

MISSISSIPPI SUPREME COURT DECISIONS – JUNE 8, 2017**SUPREME COURT - CIVIL CASES****DANIELS V. CROCKER****CIVIL - CONTRACT**

CONTRACT - RESCISSION - GROUNDS - Rescission of a contract is allowed in cases of fraud, mistake, or material breach

NEGLIGENT MISREPRESENTATION - ELEMENTS - A negligent misrepresentation occurs when there is (1) a misrepresentation or omission of fact; (2) the representation or omission is material or significant; (3) the person/entity charged with negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons/entities; (4) the plaintiff reasonably relied upon the misrepresentation or omission; and (5) the plaintiff suffered damages as a direct and proximate result of reasonable reliance

CONTRACT - CHOICE OF LAW - CONFLICT OF LAW - Choice of law analysis arises only when there is a true conflict between the laws of two states

FACTS

The Crockers established Crocker and Associates, Inc. (C&A), a sales representative firm for manufacturers of water and wastewater-treatment equipment. Later, the Danielses expressed interest in C&A after reviewing an offering memorandum for C&A. The Danielses met with the Crockers, and the Crockers provided the Danielses with information regarding the organization and ultimately the two settled on a price for the Danielses to purchase C&A from the Crockers. Before the sale, the Crockers met with the board of Aqua Aerobic Systems (“Aqua”), which C&A exclusively represented; however, the Crockers did not disclose information from this meeting to the Danielses. The sale proceeded, and later Aqua canceled its representation contract with C&A. The Danielses sued the Crockers for failing to disclose all material information regarding the contract between the two, and the Crockers counterclaimed against the Danielses. The trial court granted the Crockers’ motion for summary judgment. The Danielses appealed.

ISSUES

Whether the trial court (1) erred in granting summary judgment and (2) properly granted summary judgment on the Danielses’ indemnity and rescission claims.

HOLDING

(1) Because the record contained genuine issues of material fact concerning the Danielses’ contract claims and negligent and fraudulent misrepresentation claims, the trial court erred in granting summary judgment on these claims. (2) Because the Danielses did not comply with the notice provisions of the indemnity provision and did not act promptly and finally to repudiate the agreement when they discovered the actions they believed to be fraudulent, the trial court properly granted summary judgment on the Danielses’ indemnity and rescission claims. Therefore, the Court of Appeals affirmed in part, and reversed and remanded in part, the judgment of the Madison County Circuit Court.

Affirmed in Part; Reversed & Remanded in Part - 2016-CA-00566-SCT (June 8, 2017)

Opinion by Justice Chamberlin

Hon. John Huey Emfinger (Madison County Circuit Court)

Roy H. Liddell for Appellants - Eric F. Hatten, Christopher D. Meyer, Richard L. Farley, & Rebecca K. Lindahl for Appellees

Briefed by [Allyson B. Heine](#)

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MISS. RURAL WATER ASS'N, INC. V. MISS. PUB. SERV. COMM'N

CIVIL - STATE BOARDS & AGENCIES

ADMINISTRATIVE AGENCY - JUDICIAL REVIEW - REVERSAL - To reverse the decision of an administrative agency, the court must find the action (1) was not supported by substantial evidence; (2) was arbitrary or capricious; (3) was beyond the scope of the agency's power to adopt; or (4) violates some constitutional or statutory provision

ADMINISTRATIVE AGENCY - SCOPE OF AUTHORITY - The Mississippi Public Service Commission has exclusive jurisdiction over the intrastate business of public utilities

ADMINISTRATIVE AGENCY - SCOPE OF AUTHORITY - Pursuant to Miss. Code Ann. § 77-3-5, the MPSC does not have the authority to adopt rules governing non-profit utilities' rates for the sale and distribution of water and sewage services

FACTS

The Mississippi Public Service Commission ("MPSC") adopted a rule requiring utility providers, both non-profit and for-profit, to waive utility deposits for certified victims of domestic violence for a period of sixty days. The Mississippi Rural Water Association ("Water Association"), a non-profit corporation, objected to the promulgation of the rule in the Hinds County Chancery Court, but the court affirmed the rule. 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 MPSC regulation of rates.

HOLDING

Because Miss. Code Ann. § 77-3-3(e) includes customer deposits in the definition of the term "rate" as used in the Public Utilities Act, and § 77-3-5 prohibits the MPSC from making rules that regulate the rates of nonprofit water associations, the MPSC lacked statutory authority to promulgate the rule in question. Therefore, the Supreme Court reversed and remanded the judgment of the Hinds County Chancery Court.

DISSENT

Justice King dissented, arguing customer deposits should not be included in the definition of "rate" in Miss. Code Ann. § 77-3-5, meaning the MPSC had the proper statutory authority to promulgate and enforce their rule against the members of the Water Association.

