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Weekly Newsletter
Mississippi Cases Editor: Jacob A. Bradley

MISSISSIPPI SUPREME COURT DECISIONS – JUNE 16, 2016

SUPREME COURT - CIVIL CASES

ARROWOOD INDEM. CO. V. MISS. WINDSTORM UNDERWRITING ASS'N

CIVIL - INSURANCE

INSURANCE - UNDERWRITING - VOLUNTARY WRITINGS CREDIT - A member of the Miss. Windstorm Underwriting Ass'n ("the Windpool") shall, in accordance with the Windpool's plan of operation, annually receive credit for essential property insurance voluntarily written in a coast area, and its participation in the writings of the association shall be reduced in accordance with the provisions of the plan of operation

INSURANCE - VOLUNTARY WRITINGS CREDIT - ELIGIBLE PROPERTY - Essential property insurance is eligible for voluntary-writings credit

TORTS - NEGLIGENCE - NEGLIGENT MISREPRESENTATION - Negligent misrepresentation is applicable when a party proves 1) a misrepresentation or omission of a fact, 2) that the misrepresentation or omission is material or significant, 3) that the person/entity charged with the negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons/entities, 4) that the plaintiff reasonably relied upon the misrepresentation or omission, and 5) that the plaintiff suffered damages as a direct and proximate result of such reasonable reliance

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - TOLLING FOR REASONABLE RELIANCE - Misrepresentation by a party may toll the applicable statute of limitations when another party relies on that misrepresentation

FACTS

The Mississippi Windstorm Underwriting Ass'n ("the Windpool") is a statutorily created entity that provides wind and hail insurance to citizens on the Mississippi Gulf Coast. Each year, the Windpool's member companies report data based on their percentage of wind and hail insurance premium writings in Mississippi during the preceding calendar year so the Windpool can calculate each company's participation percentage. In the event that the Windpool suffered losses that exceeded its available assets during a policy year, it would assess member companies a dollar amount based on each company's participation percentage to cover those losses. As an incentive for companies to voluntarily write wind and hail policies on the Mississippi Gulf Coast, companies can receive credits that would reduce or eliminate their portion of an assessment.

On Mar. 2, 2004, Arrowood Indem. Co., a member of the Windpool, reported to the Windpool that its wind and hail premiums from 2003 totaled $3,328,914–an amount that included premiums for excess policies (even those that were voluntarily written). On Sept. 29, 2005, Arrowood sent the Windpool an email asking whether excess policies were eligible for voluntary writings credit. The Windpool responded with a faxed attorney's opinion stating that, because excess policies did not qualify as "essential property insurance," Arrowood was not entitled to any voluntary-writings credit.

When Hurricane Katrina struck in 2005, the Windpool suffered a loss larger than what its $175 million reinsurance would cover. The Windpool applied the majority of the reinsurance to cover the losses from the 2004 policy year–assessing its members $545 million to cover the losses from the 2005 policy year. However, the Mississippi Supreme Court held in 2012 that the Windpool reallocate the $175 million reinsurance between the 2004 and 2005 policy years based on participation percentage. As a result of the reallocation, the 2004 policy year did not have sufficient funds to cover the losses without an assessment based upon premium data from the 2004 policy year.

On Oct. 25, 2012, the Windpool sent its members a letter informing them of the upcoming corrections and a final submission deadline of Jan. 1, 2013. The Windpool sent another letter on Dec. 10, 2012, stating that submissions received after the deadline would not be accepted. Arrowood then sent the Windpool a letter of intent stating that it would not be resubmitting any data for the corrections.

The Windpool proceeded to use Arrowood's original 2003 data that it had submitted in early 2004 to calculate Arrowood's participation percentage for reassessment. After the Windpool informed each member of its estimated participation on Feb. 15, 2013, Arrowood expressed concerns about a "significant issue" with its 2003 reportable data. Arrowood sent the Windpool a copy of the attorney's opinion that the Windpool had sent to it in 2005 to explain why Arrowood had reported its premiums the way it did. Brad Little, an assistant manager of the Windpool, responded and stated that the attorney's opinion contained incorrect information, and that Arrowood should have received voluntary-writings credit for much of its 2003 premiums.

Because it had not been aware of the reporting error, Arrowood requested that the Windpool accept-filed 2003 end of year premium data to be used for the Windpool's assessment. However, the Windpool denied Arrowood's request because Arrowood had made the request after the Jan. 1, 2013, deadline. Arrowood appealed to the Mississippi Insurance Commissioner, who affirmed the Windpool's decision. Arrowood then appealed to the Hinds County Circuit Court, which affirmed the decision of the Commissioner. Arrowood appealed.

