

MISSISSIPPI SUPREME COURT DECISIONS – JULY 28, 2016

SUPREME COURT - CIVIL CASES

DERIVAUX V. THE MISSISSIPPI BAR

CIVIL - BAR MATTERS

BAR MATTERS - REINSTATEMENT - RULE 12 - Petitioner must demonstrate rehabilitation by: (1) stating the cause or causes for suspension or disbarment, (2) providing the names and current addresses of all persons, parties, firms, or legal entities who suffered pecuniary loss due to improper conduct, (3) making full amends and restitution, (4) showing requisite moral character for the practice of law, and (5) demonstrating the requisite legal education

BAR MATTERS - REINSTATEMENT - BURDEN - The Petitioner bears the burden of proving by clear and convincing evidence that he has rehabilitated himself by complying with the requirements of Rule 12, which provides that: (a) No person disbarred or suspended for a period of six months or longer shall be reinstated to the privilege of practicing law except upon petition to the Court; (b) Reinstatement to the practice of law following any discipline shall be only upon proof of compliance with any such sanctions

BAR MATTERS - REINSTATEMENT - JURISDICTION - The Mississippi Supreme Court has exclusive and inherent jurisdiction over matters pertaining to attorney discipline, reinstatement, and appointment of receivers for suspended and disbarred attorneys

FACTS

John Allen Derivaux, Jr. practiced law in Vicksburg, MS where as part of his real estate practice, he had a title agency agreement with a title insurance company, which allowed him to write and sell title insurance. After the agreement terminated, Derivaux continued to hold himself out to lenders and third parties as a title insurance agent. Derivaux fraudulently collected premiums by altering forms to make them appear authentic, and placing the proceeds in his lawyer trust account. Subsequently, Derivaux was suspended from practice for two years, beginning on November 18, 2011. Derivaux filed his first Petition for Reinstatement in March 2014 and the Court dismissed the motion for failure to comply with Mississippi case law. Derivaux filed a second petition.

ISSUE

Whether Derivaux has rehabilitated himself in conduct and character since the suspension was imposed.

HOLDING

Because Derivaux sufficiently satisfied all five factors for reinstatement, the Court found he met his burden of proving both moral and professional rehabilitation as well as an outward manifestation sufficient to convince a reasonable mind he has reformed. Therefore, the Supreme Court granted his Petition for Reinstatement.

Reinstatement Conditionally Granted - 2016-BR-00084-SCT (July 28, 2016)

En Banc Opinion by Justice Lamar

Pro Se John Allen Derivaux, Jr. for Appellant - Adam Bradley Kilgore for Appellee

Briefed by [Blake Brookshire](#)

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HOWELL V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - MOTION FOR POST-CONVICTION RELIEF - RES JUDICATA - Under Miss. Code Ann. § 99-39-27(2), successive petitions for post-conviction relief are prohibited

CRIMINAL PROCEDURE -MOTION FOR POST-CONVICTION RELIEF - NEWLY DISCOVERED EVIDENCE - A claim for post-conviction relief based on newly-discovered evidence is an exception to procedural bars if the party petitioning for relief presents evidence which was not discoverable at trial that would have caused a different result

CRIMINAL PROCEDURE -DISCOVERY - BRADY VIOLATIONS - To establish a *Brady* violation, the defendant must prove: (1) that the government possessed evidence favorable to the defense; (2) that the defense did not possess the evidence and could not have obtained it through reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that there is a reasonable probability that the outcome of the trial would have been different if the evidence had been produced

FACTS

Marlon Latodd Howell was convicted of capital murder by a jury and sentenced to death. His conviction and sentence were affirmed by the Supreme Court in 2003. Howell then petitioned for post-conviction relief, which the Supreme Court granted in part on limited issues and remanded to the trial court. The trial court denied Howell's petition and request for a new trial, and the Supreme Court affirmed. In 2015, Howell filed a second motion for post-conviction relief based on newly discovered evidence. Howell argued that he was entitled to a new trial due to the discovery of a new alibi witness and the State's failure to disclose the identity of the alibi witness under *Brady v. Maryland*.