Reversed & Remanded - 2015-CC-01249-SCT (June 8, 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 (Att'y Gen. Office) for Appellee

Briefed by [Meredith Pohl](#)

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RUSSELL V. MISSISSIPPI BAR

CIVIL - BAR MATTERS

BAR MATTERS - REINSTATEMENT - PETITION - Petitioner bears burden of proving by clear and convincing evidence that she has rehabilitated herself by complying with the rule that 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 Mississippi Supreme Court

BAR MATTERS - REINSTATEMENT - REQUIREMENTS - Before an attorney may be reinstated to the practice of law, he or she must satisfy five requirements including: (1) stating the cause or causes for suspension or disbarment; (2) giving the name and current address of all persons, parties, firms, or legal entities who suffered pecuniary loss due to the improper conduct; (3) making full amends and restitution; (4) showing that he or she has the necessary moral character for the practice of law; and (5) demonstrating the requisite legal education to be reinstated to the privilege of practicing law

FACTS

In July 2015, Ermea Russell was suspended for ten months resulting from a formal complaint filed at the request of her former clients. The Mississippi Bar found that, based on nine separate informal complaints, Russell had failed to provide representation for she had been hired, return client property, and properly withdraw from representation of her clients. The informal complaints indicated Russell's lack of communication and lack of diligence in regard to the legal representation of her clients. The complaint tribunal investigated and found seven violations of the Mississippi Rules of Professional Conduct, resulting in her suspension. Russell then filed a petition for reinstatement.

ISSUE

Whether Russell satisfied the jurisdictional requirements necessary to be reinstated to the practice of law.

HOLDING

Because Russell failed to provide (1) a clear description of the improper actions that led to her suspension; (2) information regarding whether her clients suffered any pecuniary loss; (3) proof that she made full amends and restitution, where necessary; (4) support for her list of activities purportedly engaged in since her suspension; and (5) sufficient means to establish that she has the requisite legal education to be reinstated to the practice of law, Russell failed to satisfy the jurisdictional requirements necessary to be reinstated to the practice of law. Therefore, the Supreme Court denied Russell's petition for reinstatement and barred her from filing another request for reinstatement until one year from the date of its decision.

Petition for Reinstatement Denied - 2016-BR-01807-SCT (June 8, 2017)

En Banc Opinion by Justice Beam

Pro se for Appellant - Adam Bradly Kilgore for Appellee

Briefed by [Brittany Barbee](#)

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SUPREME COURT - CRIMINAL CASES

ASHFORD V. STATE

CRIMINAL - FELONY

POST-TRIAL MOTIONS NEW TRIAL SUFFICIENCY OF EVIDENCE - The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

POST-TRIAL MOTIONS - NEW TRIAL - PERJURY - If perjury was committed, the defendant will be entitled to a new trial only if four factors are met: (1) it must appear that the perjured testimony will probably change the result if a new trial is granted; (2) the perjury must have been discovered after the trial; (3) the perjury must not have been discoverable before the trial by the exercise of due diligence; and (4) the perjury must be on an issue that is material to the case and not be merely cumulative or impeaching

POST-TRIAL MOTIONS - NEW TRIAL - RECANTED TESTIMONY - Recanted testimony is exceedingly unreliable, and is regarded with suspicion; and it is the right and duty of the court to deny a new trial where it is not satisfied that such testimony is true

POST-TRIAL MOTIONS - INEFFECTIVE ASSISTANCE OF COUNSEL - STANDARD - Defendant must prove that (1) his counsel's performance was deficient, and (2) the deficiency prejudiced their defense

FACTS

Kevin Ashford was convicted of eight counts of sexual battery and two counts of fondling. The victim, a minor, testified that Ashford molested her for five years. Ashford dated the victim's aunt, Marjorie Willis, intermittently for fifteen years, and would often stay with Willis while they dated. The victim saw Willis almost every day, and often stayed with her at night. There were several nights where both Ashford and the victim stayed at the Willis's house. After Ashford's conviction, he discovered a Facebook post from the victim stating she had been forced to lie. At a post-trial hearing, the court allowed Ashford to issue subpoenas to Facebook and certain individuals to recover additional Facebook posts. The State countered that the family of the victim was aware of several fake Facebook profiles, and that the Facebook post must have come from one of the fake profiles. As evidence that one of the fake profiles created the post, the victim stated that Facebook automatically bolds a person's name when you type their name on Facebook if you're "friends" with them, and a name in the post was not bolded, despite the fact that she was "friends" with them on Facebook. These statements regarding the Facebook posts took place at Ashford's sentencing hearing. When defense counsel tried to cross-examine other witnesses regarding the Facebook posts, the court stopped defense counsel, as it was a sentencing hearing and not a hearing regarding a motion for a new trial. Ashford appealed.

ISSUES

Whether (1) the trial court erred in its consideration of the evidence Ashford sought to present during post-trial hearings; (2) the evidence presented at trial was sufficient to support the verdict; (3) the verdict was against the overwhelming weight of the evidence; and (4) Ashford received ineffective assistance of counsel.

HOLDING

(1) Because the trial court gave an explicit cut-off date for post-trial motions, and stressed that the sentencing hearing was only a sentencing hearing, the trial court did not abuse its discretion during the sentencing hearing. (2) Because the evidence presented at trial was sufficient such that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence was sufficient to support the verdict. (3) Because Ashford's main argument that the verdict was against the overwhelming weight of the evidence hinged on witness credibility, which is strictly a jury question, the trial court did not abuse its discretion in denying the motion. (4) Because defense counsel investigated newly discovered evidence, and defense counsel's failure to present evidence prior to the trial court's post-trial deadline for newly discovered evidence did not rise to the level of ineffective assistance of counsel, the issue was without merit. Therefore, the Supreme Court affirmed the judgment of the Tate County Circuit Court.