ISSUE

Whether the Windpool's Jan. 1, 2012, deadline was tolled as to Arrowood because the Windpool's incorrect representations led to Arrowood's inaccurate submission.

HOLDING

Because Arrowood relied upon the Windpool's 2005 opinion that it was not entitled to any voluntary-writings credit in not seeking to correct the reporting of its net direct premiums and the Windpool did not disavow that information until after the deadline to submit, the Supreme Court found that the Windpool's misrepresentation tolled its deadline as to Arrowood. The Supreme Court further clarified that, although the Windpool had the authority to set and enforce deadlines in correcting its assessments, those deadlines were not immutable. Therefore, the judgments of the insurance commissioner and the chancery court were reversed and remanded.

Reversed - 2014-CA-01638-SCT (June 16, 2016)
En Banc Opinion by Justice Ann Hannaford Lamar
Hon. Denise Owens (Hinds County Circuit Court)
Andrew S. Harris, H. Mitchell Cowan, & Kaytie M. Pickett for Appellant - Rebecca Blunden, Charles G. Copeland, Ellen Robb, & James H. Heidelberg for Appellee
Briefed by William H. Holley

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IN RE ADMINISTRATIVE PROCEDURES FOR MISSISSIPPI ELECTRONIC COURTS

CIVIL - ORDER

HOLDING

After due consideration, the Supreme Court found that striking Section 9.A.5 of the Administrative Procedures for Mississippi Electronic Courts will promote the fair and efficient administration of justice.

Section 9.A.5 Struck - 89-R-99040 (June 13, 2016)
Opinion by Justice Randolph

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IN RE MISSISSIPPI RULES OF EVIDENCE

CIVIL - ORDER

HOLDING

After due consideration, the Supreme Court found that the comments to the rules of evidence should not represent the "Official Comments of the Court" or serve as "authoritative guides." Instead, the comments should be renamed the "Advisory Committee Notes," and represent commentary from the Advisory Committee on Rules, whose members represent the bench, bar, and the law schools of this state.

Rules of Evidence "Comments" Changed to "Advisory Committee Notes" - 89-R-99002-SCT (June 13, 2016)
Opinion by Justice Randolph

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MISSISSIPPI COURT OF APPEALS DECISIONS – JUNE 14, 2016

COURT OF APPEALS - CIVIL CASES

ABERCROMBIE V. ABERCROMBIE

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - DIVORCE - STANDARD OF REVIEW - Appellate courts review chancery courts' divorce rulings under an abuse of discretion standard
APPELLATE PROCEDURE - SUBJECT-MATTER JURISDICTION - JURISDICTIONAL CHALLENGE - Under Miss. R. Civ. P. 12(h)(3), an appellant may raise subject-matter jurisdiction for the first time on appeal. However, appellate courts will not consider new evidence for the first time on appeal
APPELLATE PROCEDURE - APPELLATE BRIEFS - FACTUAL ASSERTIONS - Factual assertions raised in appellate briefs are not evidence and, thus, may not be used as grounds for reversing the trial court's judgment
APPELLATE PROCEDURE - NO SPECIFIC FINDING OF FACT - RESOLUTION IN FAVOR OF APPELLEE - Issues on which a trial court made no specific finding of fact will be resolved in favor of the appellee

FACTS

Faith and Jonathan Abercrombie married in 2008. Their only child, Remington, was born in 2010. When Remington was still an infant, the entire family moved to Louisiana. Jonathan moved out of the marital home on June 14, 2014 and filed a complaint for divorce in Lamar County on December 23, 2014, asserting the grounds of habitual cruel and inhuman treatment or, in the alternative, irreconcilable differences. Jonathan's complaint asserted that the chancery court had jurisdiction over the proceeding because he had been an "adult bona fide resident citizen" of the county for more than six months preceding the commencement of the action and because it was in the child's best interest regarding custody determination. The complaint prayed that Faith be awarded custody of Remington, that Jonathan pay reasonable child support, that Faith keep the marital home in Louisiana (including mortgage) and the couple's 2004 Nissan, and that Jonathan keep the couple's 2007 GMC and the fishing boat (including debt). Faith failed to answer the complaint; the final judgment granted child custody to Faith, setting child support payments at $280 per month. Faith appealed.

ISSUE

Whether (1) the trial court had jurisdiction over the divorce and child custody proceedings; and (2) Jonathan obtained the divorce by fraud.

HOLDING

(1) Because Faith's assertion that the trial court lacked jurisdiction to hear the case was raised for the first time in her appellate brief, such assertion was not part of the record and could not be used to reverse the trial court's judgment. (2) Because Faith failed to present the fraud issue to the trial court, the issue was procedurally barred due to a lack of appellate jurisdiction.

