
MISSISSIPPI SUPREME COURT DECISIONS – JULY 23, 2020**SUPREME COURT - CIVIL CASES**

PARKER V. MALLETT**CIVIL - OTHER**

CRIMINAL PROCEDURE - PAROLE ELIGIBILITY - SUBSEQUENT DRUG OFFENDERS - Pursuant to Miss. Code Ann. § 47-7-3(1)(f), subsequent drug offenders under an enhanced penalty are no longer barred from parole eligibility

CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDERS - Pursuant to Miss. Code Ann. § 47-7-3(1)(a) and § 99-19-81, habitual offenders must serve their sentence without the possibility of suspension, reduction, parole, or probation

FACTS

In November 2006, Atiba Parker was found guilty of two felony cocaine sales. Before the November 2006 trial, Parker was also arrested for felony cocaine possession. Based on Parker's 2006 felony cocaine sale convictions, his cocaine possession charge was amended to include subsequent drug offender and habitual offender enhancements. Parker was sentenced to eight years, two times the four-year statutory maximum, and because he qualified as a habitual offender, the mandatory eight-year sentence could not be reduced or suspended. Parker became eligible for parole on his two felony cocaine sales convictions after serving one-quarter of each sentence. The Mississippi Department of Corrections ("MDOC") denied Parker's request for a parole date because he had not yet served the complete eight-year sentence for the cocaine possession conviction. The trial court affirmed the MDOC's decision to deny Parker a parole date. Parker appealed.

ISSUE

Whether the MDOC erred in denying Parker's request for a parole date.

HOLDING

Because, although Miss. Code Ann. § 47-7-3(1)(f) was amended to no longer bar parole for subsequent drug offenders, Miss. Code Ann. § 47-7-3(1)(a) and § 99-19-81 still require habitual offenders to serve their sentence without the possibility of suspension, reduction, parole, or probation, the MDOC did not err in denying Parker's parole date request. Therefore, the Supreme Court affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2019-CP-01317-SCT (July 23, 2020)

Opinion by Justice Maxwell

Hon. John Huey Emfinger (Rankin County Circuit Court)

Pro se for Appellant - Darrell Clayton Baughn (Att'y Gen. Office) for Appellees

Briefed by [Ashley Pruitt](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JULY 21, 2020**COURT OF APPEALS - CIVIL CASES**

CADIGAN V. SULLIVAN

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CHILD SUPPORT - ARREARAGE - When there is a valid extra-judicial agreement between the parties, the accused is not in arrears and the accuser is not entitled to back child support

FAMILY LAW - CHILD SUPPORT - CONTEMPT - While the chancery court has substantial discretion in contempt matters, a prima facie case of contempt is made when the party entitled to receive child support introduces evidence that the party required to pay child support has failed to do so

CIVIL PROCEDURE - DAMAGES - ATTORNEY'S FEES - The party who initiates an action and is unsuccessful is not entitled to attorney's fees

APPELLATE PROCEDURE - MOTION - WAIVER OF ERROR - Failure to cite to any relevant authority results in a waiver of the issue on appeal

FACTS

Jeffery Scott Cadigan and Stefany Anne (Cadigan) Sullivan divorced in Florida with joint legal custody of their minor son pursuant to a shared-custody agreement. Sullivan was ordered to pay child support to Cadigan. In an attempt to reconcile, Cadigan and Sullivan moved back in together to Cadigan's home in Mississippi and Cadigan assumed Sullivan's child-support obligation. They later decided that reconciliation was not possible, but Cadigan stated in an email to Sullivan that he would not demand child support as long as they were equally involved in raising their son. The Florida court modified the child-support payment procedure to allow Sullivan to pay Cadigan directly instead of through the depository, and Cadigan stated that Sullivan was current on child support payments in an affidavit. A few years later, Cadigan no longer agreed with the modified visitation schedule and asserted that all future visitation shall be in accordance with the shared-custody agreement. At this point, Sullivan did not pay child support. Later that year, Cadigan requested that the Mississippi Department of Human Services ("DHS") enforce the Florida child-support order "going forward" and did not request enforcement of child-support arrears. In a signed affidavit, Cadigan stated that Sullivan was current on child-support. Sullivan was notified that DHS had started withholding a portion of her income for child support. Sullivan filed a claim that the portion of her income being withheld was at a higher rate than Mississippi law allowed. After various pleadings, the chancery court issued a temporary order that modified Sullivan's child-support obligation. A few years later, their son indicated that he wanted to live with Sullivan and Cadigan asserted that it would be in his son's best interests to award custody to Cadigan. After more pleadings, Cadigan and Sullivan entered another temporary order that granted Sullivan sole custody and suspended her child-support obligation. After a trial, the Harrison County Chancery Court ordered Cadigan to pay child support to Sullivan for their son. The chancery court held that Sullivan was not in arrears and that neither party was in contempt or entitled to attorney's fees. Before the chancery court entered its final judgment, Cadigan filed a motion for a new trial and his post-trial motion was denied. Cadigan appealed.

