

MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 9, 2017

SUPREME COURT - CIVIL CASES

GUNN V. HUGHES

CIVIL - OTHER

CONSTITUTIONAL LAW - JUDICIAL REVIEW - LEGISLATURE - Power to review statutes for constitutional infirmity commences after the termination of legislative action

CONSTITUTIONAL LAW - LEGISLATURE - PROCEDURES - The legislature possesses exclusive power over its own procedures; the judiciary lacks any constitutional authority to interfere in the Legislature’s internal procedure

FACTS

On March 23, 2016, Rep. Hughes filed a petition against Speaker Gunn in the circuit court, seeking a temporary restraining order, a preliminary injunction, and, alternatively, a writ of mandamus. Rep. Hughes’s petition asked the circuit judge to order the Speaker’s compliance—by injunction or writ of mandamus—with Art. 4, § 59 of the Mississippi Constitution, which states “every bill shall be read in full immediately before the vote on its final passage upon demand of any member.” In his petition, Rep. Hughes acknowledged that Speaker Gunn had recognized members’ requests to have bills read under Art. 4, § 59, but in doing so, he had “only partially obliged that request by having the words of the bills read by an electronic device (set on the highest speed adjustment, #10) such that the same is being read artificially and so quickly that no human ear nor mind can comprehend the words of the bills. The circuit judge granted a temporary restraining order, which stated, “the Respondent shall, consistent with Art. 59 of the Mississippi Constitution, read or cause to be read all bills presented to the House of Representatives in a normal speed...so that each member of the House of Representatives has an opportunity to hear and understand each word of each such properly requested reading.” The Speaker appealed.

ISSUES

Whether the judiciary has jurisdiction over this dispute in light of § 1 and 2, Art. I of the Mississippi Constitution.

HOLDING

The judiciary lacks constitutional authority to adjudicate this dispute. Therefore, the Supreme Court reversed and remanded the judgment of the Hinds County Circuit Court.

CONCURRENCE

Presiding Justice Randolph agreed with the Court’s decision; however, he emphasized that the temporary restraining order that the circuit court granted possessed procedural deficiencies and was void. Therefore, on remand, the circuit judge should be instructed to conduct a hearing to determine the reasonable costs, expenses, and attorney’s fees incurred by the Speaker because “the citizens of this State should not be saddled with the costs of this litigation.”

DISSENT

Justice King argued that an appellate decision in this case was premature. Therefore, the case should be remanded to the circuit court, where a full record could be developed.

Reversed and Remanded - 2016-IA-00442-SCT (Feb. 9, 2017)

En Banc Opinion by Presiding Justice Dickinson - Concurrence by Presiding Justice Randolph - Dissent by Justice King

Hon. Winston L. Kidd (Hinds County Circuit Court)
Michael B. Wallace, Rebecca L. Hawkins & Charles Edward Cowan for Appellant- Sidney Ray Hill, III for Appellee
Briefed by [TreMarcus Rosemon](#)

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MISSISSIPPI DEPARTMENT OF CORRECTIONS V. COOK

CIVIL - STATE BOARD AND AGENCIES

ADMINISTRATIVE AGENCY - STATUTORY INTERPRETATION - DEFERENCE - Courts should reverse an administrative agency only if the decision is (1) unsupported by substantial evidence; (2) arbitrary and capricious; (3) beyond the power of the administrative agency to make; or (4) violated the complaining party's statutory or constitutional right

ADMINISTRATIVE AGENCY - STATUTORY INTERPRETATION - DEFERENCE - An agency's interpretation will not be upheld if it is so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

ADMINISTRATIVE AGENCY - STATUTORY INTERPRETATION - STANDARD OF REVIEW - An agency's interpretation of a rule or statute governing the agency's operation is reviewed de novo, but with great deference to the agency's interpretation

FACTS

Benjamin Cook plead guilty to murder in 1994 and was sentenced to life in prison. He was first eligible for parole in 2013, and was denied parole. In 2015, Cook was denied parole a second time, and his next parole hearing date was set for May 4, 2017. On July 1, 2015, Cook requested the Mississippi Department of Corrections (MDOC) issue him a parole case plan in accordance with Section 47-7-3.1 of the Mississippi Code. The MDOC denied his request because House Bill 585, which states that all parole eligible offenders are to be issued a case plan effective July 1, 2014, is not retroactive. Therefore, the MDOC interpreted House Bill 585 to only apply to offenders sentenced on or after July 1, 2014. The trial court held in favor of Cook, and ordered the MDOC to issue Cook a case plan. Therefore, the MDOC appealed.