ISSUE

Whether Howell was entitled to post-conviction relief as a result of newly discovered evidence and the State's violation of its discovery obligations under *Brady v. Maryland*.

HOLDING

Because Howell's petition was time barred for filing more than one year after the conclusion of the direct appeal and successive petitions for post-conviction relief are prohibited, Howell's second petition for post-conviction relief was procedurally barred. Also, because Howell knew the alibi witness at the time of trial, the evidence was not "newly discovered" evidence and Howell could not (1) overcome the procedural bars, (2) establish that the state violated its discovery obligation under *Brady*, or (3) prove that his right to due process was violated. Therefore, the Supreme Court denied Howell's motion for post-conviction relief.

Denied - 2015-DR-01138-SCT (July 21, 2016)

En Banc Opinion by Justice Coleman

Hon. Samac S. Richardson (Union County Circuit Court)

Briefed by [Mallory Bland](#)

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RIVERBOAT CORP. OF MISSISSIPPI V. HARRISON CTY. BD. OF SUPERVISORS

CIVIL - OTHER

CIVIL RIGHTS - STATUTES - RIGHT TO A JURY TRIAL - Cases involving statutes that create a cause of action but are silent concerning the right to a jury trial have been tried in front of juries in the past and these cases are a part of the common law

CIVIL PROCEDURE - APPEALS - TAX ASSESSMENTS - There is a right to a jury trial in appeals involving tax assessments in circuit court

FACTS

Riverboat Corporation's personal and real property was subject to an ad valorem tax assessment by the Harrison County Board of Supervisors. Harrison County's tax assessor determined the property's value and the amount it should be taxed in 2010; however, Riverboat disagreed with the assessment and filed an appeal in the Harrison County Circuit Court. The county filed a jury trial request. Riverboat also appealed the tax assessments for 2011 and 2012. The City of Biloxi joined as an additional defendant, and the appeals were consolidated. Riverboat moved for a bench trial, arguing that a right to a jury trial is present only if at common law a jury was required under Miss. Const. Art. 3, § 31. The Court found that this case should be a jury trial, the phrase "shall be tried anew" in Miss. Code Ann. § 11-51-77 indicated the Legislature intended to guarantee a jury trial, and at common law tax appeals were tried by juries. Riverboat appealed on interlocutory review.

ISSUE

Whether there is a right to a jury trial in an appeal of a county's ad valorem tax assessment.

HOLDING

Because cases involving statutes that are silent about the right to a jury have been tried in front of juries in the past, that practice is part of the common law. Because the right to a jury trial existed before the adoption of the Constitution in 1890, the right to a jury trial arises in tax assessments in circuit court. Therefore, the Supreme Court affirmed the judgment of the Harrison County Circuit Court.

DISSENT

Justice King argued that the right to a jury must be granted through the Constitution or by statute. He contended that the right to a jury trial did not exist at common law or by statute. Therefore, there is no right to a jury trial in tax assessment appeals.

Affirmed and Remanded - 2014-IA-01358-SCT (July 28, 2016)

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

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

Robert Gregg Mayer, Fred L. Banks, Jr., Jerome C. Hafter, & James Grady Wyly, III for Appellant - Tim C. Holleman, Patrick Taylor Guild, Ronald G. Peresich, & William V. Westbrook, III for Appellees

Briefed by [Victoria Jones](#)

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SMITH V. LEAKE COUNTY SCHOOL DISTRICT

CIVIL - PERSONAL INJURY

GOVERNMENTAL IMMUNITY - MISSISSIPPI TORT CLAIMS ACT - DISCRETIONARY FUNCTION

- A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof

GOVERNMENTAL IMMUNITY - MISSISSIPPI TORT CLAIMS ACT - BRANTLEY TEST - A court must consider the broadest function involved in order to make a baseline determination of whether the overarching function is discretionary or ministerial; the court must then examine any narrower duty associated with the activity at issue to determine whether a statute, regulation, or other binding directive renders that particular duty a ministerial one, notwithstanding that it may have been performed within the scope of a broader discretionary function

FACTS

After a year of bullying and intimidation by a small group of students, Yahenacy Smith was beaten and severely injured while riding the school bus home. Smith sued the Leake County School District alleging negligence *per se*. The circuit

court found the school district was entitled to discretionary-function immunity and granted the school district's motion for summary judgment. Smith Appealed.