ISSUES

Whether the chancery court erred in (1) finding Sullivan was not in arrears; (2) finding Cadigan was not entitled to an offset of his child-support obligation by the amount of Sullivan's arrearage; (3) finding Sullivan was not in contempt; (4) finding Cadigan was not entitled to attorney's fees; and (5) failing to consider Cadigan's claim for injunctive relief.

HOLDING

(1) Because Cadigan and Sullivan agreed that child support would be suspended based on a shared-custody agreement, and because Cadigan stated that Sullivan was current on child support in an affidavit with DHS, Sullivan was not in arrears. (2) Because Sullivan was not in arrears, Cadigan was not entitled to an offset of his child-support arrearage. (3) Because Cadigan and Sullivan agreed that child support would be suspended based on Sullivan assuming half custody, Sullivan was not in contempt. (4) Because Cadigan was unsuccessful in his counterclaim against Sullivan, Cadigan was not entitled to attorney's fees. (5) Because Cadigan failed to cite any relevant authority, Cadigan's claim for injunctive relief was procedurally barred. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2018-CA-01759-COA (July 21, 2020)

Opinion by Judge Greenlee

Hon. Michael H. Ward (Harrison County Chancery Court, Second Judicial Dist.)

John Paul Barber for Appellant - David Jeffrey White for Appellee

Briefed by [MaryScott Polk](#)

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COX V. UPCHURCH

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - CUSTODY - ALBRIGHT FACTORS - It is necessary for the chancellor to make specific findings of fact under each applicable *Albright* factor, but it is not necessary for him to state who prevails under each factor

FAMILY LAW - CUSTODY - BEST INTEREST OF THE CHILD - The polestar consideration in a child custody case is the best interest of the child

FACTS

Tiffany Cox and Ryan Upchurch were never married, but are the parents of their daughter, A.R. Cox and Upchurch were engaged after A.R.'s birth, but their relationship ended at their daughter's second birthday party. At this time, Upchurch filed a complaint to establish paternity, for custody, and to request a temporary restraining order. A hearing was set to take place at a later time, Upchurch was awarded immediate physical and legal custody, and the restraining order was granted. At the hearing, an *Albright* analysis was conducted and Upchurch was given temporary physical custody of the child. Cox and Upchurch were granted joint legal custody. Later, Cox filed for a modification of the custody order and she was awarded specific holiday and weekend visitation. Cox then filed for appointment of a guardian ad litem, which was also granted. The custody dispute then went to trial. The guardian ad litem, through her report and testimony at trial, recommended that Upchurch received physical custody of the child, both parties share legal custody, and that Cox receive liberal visitation rights. The chancellor followed that recommendation, awarding physical custody to Upchurch, joint legal custody to both parents, and liberal visitation to Cox. His decision was based on an *Albright* analysis and evidence and testimony given at trial. He found that three *Albright* factors favored Upchurch, none favored Cox, and the remaining favored neither party, and gave substantial reasoning behind each of those decisions. Cox appealed.

ISSUE

Whether the chancellor erred in awarding sole physical custody to Upchurch.

HOLDING

Because there was substantial evidence to support the chancellor's decision to award custody to Upchurch, the chancellor was not clearly erroneous in awarding sole physical custody to Upchurch. Therefore, the Court of Appeals affirmed the judgment of the Grenada County Chancery Court.