Affirmed - 2015-KA-01839-SCT (June 8, 2017)

Opinion by Presiding Justice Randolph

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

John Keith Perry Jr. for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Josh Rhodes](#)

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POTTS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - OBJECTIONS - FAILURE TO RAISE - The failure to object contemporaneously at trial forfeits an issue on appeal

JURY INSTRUCTIONS - “ACQUIT FIRST” - GENERALLY - The use of “acquit first” language is proper and as long as the language tracks the requisite elements of all the offenses contained in the instruction, it will not be construed as a misinterpretation of the law

MURDER CHARGES - MALICE AFTERTHOUGHT - SYNONYMS - Malice afterthought, premeditated design, and deliberate design mean the same thing

JURIES - CONVICTIONS - GENERALLY - The jury is allowed to draw reasonable inferences from facts based on experience and common sense, and is the sole judge of the credibility of witnesses; and the decision based on conflicting evidence will not be set aside where there is substantial and believable evidence supporting the verdict

FACTS

Melvin Potts was arrested and indicted for first-degree murder and motor vehicle theft in connection with the murder of Garrick Shelton. DNA evidence collected at Shelton’s house, including blood droplets, matched Shelton and Potts. Throughout the investigation, Potts told the police differing stories on how and why he killed Shelton, including one where Potts indicated he shot Shelton only after he cut him. A Madison County Circuit Court jury found Potts guilty of first-degree murder and motor-vehicle theft, and he was sentenced to life in prison for the murder, with a concurrent ten-year sentence for the theft. Potts moved for a judgment notwithstanding the verdict, or in the alternative, a new trial, which was denied. Potts appealed.

ISSUES

Whether the trial court erred by (1) providing additional instructions to the jury; (2) not declaring a mistrial when the jury stated it was deadlocked; (3) granting and refusing certain jury instructions; and (4) convicting Potts based on a lack of evidence.

HOLDING

(1) Because Potts failed to object to the additional instructions to the jury, he was procedurally-barred from raising the issue on appeal. (2) Because the jury foreperson was stating her opinion to the judge that further deliberations would not help, the statement was not made in her capacity as a jury representative. Consequently, her statement was not a report of a deadlocked jury. (3) Because Potts did not object to the improper jury instructions, and the other jury instructions were sufficient, Potts’s claim was without merit. (4) Because the evidence and testimony supported Potts’s conviction, his final claim was without merit. Therefore, the Supreme Court affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2015-KA-01377-SCT (June 8, 2017)

Opinion by Presiding Justice Dickinson

Hon. John Huey Emfinger (Madison County Circuit Court)

W. Daniel Hinchcliff, George T. Holmes (Pub. Def. Office), & *Pro se* for Appellant - Laura Hogan Tedder (Att’y Gen. Office) for Appellee

Briefed by [Patrick Huston](#)

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SUPREME COURT - ORDERS

MISSISSIPPI BAR V. SHANDS

COURT ORDER

STATE BAR - RULES OF DISCIPLINE - IRREVOCABLE RESIGNATION - Upon the tender of an irrevocable resignation from an attorney, the court shall enter an order accepting the resignation, revoking the attorney’s license, and barring the attorney’s right to seek reinstatement in the future

FACTS

In November 2016, the Mississippi Bar filed a formal complaint seeking the disbarment of Morgan Shands after he pled guilty to two felony charges in the Bolivar County Circuit Court. On February 21, 2017, Shands executed a proper Notice of Irrevocable Resignation pursuant to Rule 10.5 of the Rules of Discipline for the Mississippi Bar. Shands indicated that he had no desire to defend his outstanding disciplinary action, and therefore requested permission to resign irrevocably and with prejudice from the Mississippi Bar.

ORDER

The Supreme Court granted the Mississippi Bar's Motion to Accept the Irrevocable Resignation of Morgan P. Shands. The Supreme Court ordered: (1) the acceptance of Shands's resignation; (2) the revocation of Shands's license; (3) the prohibition of Shands seeking reinstatement; (4) the forwarding of a copy of the Order to Shands and the Executive Director of the Bar; (5) the notification of resignation to all of Shands's clients and disbursement of funds Shands holds in trust; (6) the filing of an affidavit attesting to the clients' notification; (7) the punishment for failure to comply with the Order to be contempt; (8) the forwarding of a copy of the Order to the Clerks of the United States District Courts for the Northern and Southern Districts of Mississippi, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States; and (9) the assessment of costs of the formal complaint to Shands.