ISSUES

Whether (1) Leake Central's governmental function is ministerial or discretionary and (2) the immunity afforded to acts taken by school officials to maintain control and discipline of students applies only to claims by those students to whom school officials administered control and discipline.

HOLDING

(1) Because the duty to provide a safe school environment is ministerial and the school district does not have discretion in deciding how to prevent acts of bullying, the school district is not protected by governmental immunity. (2) Because the corporal punishment statutes do not apply to a student injured by other students, summary judgment on this point was improper. Therefore, the Supreme Court reversed and remanded the judgment of the Leake County Circuit Court.

CONCURRENCES

Although Justice Randolph agreed in the result, he maintained that the *Brantley* test overcomplicates the inquiry. Justice Randolph would like the courts to use the public policy function test.

Justice Dickinson also agreed with the result, but would hold that the ministerial duty is not derived from the antibullying statutes, but from the statutes requiring all superintendents, principals and teachers in public schools to hold pupils to strict account for disorderly conduct.

Justice Lamar concurs separately only to reiterate Justice Dickinson's analysis.

Reversed & Remanded - 2015-CA-01056-SCT (July 28, 2016)

En Banc Opinion by Chief Justice Waller - Concurrences by Justices Dickinson, Lamar & Randolph

Hon. Vernon R. Cotten (Leake County Circuit Court)

Kurt A. Mord & Matthew Y. Harris for Appellant - Michael J. Wolf for Appellee

Briefed by [Pete Doran](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JULY 26, 2016

COURT OF APPEALS - CIVIL CASES

BENNETT V. MISS. STATE DEP'T OF HEALTH

CIVIL- WORKERS' COMPENSATION

WORKERS' COMPENSATION - STANDARD OF REVIEW - SUBSTANTIAL EVIDENCE - The Mississippi Workers' Compensation Commission's rulings are reversed only where findings of fact are unsupported by substantial evidence, matters of law are clearly erroneous, or the decision was arbitrary and capricious

SCOPE OF EMPLOYMENT - LIABILITY - PERSONAL ERRAND - An employer is not liable when an employee steps aside from the employer's business for some purpose of his own, disconnected from his employment, regardless of how short the time

SCOPE OF EMPLOYMENT- LIABILITY - TRAVELING EMPLOYEE - A traveling employee is one who goes on a trip to further the business interests of his employer, such as a traveling salesman or a person attending a business conference for the benefit of his employer

FACTS

James W. Bennett was a salaried senior systems administrator employed by the Mississippi Department of Health. While Bennett had a fixed place of employment, he frequently traveled to separate locations to fulfill work orders. After having lunch out, Bennett suffered serious injuries when another vehicle pulled out in front of him while he was en route to

his house to switch from his motorcycle to his jeep before returning to his office. Bennett filed a petition to controvert and a compensability hearing was held to determine the sole question of whether he was acting in the course and scope of his employment at the time of the accident. Bennett testified that he would not have been entitled to mileage reimbursement for his trip from his morning work location to lunch, and that if it had not begun to rain, he would have driven straight to his office. When the accident occurred, Bennett had with him a small external hard drive stored in his leather saddlebag. The Mississippi Workers' Compensation Commission (the Commission) reversed the administrative judge's holding, finding that Bennett was not acting within the scope of his employment at the time of the accident because he was on a personal errand to exchange vehicles, which was unconnected to a business purpose for his employer. Bennett appealed.

ISSUE

Whether Bennett was acting in the scope of his employment when, in anticipation of bad weather, he rode toward his house after lunch to switch from his motorcycle to his jeep before returning to his office.

HOLDING

Bennett's travel to lunch and his personal errand home to change from his motorcycle to his jeep was outside the scope of his employment. While aspects of his work included travel to service locations and he was entitled reimbursement for that travel, his position as a senior systems analyst was not comparable to that of a truck driver or traveling salesman. Evidenced by his own testimony, he did not need a larger vehicle to transfer equipment on the afternoon of the accident, and but for the impending rain, he would have driven straight to his office. Accordingly, substantial evidence supported the Commission's finding that Bennett's personal decision to make a trip home to switch vehicles was not necessary to facilitate his scheduled service calls. Therefore, the Court of Appeals affirmed the Commission's decision.