ISSUE

Whether Cook, a parole-eligible inmate convicted and sentenced prior to July 1, 2014, is entitled to a parole case plan under Section 47-7-3.1(1) of the Mississippi Code.

HOLDING

The decision of an administrative agency is given great deference by courts. The Mississippi Supreme Court held in *Fisher v. Drankus*, that a parole-eligible inmate convicted and sentenced prior to July 1, 2014, was not entitled to receive a parole case plan under Section 47-7-3.1(1). Further, the Court found the agency's interpretation of the statute was reasonable. Based on *Drankus* and the deference given to agencies, the Court found the trial court had erroneously held in favor of Cook. Therefore, the Mississippi Supreme Court reversed the trial court's decision and rendered judgment in favor of the MDOC.

Reversed and Remanded - 2015-CA-01724-SCT (Feb. 9, 2017)

Opinion by Justice Coleman

Hon. W. Ashley Hines (Sunflower County Circuit Court)

Anthony Louis Schmidt, Jr. (Atty. Gen. Off.) for Appellant - *Pro se* for Appellee

Briefed by [Josh Rhodes](#)

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MISSISSIPPI RURAL WATER ASSOCIATION V. MISSISSIPPI PUBLIC SERVICE COMMISSION

CIVIL - STATE BOARDS AND AGENCIES

STATE BOARDS & AGENCIES - REGULATORY POWER - NONPROFITS - Under MISS. CODE ANN. § 77-3-5, the Mississippi Public Service Commission does not have the authority to adopt rules regulating a nonprofit's rates for the sale and distribution of water and sewage disposal services

PUBLIC UTILITIES ACT - RATE - DEFINITION - MISS. CODE ANN. § 77-3-3(e) defines "rate" as it is used in the Public Utilities Act as including every compensation, fare, toll, rental, and classification, or the formula or method by which such may be determined

FACTS

The Mississippi Public Service Commission ("MPSC") adopted a rule requiring utilities to waive utility deposits for certified domestic violence victims for a period of sixty days. The Mississippi Rural Water Association, Inc. ("Water Association"), a nonprofit corporation that operates as a trade association representing more than 500 water and/or sewage disposal companies appealed to the Hinds County Chancery Court objecting to the promulgation of the new rule. The Water Association argued that the MPSC was prohibited from regulating nonprofit utility rates. The Water Association claimed that customer deposits are included in the rate-setting process and in the rule's deposit-waiver requirement, which therefore affects its members' rates. The Hinds County Chancery Court affirmed the MPSC's decision. The Water Association appealed.

ISSUE

Whether the MPSC lacked statutory authority to adopt the rule in question because nonprofit corporations and associations are not subject to MPSC regulation of rates.

HOLDING

Because Miss. Code Ann. § 77-3-3(e) includes customer's deposit in the definition of the term "rate" as it is used in the Public Utilities Act and because § 77-3-5 prohibits the MPSC from making rules that regulate the rates of the Water Association's members, the MPSC lacked authority to adopt the rule in question.

DISSENT

Justice King argued that the term "rate" did not include customer deposits. Therefore, the MPSC did not lack authority to adopt the rule.

Reversed, Rendered, & Vacated - 2015-CC-01249-SCT (Feb. 9, 2017)

En Banc Opinion by Chief Justice Waller - Dissent by Justice King

Hon. Patricia D. Wise (Hinds County Chancery Court)

James H. Herring for Appellant - Frank F. Farmer & Laura H. Dixon for Appellee

Briefed by [Bethany Poppelreiter](#)

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PEMBERTON PROP. LTD. V. CITY OF PEARL

CIVIL - OTHER

CIVIL PROCEDURE - CITY ORDINANCE - TIME PERIOD FOR APPEAL - Miss. Code Ann. § 11-51-75 states that a person aggrieved by a decision of a municipal authority may appeal within ten days from the date of adjournment at which session the municipal authority rendered such decision