Granted - 2016-BD-01552-SCT (June 7, 2017)

En Banc Order by Justice Maxwell

Briefed by [Allison A. Bruff](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 6, 2017

COURT OF APPEALS - CIVIL CASES

TAYLOR V. TIMMONS

CIVIL - CUSTODY

FAMILY LAW - MODIFICATION - CHANCELLOR DISCRETION - The findings of a chancellor will not be disturbed when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous, or an erroneous legal standard was applied

FAMILY LAW - JOINT CUSTODY - DECISION-MAKING - Pursuant to Miss. Code Ann. § 93-5-24(5)(e), joint legal custody imparts shared decision-making rights relating to the child's education, and, unless allocated, apportioned or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities, and authority

FACTS

Jason Taylor and Jessica Timmons had a child in 2011 but were never married. In January 2013, Taylor and Timmons filed a joint complaint for determination of paternity, child custody, and other relief. The agreed order from the chancery court specified that: both parties shared joint legal custody of the minor child; Timmons was awarded primary physical custody, and Taylor was awarded visitation; Taylor was to pay Timmons child support in the amount of \$300 per month; and Taylor was also to pay additional healthcare, educational, and extracurricular costs. In August 2013, Timmons filed a petition to modify the final judgment, seeking an upward modification in child support. The chancellor heard the matter in 2014 and 2015 and issued a final judgment in October 2015. The chancellor found that Timmons was entitled to decide which school the child would attend; modified Taylor's child-support obligation and visitation schedule; found Taylor in contempt for failing to make timely child-support payments; and assessed Taylor with attorney's fees. Taylor appealed.

ISSUE

Whether the trial court erred in modifying the chancery court's final judgment between Taylor and Timmons.

HOLDING

Because chancellors are afforded broad discretion in domestic-relations cases, none of the chancellor's decisions were an abuse of discretion. Therefore, the Court of Appeals affirmed the decision of the Rankin County Chancery Court.

Affirmed - 2015-CA-01552-COA (June 6, 2017)

Opinion by Chief Judge Lee

Hon. John S. Grant III (Rankin County Chancery Court)

M. Judith Barnett & Jeanine M. Carafello for Appellant - *Pro se* for Appellee

Briefed by [Davis Vaughn](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

CAMPBELL V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - Post-conviction relief motions shall be made within three years after entry of the judgment of conviction in cases involving guilty pleas

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - The six exceptions to the post-conviction relief time bar are: (1) an intervening decision of the Mississippi or United States Supreme Court that would adversely affect the outcome of the conviction or sentence; (2) newly discovered evidence not reasonably discoverable at trial that would likely have caused a different result; (3) biological evidence demonstrating that the movant would likely either not have been convicted or received a lesser sentence; (4) the movant's sentence is expired; (5) his parole, probation or conditional release has been unlawfully revoked; or (6) the motion is in the capital case and is filed no more than one year after conviction

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - Post-conviction relief motions can also be filed past the three-year statute of limitations where errors affected fundamental rights; but mere assertions of constitutional violations do not suffice to overcome the procedural bar

FACTS

In April 2011, Bobby Campbell pled guilty to aggravated assault. He was sentenced to twelve years in MDOC custody, with four years suspended, eight years to serve, and four years of post-release supervision (PRS). On June 28, 2016, Campbell moved for Post-Conviction Relief alleging that his indictment was defective, his indictment was improperly amended, he did not receive the sentence counsel said he might get, and he was sentenced for prior convictions on the same day. The circuit court denied Campbell's PCR motion. Campbell appealed.

ISSUES

Whether (1) the indictment was defective; (2) the indictment was improperly amended; (3) Campbell did not get the sentence his counsel said he might get; and (4) Campbell was sentenced for his prior convictions on the same day.

HOLDING

Because Campbell did not bring his claim within the three-year statute of limitations and because he did not meet any of the statutory exceptions, the court found the all four issues without merit. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2016-CP-00720-COA (June 6, 2017)

Opinion by Judge Greenlee

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

Pro se for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Blake Brookshire](#)

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JOHNSON V. STATE

CIVIL - POST-CONVICTION RELIEF

COURT RESPONSIBILITIES - COMPETENCE - MENTAL EXAMINATION - If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination

COMPETENCE - GROUNDS - DISCRETION - Whether a reasonable ground exists to believe that a defendant is incompetent to stand trial rests largely within the discretion of the trial court

COMPETENCE - REVIEW - REASONABLE DOUBT - On review, the pertinent question is whether the trial court received information which, objectively considered, should reasonably have raised a doubt about the defendant's competence and alerted it to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense

FACTS

In October 2012, Terrance Johnson pled guilty to two counts of sale of cocaine in the Madison County Circuit Court. Johnson was asked whether his mental illness or the medications he took for them affected his ability to understand the proceedings, and he answered that they did not interfere with his understanding. Arguing that the court should have questioned his competence, Johnson petitioned for post-conviction relief, which the Madison County Circuit Court denied. Johnson appealed.

ISSUE

Whether Johnson was competent to enter a guilty plea.