Affirmed - 2015-CP-00786-COA (June 14, 2016)
Opinion by Presiding Judge Irving
Hon. M. Ronald Doleac (Lamar County Chancery Court)
Pro se for Appellant - *Pro se* for Appellee
Briefed by **J. Matthew Orr**

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BARNETT-PHILLIPS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - SENTENCING AMENDMENTS - EXPRESS AUTHORIZATION - Under Miss. Code Ann. § 99-19-1, amendments to criminal sentencing laws do not apply retroactively to previously convicted defendants unless the new amendment expressly states its retroactive effect
POST-CONVICTION RELIEF - SENTENCING AMENDMENTS - PAROLE ELIGIBILITY - Miss. Code Ann. § 47-7-3 clearly and unambiguously gives trial court judge's discretion to recommend defendants for parole

FACTS

In 2012, Linda Fay Barnett-Phillips was sentenced to fifteen years in prison for possession of alprazolam (Xanax). In 2014, the Legislature amended the maximum sentence terms for the crime Barnett-Phillips committed to eight years, and altered the parole eligibility. This change in law was not made retroactive. Barnett-Phillips filed a petition for post-conviction relief ("PCR") following the amendment. The circuit court dismissed her motion, finding that she was not entitled to any relief from her sentence under the new statute. Likewise, the circuit court declined to recommend parole (under Miss. Code Ann. § 47-7-3) for Barnett-Phillips to the Parole Board. Barnett-Phillips appealed.

ISSUES

Whether the trial court erred (1) in dismissing the PCR motion for failing to retroactively apply the amendments to the sentencing statute, and (2) in not recommending parole.

HOLDING

(1) Because prior sentences are not made unlawful upon the passing of a later amendment, the trial court did not err in dismissing the PCR motion. (2) Because Miss. Code Ann. § 47-7-3 clearly and unambiguously provides courts with discretion to make parole recommendations, the trial court did not err not making a recommendation for Barnett-Phillips. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2015-CA-00252-COA (June, 14, 2016)
Opinion by Judge Greenlee
Hon. William E. Chapman III (Ranking County Circuit Court)
Cody William Gibson, Percy Stanfield Jr. & William Scott Mullennix for Appellant - Scott Stuar (Att'y Gen. Office) for Appellee
Briefed by John G. Archer

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CLEVELAND V. DEUTSCHE BANK NAT'L TRUST CO.

CIVIL - OTHER

PROPERTY - TAX SALE - REDEMPTION - Miss. Code Ann. § 27-43-1 requires the clerk of the chancery clerk to provide notice to the record owner of the land within one hundred eighty days and not less than sixty days prior to the expiration of the time of redemption with respect to land sold

PROPERTY - TAX SALE - NOTICE - Redemption notice must be given by all three of the following in order to be complete: by personal service, by mail, and by publication in an appropriate newspaper

STATUTORY CONSTRUCTION - NOTICE STATUTES - STRICT CONSTRUCTION - Notice statutes are to be strictly construed in favor of the landowners and any deviation from the statutorily mandated procedure renders the sale void

FACTS

Craig Cleveland brought an action against Sinecure Investments, LLC and Deutsche National Trust Company ("Deutsche Bank") to obtain clear title to real property in Prentiss County, Mississippi. The property was formerly owned by Kerrie McCarver Lewis, who executed a deed of trust to Concorde Acceptance Corporation. That deed of trust was later assigned to Deutsche Bank. Pursuant to a mortgage agreement, Lewis was responsible for the property taxes. When Lewis failed to pay the property taxes the Property was sold for the unpaid taxes to Sinecure in the amount of $88.44. The Prentiss County Chancery Clerk issued a tax deed for the Property to Sinecure, and Sinecure recorded the tax deed. Prior to the tax sale, the Prentiss County Chancery Clerk attempted to notify Lewis of the tax sale and the expiration of the time for redemption, but no notice was actually provided to her. The chancery clerk also failed to send the notice of the expiration of the redemption period to Deutsche Bank within the 120-day window provided by Miss. Code Ann. Section 27-43-1. Due to that failure, Deutsche Bank asserted that its lien survived the tax sale. Since Deutsche Bank failed to redeem the Property within the two-year redemption period, the chancery clerk issued a notice of forfeiture for the Property to Deutsche Bank fifty days before the redemption period expired. Subsequently, Cleveland noticed people living on the property in question, and contacted Lewis. Lewis was unaware of why anyone was on her property, but transferred her right, title, and interest in the property to Cleveland and Cleveland obtained title to the Property. Subsequently, Cleveland filed a petition against Sinecure, to set aside the tax deed on the property. Thereafter, Sinecure filed a petition against Deutsche Bank to quiet and confirm its interest in the Property in a separate but related action. Sinecure and Deutsche Bank reached a settlement in a separate action involving the Property. Cleveland filed a petition requesting the chancellor to quiet and confirm title in his name and to declare him the fee-simple owner of the Property against all parties. Deutsche Bank answered the petition and counter-claimed for a declaratory judgment that its lien remained intact as to the Property and that Cleveland must take the property, if at all, subject to Deutsche Bank's lien. The chancellor issued a ruling finding that (1) Cleveland possessed standing to bring his lawsuits; (2) the tax sale was invalid as to the owner and therefore void ab initio, (3) Deutsche Bank's lien remained intact; (4) and a motion to compel discovery against Sinecure was moot. Cleveland appealed. Deutsche cross-appealed.