CIVIL PROCEDURE - CITY ORDINANCE - PLAIN LANGUAGE RULE - The unambiguous language of the statute (Miss. Code Ann. § 11-51-75) counts the ten-day period from the date of the completed decision to be appealed, i.e. the final, decision

MUNICIPALITIES - WRIT OF MANDAMUS - HATHORN V. MORGAN - A circuit judge may dismiss a complaint for a writ of mandamus to order a City's action on a bill of exceptions if the bill was presented to the City outside the time for taking an appeal

FACTS

On June 27, 2013, the Mayor and Board of Alderman for the City of Pearl passed an ordinance to regulate rental housing. The ordinance would take effect thirty days after publication, which did not occur until September 17, 2014. Appellants, several rental property owners ("Pemberton"), filed suit alleging they had filed a Bill of Exceptions on November 14, 2014 to appeal the City's decision, but the City had failed to transmit the Bill of Exceptions to the circuit clerk. Appellants sought a writ of mandamus ordering the City to do so. The City moved to dismiss the complaint, arguing the circuit court lacked jurisdiction after the ten-day time period for appeal ran after the meeting on June 27, 2013. The court granted the motion. Pemberton appealed.

ISSUES

Whether (1) the appeal period begins from the day of the ordinance's adoption, and (2) a circuit judge may dismiss a complaint seeking a writ of mandamus to order a city to file a Bill of Exceptions presented to it for review, when that bill was not timely filed.

HOLDING

(1) Because the City rendered its final decision on June 27, 2013, at that point the ten-day period began to run, so the Bill of Exceptions was not timely presented by the property owners. (2) Because the Bill was not timely filed, and *Hathorn v. Morgan* has settled the question of whether a circuit judge may dismiss a complaint seeking a writ of mandamus for a Bill of Exception filed outside the appeal period, the circuit judge was within its discretion to dismiss the complaint.

Affirmed - 2015-CA-01865-SCT (Feb. 9, 2017)

En Banc Opinion by Presiding Justice Dickinson

Hon. William E. Chapman III (Rankin County Circuit Court)

Steven H. Smith & Samac S. Richardson for Appellants - James A. Bobo for Appellees

Briefed by [Meredith Pohl](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 7, 2017

COURT OF APPEALS - CIVIL CASES

DOE V. DOE

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - TERMINATION OF PARENTAL RIGHTS - PREREQUISITES - Pursuant to MISS. CODE ANN. § 93-15-103(1), three prerequisites must be found before addressing specific grounds for termination of parental rights: (1) the child has been removed from the home of its natural parents and cannot be returned to the home of his natural parents within a reasonable length of time or the parent is unable or unwilling to care for the child; (2) relatives are not appropriate or are unavailable; and (3) adoption is in the best interest of the child

DOMESTIC RELATIONS - TERMINATION OF PARENTAL RIGHTS - PREREQUISITES - A restriction of custody and visitation does not constitute a removal from the home

DOMESTIC RELATIONS - TERMINATION OF PARENTAL RIGHTS - STANDARD OF PROOF -

Grounds for termination of parental rights must be shown by clear and convincing evidence

FACTS

In 2009, John and Jane Doe were divorced, and shared joint physical and legal custody of their child. John requested a modification of the custody due to concerns regarding Jane's drug abuse. After evidence of a relapse, the chancellor granted an emergency motion and temporarily awarded sole legal and physical custody to John. At the scheduled hearing, the Chancellor, awarded John full legal custody. In 2013, John moved to terminate Jane's parental rights, and later amended the complaint to include a petition for adoption of the child by John's new wife, Laura. There was undisputed evidence that Jane was currently clean, enrolled in rehabilitative programs, had passed a number of drug tests, and was employed. Nonetheless, the Chancery Court entered an order terminating Jane's parental rights citing that Jane had a diagnosable condition unlikely to change, and that Jane had not had contact with the child for over a year. The Madison County Chancery then entered a judgment for adoption. Jane appealed.

ISSUES

Whether the chancellor erred in finding that (1) the three statutory prerequisites for termination of parental rights were met, (2) the statutory grounds for termination of Jane's parental rights were met by clear and convincing evidence, and (3) the adoption was proper.