HOLDING

Because the record showed that the trial court had no reason to doubt Johnson's competence, the trial court did not err in denying him post-conviction relief. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2016-CP-00751-COA (June 6, 2017)

Opinion by Chief Judge Lee

Hon. John Huey Emfinger (Madison County Circuit Court)

Pro se for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [Brittany Bane](#)

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LOFTON V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - DISMISSAL - TRIAL COURT AUTHORITY - Pursuant to Miss. Code Ann. § 99-39-11(2), where it plainly appears from the face of the motion, any annexed exhibits, and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal

CRIMINAL LAW - CAPITAL RAPE - CONVICTION - Pursuant to Miss. Code Ann. § 97-3-65(1), every person eighteen (18) years of age or older who is convicted of rape by carnally and unlawfully knowing a child under the age of fourteen (14) years, upon conviction, shall be sentenced to death or imprisonment for life in the State Penitentiary

FACTS

An Oktibbeha County grand jury indicted John H. Lofton on one count of aggravated assault, one count of kidnapping, and three counts of capital rape. Lofton pled guilty to the aggravated-assault charge, the kidnapping charge, and one of the capital-rape charges. The trial court accepted the plea and sentenced Lofton to life imprisonment for the rape. Later, Lofton filed a post-conviction relief (PCR) motion claiming the trial court lacked the authority to sentence him to life in prison for the rape conviction. Finding Lofton was properly sentenced, the Oktibbeha County Circuit Court dismissed the motion. Lofton appealed.

ISSUE

Whether the trial court erred in dismissing Lofton’s PCR motion.

HOLDING

Because the statute Lofton was indicted and pled guilty under—Miss. Code Ann. § 97-3-65(2)—gave the court the authority to sentence a convicted party to life in prison for the crime of rape, the trial court did not err in dismissing Lofton’s PCR motion. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Circuit Court.

Affirmed - 2015-CP-01809-COA (June 6, 2017)

Opinion by Chief Judge Lee

Hon. Lee J. Howard (Oktibbeha County Circuit Court)

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

Briefed by [Bethany Poppelreiter](#)

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LOPEZ V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - EVIDENTIARY HEARING - NECESSITY - An evidentiary hearing is not necessary where the allegations in a PCR motion are specific and conclusory

INEFFECTIVE ASSISTANCE - DEFICIENT REPRESENTATION - STANDARD - To prove ineffective assistance of counsel, a claimant must demonstrate: (1) that his counsel’s performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense—that is, there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different

SENTENCING - HABITUAL OFFENDER - PRIOR ADJUDICATIONS - Every person convicted of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation

FACTS

On July 14, 2014, Mark Lopez was charged with the unlawful transfer of a Schedule III opioid. Lopez was indicted as a habitual offender because of his previous felony convictions. Lopez voluntarily entered a plea of guilty on December 11, 2014, and he was sentenced as a habitual offender to serve a four-year term in MDOC custody without the possibility of parole. Lopez filed a motion for resentencing on December 15, 2015, which the circuit court characterized as a PCR

motion. The circuit court found no merit in the issues raised in Lopez's motion and accordingly denied his motion. Lopez appealed.

ISSUES

Whether (1) Lopez received ineffective assistance of counsel and/or an illegal sentence; (2) Lopez satisfied the requirements to be classified as a habitual offender; (3) Lopez's completing long-term drug and alcohol treatment was sufficient to reduce his sentence; and (4) Lopez's serving one-fourth of his sentence was sufficient to reduce his sentence.

HOLDING

(1) Because Lopez acknowledged his counsel's adequacy in his sworn and subscribed petition to enter a plea of guilty and because he could offer no evidence showing his counsel's errors, his ineffective assistance of counsel claim was without merit. (2) Because Lopez was convicted of three felonies and received sentences of more than one year for all of them, he met the requirement for, and was properly sentenced as, a habitual offender. (3) Because Lopez did not file a separate motion with the court, this issue was without merit. (4) Because Lopez failed to provide how this assertion entitled him to post-conviction relief in the form of a new sentence, this issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2016-CP-00394-COA (June 6, 2017)

Opinion by Judge Ishee

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, First Judicial Dist.)

Pro Se for Appellant - Billy L. Gore (Att'y Gen. Office) for Appellee

Briefed by [J. Marc McMillian](#)

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SHOEMAKE V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - POST-CONVICTION RELIEF - KNOWLEDGE OF CHARGE - The court will grant a post-conviction relief motion if the record does not adequately state that the defendant had knowledge of the sexual battery charge

CRIMINAL PROCEDURE - GUILTY PLEA - FACTUAL BASIS - If sufficiently specific, an indictment or information can be used as the sole source of the factual basis of a guilty plea

INEFFECTIVE ASSISTANCE OF COUNSEL - PREJUDICE - GUILTY PLEA - In the context of guilty pleas, to show ineffective counsel, a defendant must show that, were it not for counsel's errors, he would not have pled guilty and would have insisted on going to trial

INEFFECTIVE ASSISTANCE OF COUNSEL - TRIAL STRATEGY - Counsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy and do not give rise to an ineffective assistance of counsel claim

FACTS

In 2009, Darrell Shoemake, a National Guard recruiter, pled guilty to sexual battery for his sexual relationship with an underage recruit. Shoemake was accordingly sentenced. In 2013, Shoemake filed a motion for post-conviction relief arguing his guilty plea was involuntarily entered and his trial counsel was ineffective. The trial court denied his motion on the merits and noted that the motion was barred by the three-year statute of limitations. Shoemake appealed.

ISSUES

Whether Shoemake's (1) guilty plea was involuntarily entered and (2) counsel was ineffective.