ISSUES

Whether the chancellor properly found that (1) Cleveland possessed standing to bring his lawsuits, (2) the tax sale was invalid as to the owner and therefore void from the start, and (3) Deutsche Bank's lien remained intact.

HOLDING

(1) Cleveland possessed standing to bring his lawsuits because it was sufficient that Cleveland obtained the interest of Lewis who was injured by the sale in dispute and would have been able to bring a suit to attack the resulting tax title. (2) The tax sale was invalid as to the owner (Lewis) because of the failure to comply with statutory requirements in providing notice to Lewis. (3) Deutsche Bank's lien remained intact because the deficiency in notice to Lewis resulted in the parties assuming their positions as if the sale had not taken place. Therefore, the judgment of the Prentiss County Chancery Court was affirmed.

Affirmed - 2014-CA-01692-COA (June 14, 2016)
Opinion by Judge Carlton
Hon. Jacqueline Estes Mask (Prentiss County Chancery Court)
Thomas Orville Cooley for Appellant - Jason Eric Fortenberry & Anna Coleman Sweat for Appellee
Briefed by Robert T. Noland

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HAVARD V. SUMRALL

CIVIL - MEDICAL MALPRACTICE

CIVIL PROCEDURE - MULTI-PARTY CLAIMS - APPEALS - Pursuant to Miss. R. Civ. P. 54(b), when multiple parties are involved in an action, the court may enter a final judgment as to one or more parties, which only adjudicates and terminates the rights and liabilities of those parties and does not terminate the action against the remaining parties

CIVIL PROCEDURE - MULTI-PARTY CLAIMS - APPEALS - Absent a certification under Miss. R. Civ. P. 54(b), any order in a multiple-party action that does not dispose of the entire action is interlocutory

FACTS

In 2012, James D. Havard and Margaret Havard filed an initial complaint alleging negligence against Tanelle Sumrall, a nurse anesthetist. Allegedly Sumrall, in 2010, mistakenly injected James with epinephrine believing that it was anesthesia. As a result of this injection, James suffered an immediate heart attack in the operation room. In January of 2013, the Havards filed an amended complaint that added Sumrall's employer, Akeso Group, as a defendant. Later that month, Sumrall filed her answer to the amended complaint. The docket indicated that no activity on the case occurred from January of 2013 until September of 2014. In October of 2014, Sumrall field a motion to dismiss for failure to prosecute and after a hearing, the trial judge dismissed the claim against Sumrall. Havard appealed.

ISSUE

Whether trial court erred in dismissing the claim against Sumrall.

HOLDING

Because the amended complaint named two defendants, Sumrall and Akeso Group, and the trial court only dismissed the claims against Sumrall, the order was interlocutory and not appealable. Further, the trial court's order was not certified with a Rule 54(b) certificate, thus making the order interlocutory and not appealable. Therefore, the Mississippi Court of Appeals dismissed the appeal for lack of jurisdiction.

Dismissed - 2015-CA-00138 (June 14, 2016)
Opinion by Judge Barnes
Hon. Prentiss Greene Harrell (Lamar County Circuit Court)
S. Wayne Easterling & Gerald G. Mercier for Appellants - Douglas G. Mercier for Appellee
Briefed by: Nash Gilmore

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JACKSON CNTY., MISS. V. MISS. DEP'T OF EMP'T SEC.