HOLDING

(1) Because the child had not been removed from the home of his natural parents, the child has been living with his natural father and Jane was neither unable or unwilling to care for the child, the lower court erred in finding that the statutory prerequisites for termination of parental rights had been met. (2) Because evidence submitted at trial showed Jane had successfully completed her most recent rehabilitative program and had remained clean for at least six months, and because testimony showed that Jane believed she was under a no-contact order with the child, the lower court erred in finding that the grounds for termination were proven by clear and convincing evidence. (3) Because the issue of termination of parental rights was on appeal, the chancellor lacked authority to grant the adoption. Therefore, the Court of Appeals reversed and rendered the judgment of the Madison County Chancery Court.

Reversed and Rendered - 2015-CA-00652-COA (Feb. 7, 2017)

En Banc Opinion by Chief Justice Lee

Hon. Cynthia L. Brewer (Madison County Chancery Court)

John G. Holaday & Andy Stewart for Appellant - William R. Wright & Amanda Jane Proctor for Appellee

Briefed by [Bethany Poppelreiter](#)

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GOUL V. MISS. DEP'T OF CORR.

CIVIL - STATE BOARDS AND AGENCIES

STATE BOARDS AND AGENCIES – BURDEN OF PROOF – REBUTTABLE PRESUMPTION - There is a rebuttable presumption which favors the agency's decision, and the challenging party has the burden of proving the contrary.

FACTS

Allen Robert Goul, an inmate in Mississippi Department of Corrections (MDOC) custody, was found with "spice," a synthetic cannabinoid. Goul admitted to possessing the contraband in violation of the rules, and he signed the Rule Violation Report. Goul also indicated that he did not waive the right to a hearing, but he marked that he did not want to call witnesses. After a hearing, the hearing officer determined that Goul violated the MDOC's rules against possessing contraband. Goul appealed through the Administrative Remedy Program. The MDOC denied the appeal through a

first-step response. Goul filed a petition for judicial review in the Greene County Circuit Court. The Greene County Circuit Court affirmed the MDOC's decision. Goul appealed.

ISSUES

Whether (1) Goul's right to confront witnesses was violated and (2) the evidence was insufficient.

HOLDING

(1) Because the reporting officer's signature was on the Rule Violation Report, and Goul chose not to call witnesses at his hearing, that issue was without merit. (2) Because Goul failed to prove that the MDOC's decision was not supported by substantial evidence, was arbitrary or capricious, was beyond the agency's scope or powers, or violated his constitutional or statutory rights, the evidence was sufficient. Therefore, the Court of Appeals affirmed the judgment of the Greene County Circuit Court.

Affirmed - 2016-CP-00167-COA (Feb. 7, 2017)

Opinion by Chief Judge Lee

Hon. Robert P. Krebs (Greene County Circuit Court)

Pro se for Appellant - Anthony Louis Schmidt Jr. (Att'y Gen. Office) for Appellee

Briefed by [Morgan L. Stringer](#)

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MOORE V. McDONALD

CIVIL - REAL PROPERTY

ATTORNEYS' FEES - RELATED CASES - AWARD - A state court may award attorneys' fees incurred in connection with a related bankruptcy proceeding

ATTORNEYS' FEES - MULTIPLE LAWYERS - FEES RECOVERABLE - Fees in Mississippi are not limited to the fees of only one lawyer unless there is a finding of duplicative time entries or excessive charges

DAMAGES - PUNITIVE DAMAGES CAP - NET WORTH - Punitive damages may not exceed two percent of a defendant's net worth

FACTS

This appeal involves a long-running boundary dispute between neighbors. In 2010 the Court of Appeals unanimously affirmed the judgment of the chancery court establishing the boundary between the properties. That judgment also enjoined the Moores from disturbing McDonalds' peaceful and quiet enjoyment of their property. The Moores violated that injunction by putting fenceposts in the McDonald's driveway. The McDonalds filed a petition for contempt and other relief and the Chancellor found that the Moores were in contempt and Awarded the McDonalds compensatory damages, attorneys' fees and expenses and \$10,000 in punitive damages. The Moores appealed.

ISSUES

Whether the Chancellor erred in (1) awarding the McDonalds attorneys' fees incurred in connection with the Moores' bankruptcy case, (2) awarding attorneys' fees for the work of more than one lawyer and (2) awarding punitive damages in excess of two percent of the Moores' net worth.