HOLDING

(1) Because the record affirmatively showed that Shoemake had knowledge and understanding of the elements of the crime when entering his guilty plea, Shoemake's guilty plea was not entered involuntarily. (2) Because Shoemake failed to show that if his attorney provided him with more facts, he would have pled differently, and because his attorney's decision not to file a discovery motion was insufficient to raise an ineffective assistance of counsel claim, Shoemake's counsel was not ineffective. Therefore, the Court of Appeals affirmed the judgment of the Covington County Circuit Court.

Affirmed - 2015-CA-01415-COA (June 6, 2017)

Opinion by Chief Judge Lee

Hon. William R. Barnett (Covington County Circuit Court)

Brandon Larue Brooks for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Morgan L. Stringer](#)

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COURT OF APPEALS - CRIMINAL CASES

ALLEN V. STATE

CRIMINAL - FELONY

JURY SELECTION - PURPOSEFUL DISCRIMINATION - PRIMA FACIE CASE - To make a prima facie case of purposeful discrimination in jury selection, the objecting party must show that (1) he is a member of a cognizable racial group; (2) the non-objecting party exercised peremptory challenges to remove venire members of a different race from the defendant; and (3) these facts and any other relevant circumstances raise an inference that the non-objecting party used that practice to exclude the venire members from the petit jury on account of their race

JURY SELECTION - PURPOSEFUL DISCRIMINATION - DEFENSE - After a prima facie case of purposeful discrimination has been made, the party exercising the challenge has the burden to articulate a race-neutral explanation for excluding the potential juror

JURY SELECTION - PURPOSEFUL DISCRIMINATION - BATSON CHALLENGE - The trial judge must determine whether the facially race-neutral reason for striking a juror is in fact just a pretext for purposeful discrimination

FACTS

In April 2012, Bobby Lee Allen and two other males drove to an apartment complex in Ridgeland, Mississippi. Allen, the driver, waited in the car as the other two men robbed and shot Jose Ortiz. After driving the men away from the scene, Allen was later indicted for armed robbery, accessory after the fact to murder, and conspiracy to commit armed robbery. Allen confessed to driving the men and admitted that he heard a gunshot, but he claimed he had no knowledge of the robbery plot. During the pre-trial jury-selection process, Allen moved to strike six Caucasian male jurors solely on the basis of their "disinterested mannerisms or body language." The State objected to the peremptory strikes, claiming the strikes were racially motivated and improperly based on gender. The trial judge sustained the State's objection to the strike and allowed the jurors to remain. After a two-day trial, Allen was convicted on all three counts. Allen appealed.

ISSUES

Whether the trial court erred in (1) sustaining the State's objections to peremptory strikes of jurors; (2) finding sufficient evidence for a conviction of armed robbery; and (3) finding sufficient evidence for a conviction of conspiracy to commit armed robbery.

HOLDING

(1) Because Allen provided no explanations to disprove the State’s argument that he solely sought to rid the jury of the Caucasian males, the trial court’s finding of a non-race-neutral reason was upheld. (2) Because a reasonable trier of fact could have found intent to commit armed robbery, the trial court’s verdict was not in error. (3) Because a reasonable trier of fact could have found that Allen had knowledge of the crime occurring, the trial court’s verdict was not in error. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

DISSENT

Judge Westbrook dissented, arguing that the proffered reasons for Allen’s peremptory strikes were actually race- and gender-neutral. Specifically, Judge Westbrook argued that the “disinterested look” of the jurors exhibited body language suggesting that the jurors had already made up their minds on the case, a race- and gender-neutral reason for striking.

Affirmed - 2016-KA-00379-COA (June 6, 2017)

Opinion by Presiding Judge Griffis - Dissent by Judge Westbrooks

Hon. John Huey Emfinger (Madison County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee

Briefed by [Spencer H. Newman](#)

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BUSH V. STATE

CRIMINAL - FELONY

EVIDENCE - OBJECTIONS - FAILURE TO OBJECT - A defendant is procedurally barred from asserting an issue on appeal if he fails to object to the statements during trial

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - PREJUDICE - If jury instructions fairly announce the law of the case and create no prejudice against the moving party, no reversible error will be found

FACTS

Jody Bush was convicted of felony leaving the scene of an accident in 2015. At trial, the judge made comments that Bush argued were prejudicial against him; he also argued that the judge did not give two jury instructions that Bush believed should have been given. Bush failed to object to the comments and made no motion to have those instructions added during the trial. Bush was sentenced to twelve years in custody of the Mississippi Department of Corrections. Bush appealed.

ISSUES

Whether (1) the jury instructions and judicial comments fairly instructed the jury so that they would reach a just verdict; and (2) a sleeping juror at the first trial entitled Bush to a new trial.

HOLDING

(1) Because there was no objection or motion to add the instructions during trial, the issue is procedurally barred on appeal. In context, however, the judicial comments were not prejudicial nor were the omitted instructions necessary. (2) Because there was no objection to the sleeping juror or a motion to replace the juror, the issue is procedurally barred on appeal. Therefore, the Court of Appeals affirmed the judgment of the Scott County Circuit Court.