DISSENT

Justice James argued that the Commission's decision was not supported by substantial evidence and was based on an erroneous interpretation of the law. James contended that Bennett's commute home to swap vehicles was for business purposes as the un-contradicted testimony showed that he was carrying computer equipment in a non-waterproof motorcycle saddlebag and it was about to rain. James argued the fact that Bennett did not intend to charge for this travel did not change the nature of the trip: to ensure the equipment was protected. Therefore, James would have found that Bennett was in the course and scope of his employment at the time of the accident, and that he was a traveling employee.

Affirmed- 2015-WC-00850-COA (July 26, 2016)

En Banc Opinion by Justice Greenlee

Mississippi Workers' Compensation Commission

J. Peyton Randolph II & Rick D. Pattfor Appellant- Michael D. Young & James Andrew Faggert for Appellee

Briefed by [Amber Kipfmiller](#)

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HARRIS V. PORTER

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - CHILD-SUPPORT - MODIFICATION - Child-support modification may be warranted if a substantial or material change in circumstances of one or more of the interested parties has occurred

DOMESTIC RELATIONS - CHILD-SUPPORT - GUIDELINES - Pursuant to Miss. Code Ann. § 43-19-101 child-support-payment guidelines are based on the adjusted gross income of the parent

DOMESTIC RELATIONS - CHILD-SUPPORT - CHANGE IN CIRCUMSTANCES - A child's decision to attend college may be considered a material change in circumstances justifying child-support modification

DOMESTIC RELATIONS - CHILD-SUPPORT - BASIC AWARD - Basic award for child-support payments is created pursuant to Miss. Code Ann. § 43-19-101, providing for the child's basic living expenses such as food, clothing

and shelter; additional expenses, including but not limited to health insurance, out-of-pocket health expenses, transportation, and college expenses, may be properly added to the basic support award

DOMESTIC RELATIONS - CHILD-SUPPORT - COLLEGE EXPENSES - One or both parents may be ordered to pay part or all of a child's college tuition and related expenses, but the parent must have the ability to pay for the education without affecting his customary lifestyle

FACTS

Tony Harris filed a petition with the Bolivar County Chancery Court to suspend child-support payments for his daughter, Myrtis. Myrtis' mother, Michelle Porter, filed a counterclaim, which asserted a material change of circumstances had occurred. She requested an increase in child-support, which had not changed in fifteen years, health insurance for Myrtis, and payments for Myrtis' college expenses. Because Myrtis had resumed living with Porter, Harris' motion was moot; however, the Chancellor ordered Harris was not required to pay child-support for the six months Myrtis lived with him. At a later hearing, the Chancellor heard testimony from Harris, Porter, and Myrtis, regarding college expenses, health insurance costs, and the parties' incomes. The Chancellor granted Porter's counterclaim, and ordered an increase in child-support, health insurance for Myrtis, with each parent responsible for half of any uncovered medical expenses, and payments for Myrtis' college expenses. Harris appealed.

ISSUES

Whether the chancellor (1) deviated from the statutory guidelines when she increased the child-support payments and (2) erred in awarding college expenses.

HOLDING

(1) Because the Chancellor considered multiple factors such as Harris' obligations to his other children, his financial condition, and since the child-support had not changed in fifteen years, the chancellor did not deviate from the statutory guidelines when she increased the child-support payments. (2) Because neither Harris cited nor the trial court record contained evidence supporting his claim that his lifestyle would change by paying for Myrtis' college expenses, the chancellor did not err in awarding those expenses. Therefore, the Court of Appeals affirmed the judgment of the Bolivar County Chancery Court.

