict was so contrary to the weight of the evidence that allowing it to stand would sanction an unconscionable injustice, the verdict was supported by the weight of the evidence. (4) Because the issue of identity was called into question when Lowe's counsel began suggesting that another person may have accessed Lowe's laptop and downloaded the child pornography, the trial court did not err in admitting evidence of Lowe's prior conviction as it was admissible for the purpose of establishing his identity under Miss. R. Evid. 404(b). (5) Because an instruction that flight may be considered as a circumstance of guilt or guilty knowledge is appropriate only where that flight is unexplained and

somehow probative of guilt or guilty knowledge, and because testimony heard by the jury was probative of Lowe's guilt or guilty knowledge, the trial court was within its discretion to allow the jury instruction regarding Lowe's flight. (6) Because there was a substantial basis for the issuing magistrate to determine probable cause and issue the search warrant for Lowe's computer, Lowe provided no evidence to support his argument that the trial court denied his *pro se* motions because of bias against him, Lowe did not make the required substantial preliminary showing that Investigator Sumerall's affidavit contained any knowingly false statements or reckless disregard for the truth, and Lowe's *pro se* motion for writ of habeas corpus did not focus on whether he should have been granted bail, the trial court did not err in dismissing Lowe's various *pro se* motions. (7) Because Lowe's counsel failed to object to the instructions until after they were read to the jury, and because the criminal statute does not require receipt of child pornography only from the internet, the trial court did not constructively amend Lowe's indictment when it omitted the words "from the internet" from the jury instructions. (8) Because the criminal statute under which Lowe was indicted does not require the State to show how a defendant came to possess child pornography or where the child pornography originated, the trial court did not err in denying Lowe's motion to dismiss on the basis that the State's expert witness was unable to provide how the child pornography got onto Lowe's laptop or where the child pornography originated. (9) Because the trial court properly considered the probative nature of the videos based on Miss. R. Evid. 403, and determined that the jury needed to view them in order to determine whether they, in fact, depicted child pornography, the trial court did not err when it allowed the jury to view the child pornography retrieved from the laptop. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

**Affirmed - 2016-KA-00214-COA (Mar. 27, 2018)**

Opinion by Presiding Judge Irving

Hon. Dal Williamson (Jones County Circuit Court, Second Judicial Dist.)

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

Briefed by [William L. Moorer](#)

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