CIVIL – STATE BOARDS AND AGENCIES

UNEMPLOYMENT BENEFITS - STANDARD OF REVIEW - ADMINISTRATIVE AGENCY DECISION - The court will not disturb an administrative agency's decision unless it is 1) not supported by substantial evidence, 2) arbitrary and/or capricious, 3) beyond the scope or power granted to the agency, or 4) violated one's constitutional rights

UNEMPLOYMENT BENEFITS - INELIGIBILITY - MISCONDUCT - An employee who has been discharged for misconduct connected with her work is ineligible for unemployment benefits

UNEMPLOYMENT BENEFITS - EVIDENCE - BURDEN OF PROOF - The employer's burden is not only to produce substantial evidence of misconduct, but to prove by clear and convincing evidence that misconduct had actually occurred

FACTS

Margaret Chapman's employment was terminated for insubordination in November 2013 after working as a case manager for the Jackson County Drug Court for eight years. The specific reasons were (1) poor performance collecting fees from drug court participants, (2) failing to report participant interviews to Judge Robert Krebs, and (3) attending events of other drug courts in the district without his permission. Margaret filed for and was awarded unemployment benefits. The Jackson County Board of Supervisors appealed that decision. The MDES administrative law judge (ALJ) found that the specific reasons listed for termination did not amount to misconduct. The MDES Board of Review adopted the findings of the ALJ and affirmed. The Jackson County Circuit Court affirmed the Board of Review. The Jackson County Board of Supervisors appealed.

ISSUES

Whether (1) the Board erred in awarding Chapman unemployment benefits and (2) the decision of the Board was arbitrary and capricious.

HOLDING

(1) Because the Board did not act arbitrary in finding that the County failed to meet its burden of proof by clear and convincing evidence, the Board did not err in awarding Chapman unemployment benefits. (2) Because the ALJ was tasked with determining the true reason for Margaret's termination, his interest in recent complaints or warnings about her performance were not arbitrary or capricious. Therefore, the Mississippi Court of Appeals affirmed the judgment of the Jackson County Circuit Court.

Affirmed - 2014-CC-00928-COA (June 14, 2016)
Opinion by Judge Fair
Hon. Richard W. McKenzie (Jackson County Circuit Court)
Ryan Anthony Frederic for Appellant - Albert B. White & Leanne Franklin Brady for Appellee
Briefed by Darian Etienne

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KIDD V. MISS. DEP'T OF EMPLOYMENT SEC.

CIVIL - STATE BOARDS AND AGENCIES

LABOR AND EMPLOYMENT - UNEMPLOYMENT BENEFITS - REQUIREMENTS - A person is disqualified from receiving unemployment benefits if he was discharged for misconduct connected with his work, if so found by the Mississippi Department of Employment Security
LABOR AND EMPLOYMENT - TERMINATION - DEFINITION OF MISCONDUCT - Misconduct is defined as conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect from his employee

FACTS

Herman Kidd was employed by Marten Transport as a local designated truck driver. He was responsible for driving to Walmart in Cleveland, MS to make deliveries. Kidd was terminated because he made racially inflammatory comments while making a delivery to the Walmart in Cleveland, leading to the location requesting he no longer make deliveries for Marten Transport. On April 10, 2014 Kidd filed an application for unemployment benefits, which was denied based on the fact that he voluntarily quit. Kidd appealed, and an administrative law judge (ALJ) reversed the decision, finding that Kidd did not voluntary quit, and that his comments at the Walmart did not constitute "misconduct." Marten Transport then appealed, and the Board of Review reversed the ALJ's decision finding that Marten had met its burden proving misconduct. Kidd appealed the Board's decision to the circuit court. The circuit court affirmed, finding that the Board's decision was supported by substantial evidence and was not arbitrary or contrary to law.

ISSUE

Whether the Board of Review, affirmed by the Circuit Court, applied the correct definition of misconduct.

HOLDING

Because the Court found it was evident that Kidd's racially charged comments amounted to an intentional "disregard of standards and behaviors which [his] employer has the right to expect from [him]", and such conduct evidences a complete "disregard of [his] employer's interest," the Board of Review's finding was supported by substantial evidence. Therefore, the Court of Appeals affirmed the judgment of the Pontotoc County Circuit Court.

Affirmed-2015-CC-00542-COA (Jun. 14, 2016)
Opinion by Judge Wilson
Hon. James Seth Andrew Pounds (Pontotoc County Circuit Court)
Pro se for Appellant - Albert B. White & Anna Crain Clemmer for Appellee
Briefed by Autumn T. Breeden

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MORGAN V. STATE

CIVIL - POST-CONVICTION RELIEF

SENTENCING - POST-CONVICTION RELIEF - REQUEST FOR PAROLE RECOMMENDATION - Under Miss. Code Ann. § 47-7-3(1)(g)(iii), any nonviolent offender who has served twenty-five percent or more of his sentence may be paroled if the sentencing judge recommends parole to the Parole Board and the Parole Board approves
POST-CONVICTION RELIEF - SENTENCING - APPLICABLE STATUTE - Under *Davis v. State*, 738 So. 2d 299 (Miss. Ct. App. 1999), when a person is sentenced prior to a statute's amendment, the penalty is as it existed at the time of sentencing