Affirmed - 2014-CA00895-COA (July 26, 2016)

Opinion by Judge Ishee

Hon. Catherine Farris-Carter (Bolivar County Chancery Court)

Stephanie Nicole Morris & Thomas Morris for Appellant - Robert G. Johnston for Appellee

Briefed by [Patrick Huston](#)

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HARRIS V. TOWN OF WOODVILLE

CIVIL - TORTS - OTHER THAN PERSONAL INJURY AND PROPERTY DAMAGE

FAILURE TO TRAIN & SUPERVISE - POLICE - SCOPE OF EMPLOYMENT- An employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted . . . any criminal offense other than traffic violations

CONSPIRACY - PROOF - GENERAL CONSPIRACY - There must be proof that an agreement between two or more persons to accomplish an unlawful purpose or a lawful purpose unlawfully, in an overt act in furtherance of the conspiracy, and damages to the plaintiff as a proximate result occurred

FACTS

On October 10, 2011, Monica Harris, a probation officer, entered the Woodville Police Department to conduct a drug test on an individual under probation. While she was there, Chief Stewart, the chief of the Woodville Police Department,

and Woodville police officers Kenny Anders and Carl Cage conversed that Harris had a "big butt." Chief Stewart stated, "I'll slap her on that butt." Subsequently, Chief Stewart asked Harris to look at a plant near his desk. Officer Cage testified that Harris bent over to look at the plant, and then Chief Stewart "popped [Harris] on the behind." Harris filed a complaint with Mayor Sharon Robinson the day after the incident, and she also filed a formal grievance with the Town of Woodville. The Wilkinson County Justice Court found Chief Stewart guilty of simple assault. Harris filed a civil suit against Chief Stewart and the Town of Woodville alleging assault and battery, negligent and/or intentional infliction of emotional distress, common-law harassment, failure to properly train and/or supervise, and conspiracy. The trial court granted summary judgment after finding Chief Stewart acted outside the course and scope of his employment, and thus the Town of Woodville was not liable for Chief Stewart's actions. The trial court further found no evidence supporting Harris' claims regarding failure to train and/or supervise and her general conspiracy claims. Harris appealed.

ISSUES

Whether the trial court properly granted summary judgment on the issue of (1) failure to train and properly supervise and (2) general conspiracy.

HOLDING

(1) Because Chief Stewart's conduct constituted a criminal offense and was not committed in the course of and as a means to accomplishing the purposes of his employment with the Woodville Police Department and therefore was not in furtherance of the police department's business, summary judgment was properly granted. (2) Because Harris failed to present evidence to create a question of material fact as to the existence of any agreement between two or more persons to accomplish any unlawful purpose or evidence as to the existence of any overt act to further any such conspiracy, the court did not err in dismissing her conspiracy claim. Therefore, the Court of Appeals affirmed the judgment of the Wilkinson County Circuit Court.

Affirmed-2014-CA-01674-COA (July 26, 2016)

En Banc Opinion by Judge Carlton

Hon. L. Breland Hilburn (Wilkinson County Circuit Court)

Everett T. Sanders & Aisha Arlene Sanders for Appellant - L. Clark Hicks Jr. & R. Lane Dossett for Appellees

Briefed by [Allyson Heine](#)

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IOC-LULA, INC. V. SMARTT

CIVIL - PREMISES LIABILITY

TORTS - PREMISES LIABILITY - DUTY TO INVITEES - A land or business owner owes an invitee the duty of reasonable or ordinary care to keep the premises reasonably safe

CIVIL PROCEDURE - WILLFUL DISCOVERY VIOLATIONS - APPROPRIATE SANCTIONS - Miss. R. Civ. P. 37 gives courts a multitude of options to sanction willful discovery violations, including dismissal, but all are within the trial court's discretion

FACTS

Reuben Smartt was walking to the buffet area at the Isle of Capri Casino owned by IOC-Lula when he slipped and fell, injuring his neck and back. The jury found in favor of Smartt. The court levied heavy sanctions against Smartt at trial for willful discovery violations, as he declined to mention several previous doctor visits, x-rays, and procedures related to back and neck pain in the months leading up to his fall. IOC-Lula, Inc. appealed.

ISSUES

(1) Whether the jury's verdict was against the overwhelming weight of the evidence, and (2) whether the trial court committed reversible error by not dismissing the suit for Smartt's willful discovery violations.