Affirmed - 2016-KA-00648-COA (June 6, 2017)

Opinion by Judge Wilson

Hon. Marcus D. Gordon (Scott County Circuit Court)

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att’y Gen. Office) for Appellee

Briefed by [Tony Sax](#)

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JOHNSON V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - CRIMINAL PROCEDURE - WEIGHT OF EVIDENCE - The jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of the testimony given by each witness

CRIMINAL PROCEDURE - INVESTIGATORY TRAFFIC STOP - The investigatory-stop exception applies where police officers detain a person for a brief, investigatory stop when the officers have reasonable suspicion, grounded in specific and articulable facts that allows the officers to conclude the suspect is wanted in connection with criminal behavior

CRIMINAL PROCEDURE - REBUTTAL WITNESSES - EXCLUSION - While a refusal to allow a rebuttal witness to testify may arise to a trial judge error, a failure by the defendant to show a suffering of sufficient prejudice may prevent the finding of a trial court's abuse of discretion

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - When read together, if the jury instructions fairly state the law of the case and create no injustice, then no reversible error will be found

CRIMINAL PROCEDURE - PROSECUTION - CLOSING STATEMENT - The standard of review for lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created

FACTS

Trevontae Johnson, Meekco Johnson, and Isaac Johnson were arrested, tried, and convicted for burglary of a dwelling, armed robbery, and kidnapping Wayne Barrett. Meekco was also convicted of possession of a firearm by a convicted felon. The Johnson were sentenced to a variety of prison sentences, ranging from 10-38 years for each respective crime. The Johnson were initially identified by Keegan Latham, a juvenile who was involved to some degree with the commission of the initial set of crimes. The identification led to a police stake out where Latham had advised officers as to where stolen items from the robbery were taken. Police eventually pursued and detained Isaac and Meekco in a vehicular stop. The stop led to the discovery of stolen items of Wayne Barrett and a subsequent fleeing by Isaac and Meekco. After a warrant was obtained to search the home in question, all three of the Johnsons were subsequently arrested and charged. The Johnson's were convicted on all counts and their post-trial motions were denied. The Johnson's appealed.

ISSUES

Whether the (1) trial court erred in refusing to allow into evidence a police report for the purposes of impeaching Latham; (2) jury's verdict was against the overwhelming weight of the evidence; (3) traffic stop was unlawful; (4) trial court erred in excluding one of the defense's rebuttal witnesses; (5) jury was properly instructed regarding a sentence enhancement for burglary; and (6) prosecutor made improper comments during closing argument.

HOLDING

(1) Because the Witness Latham was not interviewed by Investigator O'Neal, who prepared the police report containing statements made by Latham to other officers, the trial court did not err in ruling that O'Neal's synopsis of the witness interview could not be used to impeach Latham. (2) Because the jury was free to reject or accept each witness's testimony, the jury did not rule against the overwhelming weight of the evidence. (3) Because Isaac and Meekco were apprehended in their vehicle on the basis of an investigatory stop and were identified based on information circulated amongst police officers investigating the alleged crime, the stop was not illegal. (4) Because Isaac and Meekco could not show how their defense suffered sufficient prejudice to compel a finding the trial court's ruling amounted to an abuse of discretion—even though the trial court erred in refusing to allow the testimony of a rebuttal witness of Latham's testimony—the trial court's error was harmless. (5) Because the phrase "likely to terrorize" is self-explanatory and needed no definition, the trial court did not err in properly instructing the jury on the enhanced sentence for burglary. (6) Because the prosecutor's comments were a proper response to the arguments made by the defense, the defendants'

argument that the trial court erred in allowing the prosecutor to make improper comments during its closing argument is without merit. Therefore, the Court of Appeals affirmed judgment of the Washington County Circuit Court.

Affirmed - 2015-KA-00235-COA (June 6, 2017)

Opinion by Presiding Judge Irving

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

Hunter Nolan Aikens, Ernest Tucker Gore, & David Neil McCarthy (Pub. Def. Office) - for Appellant - Billy L. Gore (Att’y Gen. office) for Appellee

Briefed by [Horacio Hernandez](#)

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MACK V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY SELECTION - FAILURE TO OBJECT - A party who fails to object to the jury composition before it is empaneled, waives any right to complain thereafter

ARREST WARRANT - PROBABLE CAUSE - HEARSAY - Hearsay may support the issuance of an arrest warrant if the underlying facts and circumstances support the hearsay to allow a neutral and detached magistrate to find the existence of probable cause

CRIMINAL PROCEDURE - JURY INSTRUCTION - INSUFFICIENCY - A court may refuse a jury instruction that (1) incorrectly states the law; (2) is covered elsewhere in the instructions; or (3) is without foundation in the evidence; however, when the court reviews jury instructions, it will find no reversible error if the instructions fairly announce the law of the case and creates no injustice

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - Mississippi precedent does not require that a jury instruction mirror the exact language of a criminal statute but rather that the jury be correctly and fully instructed regarding each element of the offense charged

CRIMINAL LAW - AGGRAVATED ASSAULT - ELEMENTS - A person does not have to possess ill-will toward or even know the identity of a specific individual to commit an aggravated assault on that person

FACTS

William Mack Jr. (“Mack”) was indicted for the aggravated assault with a deadly weapon against Joseph Scott. The jury was instructed that the deadly weapon used was a gun and that the behavior was not done in necessary self-defense, accident, or misfortune. Mac’s arrest warrant was issued based on statements made by Scott after the shooting and by Scott’s friend, Warren Randle. During voir dire, a juror was dismissed for having a personal relationship with the accused, while several jurors remained that knew people from the defense, although they promised that these relationships would not impact their ability to remain fair and impartial. During the trial, the State questioned Mack about whether he gave a pretrial statement to the police, to which Mack gave contradicting answers. After considering the evidence and testimony, the jury found Mack guilty. Mack filed a motion for JNOV, or in the alternative, a new trial, both of which the Forrest County Circuit Court denied. Mack appealed.