FACTS

In 2012, Michael Morgan pled guilty to transfer of a controlled substance and was sentenced to thirteen and a half years. Following the 2015 amendments to the relevant sentencing and parole-eligibility schemes, Morgan filed a pro se motion for post-conviction relief. Morgan urged the trial judge to authorize him to be eligible for parole consideration, and also argued that his sentence was illegal after the new amendments capped the maximum sentence for transfer of a controlled substance at eight years. The trial court denied the motion. Morgan appealed.

ISSUES

Whether (1) the trial court's denial of Morgan's request for a parole recommendation is an appealable judgment and (2) Morgan's thirteen-and-a-half-year sentence is illegal.

HOLDING

(1) Because the sentencing judge did not recommend parole, the trial court's denial of Morgan's request for a parole recommendation is not an appealable order and therefore is a meritless claim. (2) Because the thirteen and a half year sentence was within the applicable statute's limit of thirty years at the time of the sentencing, the sentence was legal. Therefore, the Court of Appeals affirmed the Harrison County Circuit Court's denial of Morgan's request for post-conviction relief.

Affirmed - 2015-CP-00530 (June 14, 2016)
Opinion by Judge Greenlee
Hon. Roger T. Clark (Harrison County Circuit Court)
Pro se for Appellant - Alicia Marie Ainsworth & John R. Henry Jr. (Att'y Gen. Office) for Appellee
Briefed by Paul Wallace

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CROWELL V. STATE

CRIMINAL - FELONY

CIVIL PROCEDURE - JNOV - STANDARD - The standard of review for a judgment notwithstanding the verdict is whether the evidence was sufficient to warrant the guilty verdict and whether fair-minded jurors could have arrived at the same verdict

CIVIL PROCEDURE - MOTION FOR NEW TRIAL - STANDARD - The denial of a motion for new trial will be reversed only when a verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

CIVIL PROCEDURE - JNOV - STANDARD - When addressing the legal sufficiency of evidence for a JNOV, the court considers all evidence in the light most favorable to the State; the relevant question is then whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

MOTION FOR NEW TRIAL - WEIGHT OF THE EVIDENCE - BEYOND A REASONABLE DOUBT - When looking at the weight of the evidence for a motion for new trial, the court views the evidence in the light most favorable to the verdict and will reverse only when the facts and inferences point in favor of the defendant on any element of the offense with sufficient force such that a reasonable jury could not have found beyond a reasonable doubt that the defendant was guilty

FACTS

After Adrian Crowell's car was struck by an object falling from Julious Graves's truck, Crowell and Graves met at a shopping center to assess the damage. The two disagreed and things escalated. A man who was in Crowell's car shot into Graves's car. Crowell was convicted by a jury on one count of aiding and abetting a shooting into a vehicle in violation of Miss. Code Ann. § 97-25-47. He was sentenced to five years. Crowell filed a motion for a new trial or, alternatively, a JNOV. The trial court denied the motion. Crowell appealed.

ISSUES

Whether (1) there was sufficient evidence to support the jury's verdict (2) the jury's verdict was against the overwhelming weight of the evidence.

HOLDING

(1) Because viewing the evidence in the light most favorable to the State, the court found that there was sufficient evidence for a reasonable jury to find Crowell guilty of aiding and abetting the shooting in the vehicle and denied appellant's JNOV. (2) Because viewing the evidence in the light most favorable to the verdict, the court found that Crowell's guilty verdict was not so contrary to the evidence as to constitute an unconscionable injustice and denied appellant's motion for new trial. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2014-KA-00784-COA (June 14, 2016)
Opinion by Judge James
Hon. Jeff Weill, Sr. (Hinds County Circuit Court)
Mollie Marie McMillin (Pub. Defender Office) for Appellant - Robert Shuler Smith (Att'y Gen. Office) for Appellee
Briefed by Shayna Giles

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HARVEY V. STATE

CRIMINAL - MISDEMEANOR

MISDEMEANOR - PUBLIC DRUNKENNESS - ELEMENTS - Miss Code Ann. § 97-29-47 states that a person is guilty of public drunkenness or public profanity when they profanely swear or curse, or uses vulgar and indecent language, or is drunk in any public place, in the presence of two or more persons
MISDEMEANOR - ARREST WITHOUT WARRANT - CIRCUMSTANCES - An officer may make an arrest for a misdemeanor committed in his or her presence without a warrant
MISDEMEANOR - RESISTING ARREST - ELEMENTS - According to Miss Code Ann. § 97-9-73, a person is guilty of resisting arrest when he uses force, violence, threats, or any other manner to evade he lawful arrest by a law enforcement officer
CONVICTION REVERSAL - INCONSISTENT VERDICTS - SUFFICIENCY - An inconsistent verdict alone is insufficient to reverse a criminal conviction