HOLDING

(1) Because a reasonable jury could have found IOC-Lula negligent based on the evidence viewed in light most favorable to the appellee, the jury's verdict could not be set aside. (2) Because all sanctions for discovery violations are within the discretion of the trial court, the imposition of monetary sanctions was not an abuse of discretion and dismissal of the case was not required. Therefore, the Court of Appeals affirmed the decision of the Coahoma County Circuit Court.

Affirmed - 2014-CA-01459-COA (July 26, 2016)

Opinion by Judge Barnes

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

Roy Jefferson Allen, and Joshua Paul Moore for Appellant - Joseph Harland Webster and Dana J. Swan for Appellee

Briefed by [Meredith Pohl](#)

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LADNER V. ZACHRY CONSTRUCTION

CIVIL - WORKERS' COMPENSATION

WORKERS' COMPENSATION - DISABILITY - EMPLOYABILITY - In order to receive disability, the claimant must not be able to obtain work in similar or other jobs, and the claimant's un-employability must be due to the injury in question

WORKERS' COMPENSATION - DISABILITY - DETERMINATION - In addition to the medical evidence, disability is determined by comparing the employee's pre-injury wages with the employee's post-injury capacity to earn wages in the open labor market

WORKERS' COMPENSATION - EMPLOYER - PRESUMPTION OF EARNING CAPACITY - Actual post-injury earnings will create a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as unreliable basis for estimating capacity

WORKERS' COMPENSATION - DISABILITY - LOSS OF WAGE-EARNING CAPACITY - The Commission considers the employee's actual wages earned prior to the injury as compared to the employee's capacity to earn those same wages after the injury, as well as other factors such as the employee's age, education, training and work experience, and his or her ability to return to the same or other employment

FACTS

Matthew Ladner filed a petition with the Workers' Compensation Commission (Commission), alleging that he had suffered a work-related injury to his lower back. The Commission found that the two-year statute of limitations for filing a claim precluded Ladner's petition; however, the Supreme Court reversed and remanded the Commission's judgment. On remand, the Administrative Judge ruled that Ladner was entitled to permanent-partial benefits of \$128.01 for 450 weeks. Zachry Construction appealed the Administrative Judge's order to the full Commission, and the Commission found that Ladner failed to prove a loss of wage-earning capacity to sustain a claim for permanent-partial disability. Ladner appealed.

ISSUE

Whether the Workers' Compensation Commission erred in finding that Ladner failed to prove a loss of wage-earning capacity to sustain a claim for permanent-partial disability.

HOLDING

Because Ladner did not return to his pre-injury duties and could not work in the same occupation as before, the evidence demonstrates that Ladner proved a work-related injury and suffered a loss of wage-earning capacity resulting in permanent-partial disability. Therefore, the Court of Appeals reversed the Mississippi Workers' Compensation Commission's judgment and reinstated the Administrative Judge's order.

Reversed & Rendered - 2015-WC-01044-COA (07/26/2016)

Opinion by Presiding Judge Griffis
(Mississippi Workers' Compensation Commission)
James Kenneth Wetzel & Garner James Wetzel for Appellant - Walter J. Eades for Appellees
Briefed by [TreMarcus Rosemon](#)

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COURT OF APPEALS - CRIMINAL CASES

CARPENTER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - ARGUMENTS AND CONDUCT IN GENERAL - TIME FOR OBJECTION

- A contemporaneous objection must be made for an appellate court to consider claims of improper or erroneous comments by a prosecutor during arguments, or the objection is waived; however, if a comment is so inflammatory that the trial court should have objected on its own motion, the issue may be considered on appeal

CRIMINAL PROCEDURE - JUDGMENT NOTWITHSTANDING THE VERDICT - TIMELINESS

- A motion for a new trial must be made within ten days of the judgment, and in the case of a motion for a JNOV, within ten days or by the end of the term of court

APPEAL AND ERROR - REVERSIBLE ERROR - CUMULATIVE EFFECT - Errors in the lower court that do not require reversal standing alone may nonetheless, taken cumulatively, require reversal; however, where there is no reversible error in any part, there is no cumulative error