HOLDING

(1) Because the Moores intentionally stalled the chancery action by filing for bankruptcy which was dismissed, the attorney fees in the Moore bankruptcy case were properly incurred on behalf of the McDonalds and should be awarded as part of the fees awarded. (2) Because the Moores failed to identify any duplicative time entries or excessive charges, the Chancellor did not err in awarding fees of more than one attorney. (3) Because the Moores waived the issue and failed to present any credible evidence of their net worth, the Chancellor did not err in denying the Moores the benefit of the statutory cap on punitive damages. Therefore, the Court of Appeals affirmed the Chancellor's judgment.

Affirmed - 2015-CA-01252-COA (Feb. 7, 2017)

En Banc Opinion by Judge Wilson

Hon. Dawn H. Beam (Pearl River County Chancery Court)

John R. Reeves & John Justin King for Appellants - Samuel Steven McHard & Marcus Alan McLelland for Appellees

Briefed by [Pete Doran](#)

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THE PENNINGTON GROUP, LLC v. PRIORITYONE BANK

CIVIL - REAL PROPERTY

DEEDS OF TRUST - LIENS - PRIORITY POSITIONS - Priority positions of deeds of trusts are governed by the priority in time of the filing of the several instruments

LIENS - PRIORITY - EQUITABLE SUBROGATION - Equitable subrogation is the doctrine whereby a court may substitute a later-filed lien into the primary lien holder position on a tract of real estate, such that the substitute creditor succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities; Above all, subrogation must be equitable to the parties involved; The determination of whether subrogation is applicable is a factual determination of each particular case with consideration of fairness and justice as its guiding principles

EVIDENCE - JUDICIAL NOTICE - REASONABLE DISPUTE - Courts may only take judicial notice of facts not subject to reasonable dispute

FACTS

The Pennington Group, LLC (“TPG”) pledged a tract of real property to PriorityOne Bank as collateral in a series of deeds of trust. TPG also executed deeds of trust to Helen Pennington on the same property. After executing these deeds to Helen, TPG executed a new deed of trust to PriorityOne to stop a foreclosure and refinance business debts. When Helen later foreclosed the property, PriorityOne asserted its first lien priority and filed suit against TPG, Helen, Joe (Helen’s husband), and Pennibunkport (a corporation created by Helen to obtain the winning bid for the property at foreclosure). The chancellor held that PriorityOne had first lien priority. The Penningtons appealed.

ISSUES

Whether the chancellor erred in finding that: (1) PriorityOne held first lien position over Helen, (2) the entire proceeds of the 2012 PriorityOne loan were used to pay the 2008, 2009, and 2011 loans, and (3) all of the debtors in this case were family.

HOLDING

(1) Because it would be inequitable to hold that PriorityOne lost its priority lien position to Helen by stopping its foreclosure proceedings and issuing another loan for the specific purpose of refinancing TPG’s debts, the chancellor did not err in finding that PriorityOne held first lien position over Helen. (2) Because the chancellor’s finding that the entire proceeds of the 2012 PriorityOne loan were used to pay the previous loans was supported by substantial credible evidence, there was no error in this finding. (3) The chancellor did not err in taking judicial notice of the fact that all the debtors in this case were family. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Chancery Court.

Affirmed - 2015-CA-01173-COA (Feb. 7, 2017)

En Banc Opinion by Chief Judge Lee

Hon. William R. Barnett (Rankin County Chancery Court)

Sean A. Milner & Steven Price Nixon for Appellants - Derek Andrew Henderson for Appellee

Briefed by [Brittany Bane](#)

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COURT OF APPEALS – POST-CONVICTION RELIEF

DEVER V. STATE

CIVIL – POST-CONVICTION RELIEF

CONSTITUTIONAL LAW - CRIMINAL PROCEDURE - INTERVENING DECISION - An intervening decision that would provide relief to a convicted defendant is one that creates new intervening rules, rights, or claims that did not exist at the time of the conviction

CRIMINAL PROCEDURE – INDICTMENT - SUFFICIENCY OF AN INDICTMENT- It is the conduct specified in the statute that constitutes the offense and determines the legal sufficiency of the charges, not the name to which it is referred

CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS OF A PLEA - A claim of involuntariness of a plea fails on its face if the defendant is aware of his parole ineligibility from another source

FACTS

Robert J. Dever pled guilty to two counts of exploitation of a minor when a police officer responded to a note left by Dever on a bathroom in an attempt to conspire with other co-pedophiles. Dever filed two motions for post-conviction relief. The trial court denied both motions for relief. Dever appeals.