FACTS

Officer Joey Shows was investigating a traffic stop when a passenger exited the vehicle and ran into a nearby home. After police followed the passenger, Travis Jerome Harvey exited the home and began screaming obscenities at the police officers. The police apprehended Harvey and he became combative. Harvey was charged with public drunkenness, profanity in public, and resisting arrest. The Brandon Municipal Court dismissed the public profanity charge, but found Harvey guilty of resisting arrest and public drunkenness. Harvey appealed to the County Court of Rankin County who dismissed the public drunkenness charge, but affirmed the charge for resisting arrest. Harvey then appealed to the Rankin County Circuit Court who affirmed the county court's resisting arrest conviction. Harvey appealed.

ISSUES

Whether (1) probable cause existed for arrest and (2) Harvey's arrest is inconsistent with the dismissal of his public drunkenness and public profanity charges.

HOLDING

(1) Because the arresting officer personally observed Harvey committing a misdemeanor by engaging in profanity-laden speech with the officers in a public street with bystanders, there was sufficient probable cause for Harvey's arrest. Because the officers observed Harvey physically pulling away from the arresting officer, the charge for resisting arrest was appropriate. (2) The fact that two charges were dismissed had no bearing on the third charge. Therefore, the Court of Appeals affirmed the judgment of the Rankin County Circuit Court.

Affirmed - 2015-KM-01184-COA (June 14, 2016)
Opinion by Judge Greenlee
Hon. John Huey Emfinger (Rankin County Circuit Court)
Thomas Jon-William Bellinder for Appellant - David L. Morrow Jr. & John R. Henry Jr. for Appellee
Briefed by Katherine M. Portner

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JOHNSON V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - AMENDMENT TO INDICTMENT - WAIVER - When a defendant does not ask for a continuance in response to the amending of an indictment, he cannot later object that he was surprised and prejudiced in his defense
CRIMINAL PROCEDURE - RECUSAL - WAIVER - The failure to raise the issue of recusal before the trial court bars the issue from being raised on appeal

CRIMINAL PROCEDURE - POST-CONVICTION BAIL - BURDEN OF PROOF - The convicted must prove by clear and convincing evidence that his release will not constitute a danger to any other person or to the community and that a condition may be placed upon release that will reasonably assure his required appearance

FACTS

Jeffery Johnson was convicted of three felonies between 1987 and 2004. After fifteen years in prison, he was arrested at a traffic stop when Officer Derek Nelson pulled Johnson over for not wearing a seatbelt. Nelson noticed the smell of marijuana. Norman called Johnson's probation officer to assist. The two found 29.6 grams of marijuana, boxes of sandwich bags, and condoms in the car. Johnson admitted that the marijuana was "for the women." Johnson was arrested for possession of marijuana in an amount more than ten grams but less than thirty grams with the intent to distribute. More than three weeks before the trial, the State filed a motion to amend the indictment, charging Johnson as a habitual offender and as a second or subsequent drug offender. The trial court granted the State's motion. At trial, Johnson testified that he was headed to a friend's house to share the drugs that each individual brought. The jury found Johnson guilty of possession of marijuana in an amount less than thirty grams with intent to distribute. Johnson appealed.

ISSUES

Whether (1) the trial court proved his intent to distribute, (2) there was an improper jury instruction, (3) the circuit court erred in not allowing him to "fully" cross-examine Nelson, (4) the amending of the indictment was improper, (5) his attorney provided ineffective assistance of counsel, (6) plain error occurred, (7) the trial judge should have recused himself, and (8) the trial court erred in denying the request for post-conviction bail pending an appeal.