FACTS

On June 12, 2010, thirteen-month-old C.W. was admitted to the hospital after sustaining life-threatening injuries consistent with child abuse. Jamie Carpenter, the victim's mother, and a social worker discussed Carpenter's recent miscarriage, and when the social worker suggested that Carpenter look into counseling, Carpenter replied that she was "having a good day" and "felt fine." Prior to trial, the State moved to exclude the testimony of two witnesses, and the trial court ruled that the proposed testimony was irrelevant and inadmissible hearsay. At trial, the prosecutors made comments in their closing arguments about the timing of C.W.'s injuries and comments with respect to Carpenter's statement that she was "having a good day." In May 2012, Carpenter was convicted of felony child abuse. Two years later, Carpenter filed a motion for a judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial. The trial court denied Carpenter's motion for a JNOV or, in the alternative, a new trial as untimely. Carpenter appealed.

ISSUES

Whether (1) the prosecutors engaged in prosecutorial misconduct; (2) the trial court erred by excluding witness testimony; (3) the trial court erred by denying Carpenter's motions for a JNOV, or, in the alternative, a new trial; and (4) there was cumulative error.

HOLDING

(1) Because Carpenter did not object to the prosecutors' comments at trial and the comments were not so inflammatory that the trial court should have objected on its own motion, the comments did not constitute prosecutorial misconduct. (2) Because the trial court did not abuse its discretion, the trial court properly excluded the witness testimony. (3) Because Carpenter was not timely in filing, the trial court properly denied Carpenter's motions for a JNOV, or, in the alternative, a new trial. (4) Because there was no reversible error in any part, there was no cumulative error. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2014-KA-01573-COA (July 26, 2016)

Opinion by Judge Lee
Hon. Roger T. Clark (Harrison County Circuit Court)
Michael W. Crosby for Appellant - Ladonna C. Holland (Att'y Gen. Office) for Appellee
Briefed by [Catherine Norton](#)

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HUSBAND V. STATE

CRIMINAL -FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - If jury instructions do not fairly announce the law of the case and create injustice, reversible error is found

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - EVIDENTIARY PRESUMPTION - The Supreme Court, in *Francis v. Franklin*, held that the State is prohibited from using an evidentiary presumption in a jury instruction if it relieves the State of its burden of proof beyond a reasonable doubt of every material element of a crime

SELF-DEFENSE - BURDEN OF PROOF – SLOAN - Under *Sloan v. State*, the Mississippi Supreme Court held that in a criminal case where a defendant has claimed self-defense, the burden of proof never shifts from the State to the defendant

CRIMINAL LAW - CASTLE DOCTRINE -REBUTTABLE PRESUMPTION - Under Mississippi law, the castle doctrine's rebuttable presumption is granted to the defendant, not the victim

FACTS

Malcolm Husband and his stepson visited his elderly aunt and uncle, the McGowans, at their duplex apartment. The neighbors, Phylicia Stokes and Forester Crenshaw, were outside on the shared porch having a cookout. When the McGowans did not answer the door, Husband began casually talking with Stokes and Crenshaw. Husband became confrontational with Stokes about a minor dispute she had with the McGowans. As Husband walked back to his car in the driveway, Crenshaw walked to Stokes' car and retrieved her handgun. Husband sat down in his car; Crenshaw walked to Husband's car with the gun at his side, not allowing Husband and his stepson to leave. Husband then grabbed a gun from his car and pointed it at Crenshaw who ran behind a neighbor's car. Both men began shooting at one another. A bullet hit Crenshaw, he continued to shoot, and Husband drove off. Crenshaw later died from the gunshot wound. Crenshaw had marijuana and stimulant drug BZP in his system, and Husband admitted to drinking beer before arriving at the McGowan's and was booked for felony DUI. A jury trial in Marion County Circuit Court convicted him of heat-of-passion manslaughter. Husband appealed.

ISSUE

Whether the trial court erred in giving a castle-doctrine jury instruction, which applied to Crenshaw and not Husband.

HOLDING

Because the castle-doctrine jury instruction shifted the burden of proof and created an evidentiary presumption that Crenshaw acted reasonably, the trial court erred in giving the jury instruction. Therefore, the Court of Appeals found that the Marion County Circuit Court committed reversible error and remanded the case for a new trial.