Affirmed - 2019-CA-00851-COA (July 21, 2020)

Opinion by Judge Westbrook

Hon. Mitchell M. Lundy Jr. (Grenada County Chancery Court)

Jerry Wesley Hisaw for Appellant - Luther Putnam Crull Jr. for Appellee

Briefed by [Claire Scott](#)

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CROSS V. ATTALA CTY. COOP.

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - SUMMARY JUDGMENT - NONMOVANT'S BURDEN - In opposition to the motion, the nonmoving party must show there is significant probative evidence that such an issue of fact exists; mere allegations unsupported by detailed and precise facts are not sufficient

TORTS - PREMISES LIABILITY - DUTY TO INVITEES - A landowner owes an invitee the duty to keep the premises reasonably safe and, when not reasonably safe, to warn only where there is hidden danger or peril that is not in plain and open view

TORTS - PREMISES LIABILITY - ASSUMPTION OF RISK - Assumption of risk applies where a person freely and voluntarily chose to encounter a dangerous condition

FACTS

In June 2016, Retha Cross filed a premises-liability action against the Attala County Cooperative ("Co-Op"). Cross alleged that the Co-Op was negligent by failing to (1) maintain the area; (2) clearly mark the area; (3) warn of the hazard; and (4) eliminate the hazard. While shopping for plants with her neighbor, Lily Sharp, at the Co-Op, Cross reached for a plant on a shelf, fell, and injured her face and mouth. Cross claimed that a big knot, or clump of concrete, caused her to trip and fall. Cross conceded that she noticed a transition between the floor and the shelf and did not have difficulty maneuvering the transition. Sharp did not see how Cross fell. In June 2017, A.K. Rosenhan, an engineer and expert witness, filed a report indicating that the proximate cause of Cross's fall was a transition, or inclined area, between the floor and the shelf of a one-inch height differential. Rosenhan did not notice a big knot or clump of concrete when he inspected the site a year after the incident. In April 2018, the Co-Op filed a motion for summary judgment, asserting that Cross did not establish the existence of a dangerous condition, an essential element of her claim. Cross filed a response, arguing that a dangerous condition existed and that the Co-Op breached its duty of care to keep the premises in a reasonably safe condition. In May 2019, the Attala County Circuit Court granted summary judgment in favor of the Co-Op, holding that Cross's injury was not due to a dangerous condition and that there were no genuine issues of material fact. The circuit court also found that Cross assumed the risk, if any existed, by stepping on the area that allegedly caused the fall. Cross appealed.

ISSUE

Whether the circuit court erred by granting summary judgment, finding no dangerous condition existed.

HOLDING

Because minor imperfections in pathways do not constitute dangerous conditions, because there was no evidence that the floor condition was concealed, and because Cross could not assume any risk if there was no dangerous condition, summary judgment was proper. Therefore, the Court of Appeals affirmed the judgment of the Attala County Circuit Court.

Affirmed - 2019-CA-00935-COA (July 21, 2020)

En Banc Opinion by Judge Greenlee

Hon. George M. Mitchell Jr. (Attala County Circuit Court)

Edward Blackmon Jr. & Bradford Jerome Blackmon for Appellant - Cecil Maison Heidelberg & Trhesa Barksdale Patterson for Appellee

Briefed by [Caroline Heavey](#)

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LADNER INVS. INC. V. MICHAEL CONWAY INC.

CIVIL - INSURANCE

TORTS - NEGLIGENCE - GRATUITOUS DUTY - Even if a plaintiff can show an assumed duty based on detrimental reliance, the assumed duty is limited to the scope of the gratuitous undertaking

TORTS - NEGLIGENCE - PROXIMATE CAUSE - A negligence claim fails as a matter of law if the proximate cause of the plaintiff's damages was their own failure to execute their duty

CONTRACTS - INSURANCE - DUTY-TO-READ - An insured is imputed with knowledge of the contents of their insurance policy, regardless of whether they have read the policy