HOLDING

(1) Because Johnson admitted that he was bringing marijuana to a party fully aware that he would be "sharing" whatever he brought, there was sufficient evidence to prove his intent to distribute. (2) Because the circuit court's instructions adequately addressed the weighing of testimony and Johnson's proposed instruction was adequately covered by the court's instructions, the circuit court did not abuse its discretion in refusing Johnson's instructions. (3) Because the questioning would only confuse the jury and Nelson's testimony was corroborated by others at trial, the circuit court did not err in not allowing a line of questioning. (4) Because Johnson did not ask for a continuance, he waived his ability to appeal the amending of the indictment. Notwithstanding the procedural bar, because the amendment was filed more than two months before the start of the trial, the amendment to the indictment was made sufficiently in advance of trial. (5) Because the circuit court did not admonish Johnson's counsel in the presence of the jury, Nelson met the requisite standard for the traffic stop, Johnson insisted on going to trial rather than asking for a continuance, and had Johnson's attorney objected to certain testimony it would not have been fruitful, Johnson's ineffective assistance of counsel claim was without merit. (6) Because Johnson failed to show that any error resulted in a manifest miscarriage of justice, no plain error was found. (7) Because Johnson never raised the issue of recusal before the trial court, he is barred from raising the issue on appeal. Notwithstanding the bar, the fact that the judge was a prosecutor for one of the defendant's prior convictions is not reason for recusal. (8) Because Johnson did not prove by clear and convincing evidence that a confidential informant would not be endangered, the trial court did not err in denying his request for post-conviction bail pending an appeal. Therefore, the Court of Appeals affirmed the decision of the Oktibbeha County Circuit Court.

Affirmed - 2015-KA-00070-COA (June 14, 2016)
Opinion by Judge Greenlee
Hon. James T. Kitchens Jr. (Oktibbeha County Circuit Court)
Charles Bruce Brown for Appellant - Alicia Marie Ainsworth & Jason L. Davis (Att'y Gen. Office) for Appellee
Briefed by Addie Clark

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TOWLES V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - CONSTRUCTIVE AMENDMENT - A constructive amendment of the indictment occurs when the proof and instructions broaden the grounds upon which the defendant may be found guilty of the offense charged so that the defendant may be convicted without proof of the elements alleged by the grand jury in its indictment

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - SELF-DEFENSE - A defendant is not entitled to use deadly force in self-defense based upon a subjective fear of great bodily injury unless it is determined by a jury that this fear is reasonable under the circumstances

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - PROPER INSTRUCTION - A defendant has a fundamental right to have his or her lawful defense – even if the evidence is minimal or highly unlikely – presented as a factual issue before the jury under proper instruction

CRIMINAL PROCEDURE - CLOSING ARGUMENT - IMPROPER STATEMENTS - It is error to urge jurors to consider that the verdict they return is going to be reflective of the conscience of the community

FACTS

Amy Towles shot and seriously injured her on-again-off-again boyfriend William Wells with a .22-caliber rifle in the early morning hours of June 17, 2012 after a violent argument. The facts were disputed. Towels argues that Well's came at her and she shot him accidentally. Towles was convicted of aggravated assault and sentenced to twenty years, with five years served, fifteen years suspended, and five years of post-release supervision. She filed a motion for a judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial. Towles stated that the circuit court erred in giving Jury Instruction 3 on accident and mistake, arguing the instruction was deficient because it improperly limited the defense to only one subsection of the applicable statute. Towles also argued that the inclusion of the term "recklessly" in Jury Instruction S-1 (2), as an element of the offense, constituted reversible error. She also filed a motion to reconsider her sentence, claiming it was excessive and noting hardship due to her Crohn's disease. The circuit court denied her motions. Towles appealed.

ISSUES

Whether the trial court erred in (1) giving Jury Instruction 2, (2) failing to instruct the jury on self-defense, (3) improperly instructing the jury by giving Jury Instruction 3, (4) allowing the prosecution's cross-examination of Towels regarding her failure to sign her Miranda statement, and (5) allowing the prosecutions "send-a-message" comments in closing argument.

HOLDING

(1) Because the original indictment clearly provided that Towles was being charged under Miss. Code Ann. Section 97-3-7 there was no error in giving Jury Instruction 2. (2) Because a self-defense instruction would have allowed the jury to consider whether Towles possessed the gun in a lawful manner and through lawful means to defend herself, the fact that the gun was discharged accidentally is not in conflict with Towles's claim and therefore failing to instruct the jury on self-defense was a reversible error. (3) Because circuit court has no affirmative duty to offer jury instruction sua sponte or to suggest instructions for the parties to consider, the court did not error by not modifying Jury Instruction 3. (4) The prosecution's comments regarding Towles failure to sign the statement did not violate *Doyle* and there was no error. (5) Because the court had already found reversible error in this case, they did not determine whether the jurors would have convicted her absent the offending comments. Therefore the Court of Appeals reversed and remanded the judgment of the Alcorn County Circuit Court.

Reversed and Remanded - 2014-KA-01226-COA (June 14, 2016)
Opinion by Judge Banes
Hon. Thomas J. Gardner III (Alcorn County Circuit Court)
Julie Ann Epps for Appellant - Abbie Eason Knoonce (Att'y Gen. Office) for Appellee
Briefed by Rod Hickman

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