Reversed & Remanded-2015-KA-00558-COA (July 26, 2016)

Opinion by Judge Barnes

Hon. Prentiss Greene Harrell (Marion County Circuit Court)

Mollie Marie McMillin (Pub. Def. Office) for Appellant- Barbara Wakeland Byrd (Att'y Gen. Office) for Appellee

Briefed by [Brittany Barbee](#)

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JOHNSON V. STATE

CRIMINAL - FELONY

CRIMINAL INDICTMENT - NON-JURISDICTIONAL ISSUES - WAIVER - Absent a showing of cause and actual prejudice, a defendant must raise any alleged non-jurisdictional defects in his indictment prior to appeal

FACTS

Johnson was convicted of statutory rape. He argued on appeal that his indictment was defective because it was not signed by the grand-jury foreman, marked “filed,” or signed and dated by the circuit-court clerk. Johnson appealed.

ISSUE

Whether Johnson’s indictment was defective.

HOLDING

Because Johnson’s objection was a non-jurisdictional issue raised only on appeal, it is procedurally barred. Also, the defects he alleged were meritless. Therefore, the Court of Appeals affirmed the judgment of the Sharkey County Circuit Court.

Affirmed - 2014-KA-00937-COA (July 26, 2016)

Opinion by Judge Carlton

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

Daniel Hinchcliff and George T. Holmes (Pub. Def. Office) for Appellant - Jeffrey A. Klingfuss and Richard Smith Jr. (Att’y Gen. Office) for Appellee

Briefed by [Brittany Bane](#)

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LYONS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - FELONY DUI - PRIOR CONVICTIONS - In Mississippi, prior convictions are necessary elements of the crime of felony DUI

CONSTITUTIONAL LAW - SIXTH AMENDMENT - RIGHT TO COUNSEL - In order to challenge the use of a prior conviction due to lack of counsel, the defendant must put on evidence that a prior DUI conviction was uncounseled and that he spent time in jail as a result of his conviction; unsupported factual assertions are not sufficient to rebut the presumption of validity

CRIMINAL PROCEDURE - SUBJECT MATTER JURISDICTION - INVESTITURE OF JURISDICTION - A grand jury indictment for felony DUI vests jurisdiction of the matter solely with the circuit court; pursuant to Miss. Code Ann. § 99-33-1(2), justice courts have jurisdiction over misdemeanors, not felonies

CRIMINAL PROCEDURE - PRETRIAL - PRELIMINARY HEARING - Once a defendant has been indicted by a grand jury, the right to a preliminary hearing is deemed waived

FACTS

David Lyons was pulled over and arrested after an officer observed him swerving in the road and detected alcohol on his person and in his vehicle. Lyons’s traffic ticket ordered him to appear before the Monroe County Justice Court. Lyons was indicted by a grand jury for felony DUI. Prior to trial, Lyons motioned to dismiss the charges and to exclude his two previous DUI convictions as evidence because he did not have access to counsel. His motions were denied. Lyons was convicted of felony driving under the influence and deemed a habitual offender. Lyons then filed a motion for a new trial or JNOV, but was denied. Lyons appealed.

ISSUES

Whether the trial court (1) erred in admitting the use of Lyons’s prior DUI convictions, and (2) lacked subject matter jurisdiction and denied Lyons a preliminary hearing.

HOLDING

(1) Because Lyons assessed no jail time for either DUI conviction and Mississippi case law dictates that prior convictions are necessary elements of the crime of felony DUI, the trial court properly admitted abstracts of prior DUI convictions as evidence against Lyons. (2) Because Lyons was indicted by a grand jury of felony DUI, the preliminary hearing was

waived and subject matter jurisdiction vested in the circuit court. Therefore, the Court of Appeals affirmed the judgment of the Monroe County Circuit Court.

Affirmed - 2014-KA-00861-COA (July 26, 2016)

Opinion by Judge Ishee

Hon. James Seth Andrew Pounds (Monroe County Circuit Court)

Mollie M. McMillin (Pub. Def. Office) for Appellant - Lisa L. Blount (Att’y Gen. Office) for Appellee

Briefed by [Josh Rhodes](#)

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