FACTS

Michael Conway Inc. ("MCI") sold an inland marine insurance policy from Shelter Insurance to Ladner Investments Inc. ("Ladner") to cover equipment used in Ladner's transportation and logging business. Ladner routinely purchased and sold equipment, which was added to and removed from coverage under the insurance policy. Ladner took possession of a Caterpillar skidder from Puckett Machinery. Puckett Machinery forwarded an insurance selection form to Caterpillar Financial. Caterpillar Financial faxed the insurance selection form for the new skidder to MCI. MCI never received the insurance selection form and the skidder was not added to the Shelter Insurance policy. There was no communication between Ladner and MCI related to insuring the skidder. Shelter Insurance issued two new declarations statements to Ladner and the skidder was not listed on either declarations statement. The skidder eventually burned. Shelter Insurance denied Ladner's claim because the skidder was not listed on its insurance policy. Ladner filed a complaint for damages, alleging MCI was liable for negligently failing to procure the insurance coverage, negligent misrepresentation, and punitive damages. MCI moved for summary judgment, asserting Ladner had a duty to read its policy declarations statements, which was the proximate cause of its damages. The Lamar County Circuit Court granted summary judgment for MCI. Ladner appealed.

ISSUES

Whether the trial court erred in (1) granting summary judgment in MCI's favor and (2) finding that the duty-to-read doctrine barred Ladner's claims against MCI.

HOLDING

(1) Because there was no evidence that MCI assumed a gratuitous duty to procure insurance or process the insurance request on the skidder, and because Ladner's own failure to read the Shelter Insurance policy declarations statements was the proximate cause of Ladner's damages, the trial court properly granted summary judgment in MCI's favor. (2) Because Ladner, as the insured, was imputed with the knowledge of the contents of its insurance policy regardless of its failure to read the policy, the "duty-to-read" or "imputed knowledge" doctrine barred Ladner's claims against MCI. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Circuit Court.

Affirmed - 2019-CA-01111-COA (July 21, 2020)

Opinion by Presiding Judge Carlton

Hon. Prentiss Greene Harrell (Lamar County Circuit Court)

David R. Wade & Jeffrey Gray Baker Houston for Appellant - Michael Brady Mitchell for Appellee

Briefed by [Lynette Potter](#)

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NEWTON V. PUB. EMPS.' RET. SYS.

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE LAW - APPELLATE REVIEW - AGENCY CONCLUSIONS - An agency's conclusions must remain undisturbed unless the agency's order (1) is not supported by substantial evidence; (2) is arbitrary or capricious; (3) is beyond the scope or power granted to the agency; or (4) violates one's constitutional rights

ADMINISTRATIVE LAW - DISABILITY - SUBSTANTIAL EVIDENCE - Substantial evidence is defined as relevant evidence that reasonable minds might accept as adequate to support a conclusion

ADMINISTRATIVE LAW - DISABILITY - SPECIFIC CONDITION - When determining a claimant's eligibility for disability, there is no requirement for a specific medical condition if the evidence supports the inability to continue work or disability; failure to find the specific cause of a claimant's pain is not fatal to a finding of disability

FACTS

In 2006, Linda Newton, a kindergarten teacher's assistant, applied for non-duty-related disability retirement benefits from the Public Employees' Retirement System of Mississippi ("PERS"). Superintendent Jimmy Dahlen completed the PERS Form 6B detailing Newton's job requirements. Several doctors conducted medical examinations of Newton and diagnosed various conditions, including back problems and cerebral palsy. In January 2007, the PERS medical board determined that there was insufficient objective evidence to support Newton's claim that her medical condition prevented her from performing her duties as Dahlen described them. Newton appealed the decision to the committee. At the hearing, Newton testified that she did not believe Dahlen knew what her job duties entailed and that Russel Thomas, the principal and her immediate supervisor, had a better understanding of her duties. The committee denied hearing Thomas's testimony. In June 2007, the committee recommended the board deny Newton's disability benefits. Newton appealed to the Hinds County Circuit Court. In August 2010, Judge Yerger entered an order finding that the committee based its opinion in disregard to medical evidence contained in the record, and the determination of the effect of Newton's condition was arbitrary and capricious. Judge Yerger remanded the case for further factual findings regarding Newton's diagnoses of cerebral palsy and Newton's job requirements. At a hearing before the committee in January 2011, Thomas and Angie Crowe, a fellow teaching assistant, testified as to Newton's job duties and requirements as a kindergarten teacher's assistant. Thomas's testimony of Newton's job duties was contrary to and more extensive than Dahlen's assessment. Crowe testified Newton had become slower and had difficulties performing some of her job duties. The board of trustees adopted the committee's recommendation to deny Newton's claim because the committee found that Newton performed her job well enough to be offered to come back, and her supervisor would have continued to make accommodations for her. In July 2011, Newton filed a second notice of appeal to the Hinds County Circuit Court. In August 2018, Judge Weill affirmed the denial of Newton's claim, finding PERS's decision was neither arbitrary or capricious and that it was supported by substantial evidence. Newton appealed.