ISSUES

Whether the trial court erred in (1) affirming a sentence when an intervening decision would have adversely affected the outcome, (2) appropriately charging Dever with a crime, (3) upholding Devers’ conviction despite a claim of innocence, and (4) accepting Dever’s plea despite a lack of voluntariness.

HOLDING

(1) Because Dever’s sentences were not enhanced under the residual clause of the Armed Careers Criminal Act of 1984, and his crime of exploitation of a child is not characterized under Mississippi Code as a “nonviolent crime”, the United States Supreme Court’s decision in *Johnson v. United States* played no bearing on Dever’s sentencing outcome. (2) Because there was no authority requiring a statute defining an offense to include the common name of the offense and the conduct specified in the statute determines the legal sufficiency of the charges, Dever’s claim that he was improperly indicted was without merit. (3) Because the record showed no evidence of Dever’s claim of actual innocence, his claims to the contrary were procedurally barred and without merit. (4) Because his parole ineligibility would not render Dever’s plea involuntary if he already knew from another source, the claim that his plea was involuntary for failure of the trial judge to inform him of the ineligibility failed on its face. Therefore, the Court of Appeals affirmed the decision of Harrison County Circuit Court.

Affirmed - 2016-CP-00142-COA (Feb. 7, 2017)

Opinion by Judge Fair

Hon. Roger T. Clark (Hinds County Circuit Court)

Pro se for Appellant - Laura Hogan Tedder (Att’y General’s Office) for Appellee

Briefed by [Horacio Hernandez](#)

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COURT OF APPEALS - CRIMINAL CASES

PARKS V. STATE

CRIMINAL - FELONY

RIGHT TO SPEEDY TRIAL - PRESUMPTION OF PREJUDICE - IMPAIRMENT OF DEFENSE - A delay of eight months gives rise to a presumption of prejudice and triggers the consideration of three factors: reason for delay, assertion of the right, and actual prejudice; Impairment of the defense (e.g., loss of exculpatory evidence) is the most important concern in the determination of actual prejudice

RIGHT TO COUNSEL - INEFFECTIVE ASSISTANCE - REMOVAL OF APPOINTED COUNSEL - An defendant's right to counsel does not require the appointment of counsel of the defendant's own choosing, and disagreement over trial strategy is not sufficient to show how counsel's performance was detrimental to or prejudiced a defendant's case

CRIMINAL PROCEDURE - UNREASONABLE SEARCH AND SEIZURE - EXIGENT CIRCUMSTANCES - Under the totality of the circumstances, a safety search of a residence is constitutionally permissible and is justified under the exigent-circumstances exception, so evidence discovered during the safety search is admissible

FACTS

Police were dispatched to the home of George Parks after he attacked Desiree Stringer. Parks consented to a search of his person, and the officers found cocaine in Parks's pocket. The officers then conducted a safety search and discovered marijuana and large amounts of dried blood. The officers obtained a search warrant for Parks's house and found a knife with both Parks's and Stringer's blood on it. At trial, the prosecution presented testimony from two women who testified about Parks holding them against their will, threatening them, and physically attacking them with a knife. The jury convicted Parks of two counts of sexual battery and one count each of aggravated assault, kidnapping, and possession of a controlled substance and sentenced him to one hundred thirteen years in the custody of the Mississippi Department of Corrections, with parts of the sentence to be served consecutively and some concurrently. Parks appealed.

ISSUES

Whether (1) the trial court erred by denying his motion to dismiss the indictment; (2) Parks was improperly arraigned; (3) Parks's right to a speedy trial was violated; (4) the trial court erred by denying Parks's motion for new appointed counsel; (5) the trial court erred by denying Parks's motion to suppress evidence; (6) the trial court erred by allowed the prosecution to use evidence of Parks's prior bad acts; (7) Parks was denied the right to a public trial; (8) Parks's attorney provided ineffective assistance of counsel; (9) prosecutorial misconduct denied Parks a fair trial; (10) the trial court erred by granting the State's proposed jury instruction regarding uncorroborated testimony; and (11) the trial court erred by denying Parks's request for bail pending appeal.