ISSUES

Whether (1) the circuit court erred by failing to impartially dismiss members of the venire; (2) sufficient probable cause existed to issue Mack’s arrest warrant; (3) the State improperly elicited testimony that violated Mack’s right against self-incrimination, (4) the circuit court improperly instructed the jury; and (5) the circuit court erred by denying Mack’s motion for a JNOV.

HOLDING

(1) Because Mack did not object to the jury’s composition before it was empaneled, he effectively waived the right to object. Consequently, Mack failed to demonstrate a manifest miscarriage of justice occurred. (2) Even though the arrest

warrant was based on hearsay, the statements were supported by underlying facts and circumstances that allowed the magistrate to find the existence of probable cause. (3) Because the disputed line of questioning pursued during Mack's cross-examination was a comment on Mack's lack of defense rather than a comment on his right against self-incrimination, Mack's claim that the State violated his right against self-incrimination was without merit. (4) Because Mississippi precedent allows jury instructions to define the type of weapon used in the assault, and because the instructions did not need to consider Mack's intent to commit the crime, the jury instructions were lawful and a correct statement of the law. (5) Because substantial evidence supported Mack's verdict, a rational juror could have found beyond a reasonable doubt that Mack was guilty. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2016-KA-00035-COA (June 6, 2017)

Opinion by Judge Carlton

Hon. Robert B. Helfrich (Forrest County Circuit Court)

Seth Magill Hunter for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Daniel Smith](#)

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PINTER V. STATE

CRIMINAL - FELONY

EVIDENCE - HEARSAY - FAILURE TO OBJECT - A trial judge is not required to insert herself into the role of counsel and sua sponte raise hearsay objections on the defendant's behalf or risk subsequent reversal based on plain error

EVIDENCE - *MIRANDA* RIGHTS - CONFESSION - A confession is admissible if confessed after advised of *Miranda* rights and stated that he or she understood their rights, even though he or she then refused to sign a *Miranda* waiver

SUFFICIENCY OF EVIDENCE - CONFESSION - CORROBORATION - A confession corroborated by independent proof of the body or substance of the crime is sufficient to prove guilt beyond a reasonable doubt

EVIDENCE - INVENTORY SEARCH - ADMISSIBILITY - If there is no showing that the police acted in bad faith or for the sole purpose of investigation, evidence discovered during an inventory search is admissible

SENTENCING - HABITUAL OFFENDER - PLAIN ERROR - Sentencing a defendant as a habitual offender does not rise to the level of plain error after the failure to formally admit the documents into evidence if it did not seriously affect the fairness, integrity or public reputation of judicial proceedings

FACTS

Robert Andy Pinter was convicted of possession of methamphetamine, marijuana, and Xanax and sentenced to serve a total of four years in the custody of the Mississippi Department of Corrections (MDOC) as a habitual offender. During the trial, however, Pinter's wife testified that he was known to use marijuana and methamphetamine, with no objection. Additionally, the trial judge denied Pinter's motion to suppress evidence of his drugs and statements he made to the police. Pinter filed a motion for a new trial, which was denied. Pinter appealed.

ISSUES

Whether (1) Pinter wife's testimony that he had been known to use marijuana and methamphetamine rises to the level of plain error; (2) the trial judge erred in denying Pinter's motion to suppress evidence of the drugs at issue and his alleged statement to police; (3) the evidence was insufficient to support the conviction or the verdict was against the overwhelming weight of the evidence; and (4) Pinter's sentence as a habitual offender was illegal and plain error.

HOLDING

(1) Because the trial judge may admit hearsay un-objected to, the admittance of the testimony was not plain error. (2) Because the confession immediately followed Pinter's express statement that he understood the *Miranda* rights that had just been read to him, Pinter's confession was voluntary and admissible. (3) Because the police searched his vehicle as part of standard procedure before towing a car after an arrest, and because a credible witness testified his confession came after his reading of *Miranda* rights, and there was independent corroborating evidence, there was sufficient evidence to support his conviction. (4) Because Pinter failed to object to the State's records of his prior convictions, it did not raise to the level of plain error when the State forgot to formally admit them into evidence before the sentencing. Therefore, the Court of Appeals affirmed in part, and vacated and remanded in part the judgment of the Scott County Circuit Court.

Affirmed in Part; Vacated & Remanded in Part - 2016-KA-01029-COA (June 6, 2017)

Opinion by Judge Wilson

Hon. Christopher A. Collins (Scott County Circuit Court)

Hunter N. Aikens (Pub. Def. Office) for Appellant - Katy T. Gerber (Att'y Gen. Office) for Appellee

Briefed by [Jonathan M. Barnes](#)

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