ISSUE

Whether the trial court erred in determining that PERS's decision to deny Newton's application for non-duty-related disability retirement benefits was not arbitrary and capricious and was supported by substantial evidence.

HOLDING

Because there was objective evidence of Newton's back problems and several doctors agreed with, or failed to dispute, the finding of cerebral palsy, because PERS continued to rely on Dahlen's assessment of Newton's job requirements that had no basis in the record, because Crowe testified that Newton had become slower and had difficulty performing some of her job duties, and because Thomas testified that moving Newton to another grade was not an option, the decision to deny Newton's application for benefits was arbitrary and capricious and was not supported by substantial objective evidence. Therefore, the Court of Appeals reversed and rendered the judgment of the Hinds County Circuit Court.

CONCURRENCE

Judge Lawrence concurred to express concern regarding the unconscionable delay in the adjudication of this case, stating that such delay is a threat to civil and orderly society and seven years to rule on an appeal from 2011 is offensive to Miss. Const. art. III § 24.

Reversed & Rendered - 2018-SA-01343-COA (July 21, 2020)

Opinion by Judge Greenlee - Concurrence by Judge Lawrence
Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)
Michelle Dean Easterling for Appellant - Samuel Martin Millette for Appellee
Briefed by [Glory Crocco](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

SMITH V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - INDICTMENT - NOTICE - An indictment that tracks the language of the relevant statute provides full notice of the charge to the accused

POST-CONVICTION RELIEF - SENTENCING - PROCEDURAL BAR - Sentencing issues that are not raised during a plea hearing are procedurally barred from being raised on appeal

POST-CONVICTION RELIEF - SENTENCING - PERMISSIBLE RANGE - Sentences that fall within the permissible range designated by statute will generally not be disturbed on appeal

FACTS

Thomas Smith pled guilty to armed robbery in the Pike County Circuit Court pursuant to Miss. Code Ann. § 97-3-79. Smith was sentenced to twenty-five years in the custody of the Mississippi Department of Corrections, with thirteen years suspended and twelve years to serve. He was also placed on five years of post-release supervision and ordered to pay a \$2,000 fine. Although Smith's indictment read "Armed Robbery," Miss. Code Ann. § 97-3-79 does not contain this term. He presented no evidence regarding his age or life expectancy to the trial court. Smith filed a Post-Conviction Relief motion, arguing that he pled guilty to a non-existent crime and his sentence was illegal because it effectively amounted to a life sentence due to his age. The circuit court denied this motion. Smith appealed.

ISSUES

Whether the trial court erred in denying Smith's claims that (1) he pled guilty to and was sentenced to a non-existent crime, in violation of his due process rights and (2) his twenty-five-year sentence is illegal because it essentially amounts to a life sentence for a person of his age.

HOLDING

(1) Because the title of a statute does not control, and because Smith's indictment tracked the language of the statute, the crime of armed robbery existed and Smith was provided full notice of his charge. (2) Because Smith failed to object to his sentence at the plea hearing, because the sentence was within the range permitted by the statute, and because Smith failed to present mitigating evidence relating to his life expectancy at his sentence hearing, Smith was procedurally barred from raising the issue on appeal and the sentence was legal. Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit Court.

Affirmed - 2019-CP-01267-COA (July 21, 2020)

Opinion by Presiding Judge Carlton

Hon. David H. Strong Jr. (Pike County Circuit Court)

Pro se for Appellant - Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [Brie Mansoor](#)

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COURT OF APPEALS - CRIMINAL CASES

HAMLIN V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF -

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

CRIMINAL PROCEDURE - ALIBI DEFENSE - REQUIREMENTS - Pursuant to *Ford*, the law relating to an alibi defense involves more than merely the defendant's denial that they were present at the precise time the crime was committed; an alibi defense requires evidence that the defendant's location at the relevant time was so far removed from the incident as to render it impossible for the defendant to be the guilty party