HOLDING

(1) Because the circuit court clerk sent Parks a copy of his indictment and he confirmed his receipt of the indictment in a letter, the trial court did not err by denying his motion to dismiss the indictment for lack of personal service. (2) Because Parks originally signed a waiver for his arraignment and failed to object to the timing of his arraignment, the Court of Appeals found no merit to Parks's improper arraignment claim. (3) Because the rescheduling of Parks's trial was due to a pro se motion seeking appointment of alternate counsel and because he offered no evidence to show the delay prejudiced him, Parks's right to a speedy trial was not violated. (4) Because trial strategy is left to the attorney's discretion, the disagreement between Parks and his attorney was not detrimental to Parks's case, and the trial court did not err by denying Parks's motion for new appointed counsel. (5) Because the safety search of Parks's residence was justified under exigent circumstances, the trial court did not err by denying Parks's motion to suppress evidence. (6) Because the testimony about Parks's prior bad acts was presented with the purpose of showing motive, intent, and modus operandi, the trial court did not err by admitting the testimony. (7) Because Parks's friend, Amber Andrews, left the courtroom on her own accord, Parks was not denied the right to a public trial. (8) Because Parks failed to show how his attorney's performance was deficient or how that deficiency prejudiced him, Parks's attorney did not provide ineffective assistance of counsel. (9) Because Parks did not raise an objection to statements made in the State's closing argument, the issue of prosecutorial misconduct was procedurally barred. (10) Because the jury instruction regarding uncorroborated testimony did not comment on the weight of the evidence or the determination of credibility of the

testimony, the trial court did not err by granting the jury instruction. (11) Because Parks failed to show that his release would not constitute a special danger to another person or the community, the trial court did not err by denying Parks's request for bail pending appeal. Therefore the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2015-KA-01607-COA (Feb. 7, 2017)

Opinion by Judge Carlton

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, Second Judicial District)

George T. Holmes (Pub. Def. Office) for Appellant - Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Allison Bruff](#)

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STEWART V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - LEGAL SUFFICIENCY - INDICTMENT - The purpose of an indictment is to inform the defendant with some measure of certainty as to the nature of the charges brought against him so that he may have a reasonable opportunity to prepare an effective defense and to enable him to effectively assert his constitutional right against double jeopardy in the event of a future prosecution for the same offense

CRIMINAL LAW - LESSER OFFENSE - SEXUAL BATTERY AND MOLESTATION - Under Mississippi law, sexual battery and molestation are separate and distinct criminal offenses; However, molestation may be a lesser-included offense in some types of sexual battery

FACTS

Kenny Stewart was convicted of sexual battery and molestation. Stewart filed a motion for a judgment notwithstanding the verdict or, in the alternative, a new trial, which the circuit court denied. Stewart appealed.

ISSUES

Whether the (1) indictment failed to allege sufficient facts to put Stewart on notice of the charges against him and to protect him from double jeopardy and (2) circuit court erred in failing to dismiss Count II of the indictment.

HOLDING

(1) Because Stewart's indictment provided sufficient facts to properly notify him of the charges, the indictment enabled Stewart the ability to plead double jeopardy in the event of a future prosecution for the same offense. (2) Because there was not sufficient evidence to support separate and distinct acts of molestation and sexual battery, Stewart's conviction of Count II, molestation, was improper. Therefore, the Court of Appeals affirmed in-part and reversed and rendered in-part the judgment of the Warren County Circuit Court.

CONCURRENCE

Judge Carlton agreed in affirming Stewart's conviction in Count I of his indictment for the charge of sexual battery.

DISSENT

Judge Carlton argued that the evidence in the record supported the fact that a separate act of molestation occurred. Therefore, Stewart's conviction of Count II, molestation, was proper.

Affirmed in Part; Reversed and Rendered in Part - 2014-KA-01520-COA (Feb. 7, 2017)

En Banc Opinion by Judge Griffis - Concurrence in-part by Judge Carlton - Dissent in-part by Judge Carlton

Hon. M. James Chaney Jr. (Warren County Circuit Court)

Mollie Marie McMillin, George T. Holmes & Aafram Yaphet Sellers (Pub. Def. Office) for Appellant - Joseph Scott Hemleben & Jason L. Davis (Att'y Gen. Office) for Appellee

Briefed by [Davis Vaughn](#)

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