CRIMINAL PROCEDURE - ALIBI DEFENSE - ALTERNATE LOCATION - If the asserted alternate location is such that it would remain within the realm of physical possibility for the defendant to have committed the crime, then the defense is nothing more than a denial and would not rise to the level of alibi

FACTS

Otha Hamlin was convicted for committing sexual crimes against his nine-year-old granddaughter in Sharkey County. At trial, testimony showed that the crimes did not all occur on the same day or time. Hamlin testified that he was in Chicago during some of the time period, but conceded that he was in Sharkey County on three separate occasions during the time period that the crimes occurred. At two different times, Hamlin actually lived in the same house as his daughter, the mother of his granddaughter. Hamlin also admitted under oath that he had access to his granddaughter during the times he lived at his daughter's house. Hamlin was convicted of two counts of statutory rape and four counts of sexual battery. Hamlin appealed.

ISSUE

Whether Hamlin received ineffective assistance of counsel due to his lawyer's failure to request an alibi jury instruction.

HOLDING

Because testimony established that Hamlin was not so far geographically removed from the scene and times of the crimes to render it impossible for him to be the guilty party, an alibi instruction was not warranted based on the uncontested evidence and Hamlin's counsel did not provide ineffective assistance of counsel by failing to request an alibi instruction. Therefore, the Court of Appeals affirmed the judgment of the Sharkey County Circuit Court.

Affirmed - 2019-KA-00172-COA (July 21, 2020)

Opinion by Judge McCarty

Hon. Isadore W. Patrick Jr. (Sharkey County Circuit Court)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Matthew Wyatt Walton, Kaylyn Havrilla McClinton, & Ashley Lauren Susler (Att'y Gen. Office) for Appellee

Briefed by [Fatelia Avery](#)

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MAGEE V. STATE

CRIMINAL - FELONY

EVIDENCE - HEARSAY - TENDER YEARS EXCEPTION - Under Miss. R. Evid. 803(25), a statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible evidence if (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability and (b) the child either (1) testifies at the proceedings or (2) is unavailable as a witness

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - POST-CONVICTION COLLATERAL RELIEF - An ineffective-assistance-of-counsel claim can be addressed on direct appeal when (1) the record affirmatively shows ineffectiveness of constitutional dimensions or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without considering the trial judge's findings of fact

FACTS

Patrick O'Brien Magee was indicted for one count of sexual battery by sexual penetrating J.M., a mentally defective person. J.M., who was sixty-six years old at the time of the incident, was taken to the Mississippi Child Advocacy Center

for a forensic interview by clinical director Jennifer Weaver. During the interview, which was recorded and shown to the jury, J.M. explained in detail to Weaver what Magee had done to her during the sexual assault. At a pretrial hearing, J.M. was determined to have the emotional and mental capacity of a six-to-eight-year old girl. The Madison County Circuit Court determined J.M. was a child of tender years for purposes of Miss. R. Evid. 803(25) and that there was sufficient indicia of reliability to apply the tender-years exception and allow hearsay testimony. Consequently, three individuals testified at trial as to what J.M. told them about the sexual assault. The jury found Magee guilty and he was sentenced to serve thirty years in the custody of the Mississippi Department of Corrections. Magee filed a motion for judgment notwithstanding the verdict (“JNOV”) or, alternatively, a new trial and was denied. Magee appealed.

ISSUES

Whether (1) the trial court erred in admitting hearsay evidence under Miss. R. Evid. 803(25) and (2) Magee was provided ineffective assistance of counsel.

HOLDING

(1) Because the circuit court went through the proper steps outside of a jury in determining that J.M. was mentally and emotionally a child, the circuit court’s admission of hearsay evidence under the tender-years exception was not an abuse of discretion. (2) Because neither party stipulated that the trial record was adequate for the appellate court to make the finding without considering the trial judge’s findings of fact, the issue was better suited for a motion for post-conviction collateral relief; thus, the Court of Appeals declined to address the merits of Magee’s ineffective assistance of counsel claim. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2019-KA-00056-COA (July 21, 2020)

Opinion by Judge Westbrook

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

John R. Reeves for Appellant - Abbie Eason Koonce (Att’y Gen. Office) for Appellee

Briefed by [William "Jack" Simpson](#)

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