

MISSISSIPPI SUPREME COURT DECISIONS – SEPTEMBER 29, 2016

SUPREME COURT - CIVIL CASES

IN RE SMITH

ADMINISTRATIVE ORDER OF IMMEDIATE TEMPORARY DISQUALIFICATION

ADMINISTRATIVE ORDER - DUE PROCESS - MINIMUM REQUIREMENT - Procedural due process requires, at a minimum, notice and a meaningful opportunity to be heard

FACTS

District Attorney Robert Shuler Smith was temporarily disqualified from any and all participation in any grand jury proceedings in Hinds County. Smith appealed.

ISSUE

Whether the trial court violated Smith's due process rights.

ORDER

Because Smith was provided no meaningful opportunity to be heard, the trial court violated his right to due process. Therefore, the Supreme Court vacated the order of the Hinds County Circuit Court.

CONCURRENCE

Justice Coleman stated that pursuant to Mississippi Rule of Appellate Procedure 21(d), Smith's petition is treated as a Rule 5 interlocutory appeal and will render the decision on appeal the same as the relief afforded by the Court's order.

DISSENT

Presiding Justice Randolph stated that because Smith did not seek reconsideration or appeal from Judge Weill's temporary *sua sponte* order, his motions should be dismissed without prejudice.

Vacated - 2016-M-01013 (Sept. 28, 2016)

En Banc Order by Justice Lamar

Hinds County Circuit Court

Briefed by [Ally Heine](#)

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WALDEN V. STATE

POST-CONVICTION RELIEF

INEFFECTIVE ASSISTANCE OF COUNSEL - TEST - *STRICKLAND* - The test to be applied in cases involving alleged ineffectiveness of counsel is whether counsel's over-all performance was (1) deficient and if so, (2) whether the deficient performance prejudiced the defense

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - PLEA BARGAINING -

When a defendant claims his counsel provided ineffective assistance by advising the defendant to reject a plea offer, prejudice is established by showing that the outcome of the plea process would have been different with competent advice

POST-CONVICTION RELIEF - AFFIDAVITS - EXCUSE - The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained

FACTS

Walden sought post-conviction relief claiming ineffective counsel during plea bargaining. The circuit court summarily dismissed the claim. Walden appealed.

ISSUES

Whether the circuit court erred in finding that Walden's claim failed on the merits because (1) he could not prove prejudice because the evidence at trial supported his conviction; and (2) his petition was supported only by his own affidavit.

HOLDING

Because the circuit judge erred in (1) focusing her prejudice analysis on evidence of guilt at trial; and (2) failing to consider whether Walden's assertion that he had been able to contact his defense attorney or the district attorney established good cause for failing to obtain affidavits besides his own, Walden's claim should not have been summarily dismissed. Therefore, the Supreme Court reversed and remanded the Holmes County Circuit Court's dismissal.

Reversed and Remanded - 2014-CT-00165-SCT (Sept. 29, 2016)

En Banc Opinion by Presiding Justice Dickinson

Hon. Jannie M. Lewis (Holmes County Circuit Court)

Pro se for Appellant - Ladonna C. Holland (Att'y Gen. Office) for Appellee

Briefed by [Brittany Bane](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – SEPTEMBER 27, 2016

COURT OF APPEALS - CIVIL CASES

JENKINS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - INEFFECTIVE COUNSEL - *STRICKLAND* - To prove ineffective counsel, the defendant must show his counsel's performance was deficient, and the deficient performance prejudiced the defendant's defense

POST-CONVICTION RELIEF - INEFFECTIVE COUNSEL - REBUTTING PRESUMPTION - To overcome the presumption of effective counsel, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different

POST-CONVICTION RELIEF - DISMISSAL OF CLAIM - FAILURE TO SUBMIT AFFIDAVITS - A trial court may dismiss a motion for post-conviction relief if the petitioner fails to submit affidavits in support of his allegations

POST-CONVICTION RELIEF - GUILTY PLEA - ESTABLISHING FACTUAL BASIS - There are many ways to establish factual basis including a statement of the prosecutor, the testimony of live witnesses, and prior proceedings, as well as an actual admission by the defendant

POST-CONVICTION RELIEF - GUILTY PLEA - ESTABLISHING FACTUAL BASIS - A defendant can establish a factual basis for a guilty plea simply by pleading guilty; however, the guilty plea must contain factual statements constituting a crime or be accompanied by independent evidence of guilt

FACTS

On his second day of trial, Darrell Owens Jenkins entered an *Alford* plea for sexual battery on a child victim. After sentencing, Jenkins filed a motion for post-conviction relief claiming that his counsel was ineffective and there was no factual basis for his guilty plea. The trial court found no evidentiary hearing was necessary and his motion was denied. Jenkins appealed.

ISSUES

Whether the trial court erred in holding there was no claim to (1) ineffective counsel and (2) no factual basis for the guilty plea.

HOLDING

(1) Because Jenkins did not provide any evidence that he received inefficient counsel in order to overcome the presumption of sufficient counsel, his claim was properly denied. (2) Because a factual basis could be established by a statement of the prosecutor, the testimony of live witnesses, prior proceedings, and his own guilty plea to the charges, there was a factual basis for the plea and Jenkins's claim was properly denied. Therefore, the Court of Appeals affirmed the judgment of the Greene County Circuit Court.

Affirmed - 2015-CP-01063-COA (Sept. 27, 2016)

Opinion by Judge Fair

Hon. Dale Harkey (Greene County Circuit Court)

Darrell Jenkins for Appellant - Kaylyn Havrilla McClinton (Att'y Gen. Office) for Appellee

Briefed by [Morgan L. Stringer](#)

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KEYS V. STATE

CIVIL- OTHER

CRIMINAL PROCEDURE - SENTENCING - REVOCATION OF A SUSPENSION OF SENTENCE -

An order revoking s suspension of sentence or revoking probation is not appealable

CRIMINAL PROCEDURE - SENTENCING - RECONSIDERATION OF SUSPENSION REVOCATION

- A court does not have the jurisdiction to alter, amend or suspend a sentence after the defendant has begun to serve the sentence

FACTS

Earnest Antonio Keys was convicted in 2007 of armed robbery and sentenced to ten years under the supervision of the Mississippi Department of Corrections. After serving three years, Keys was released and the remaining seven years of his sentence were suspended, and Keys was placed on post-release supervision for five years. The trial court, in 2011 entered an order revoking the original suspension of Keys' sentence for failure to refrain from committing further offenses and failing to report to a probation officer. In 2014, Keys filed a motion for reconsideration of the revocation sentence, as the original armed robbery had been passed to the inactive files. Treating the motion as one for post-conviction relief, the trial court denied the motion, also noting that the court was without jurisdiction to alter, amend or suspend Keys' sentence. Keys then appealed the trial court's decision.

ISSUES

Whether the trial court erred in (1) revoking the suspension of the defendant's sentence and (2) not reconsidering the revocation of his suspension.

HOLDING

(1) Because an order revoking a suspension of sentence or revoking probation is not appealable, the appeal was improperly before the trial court. (2) Because the trial court did not have proper jurisdiction, they did not err in failing to reconsider the revocation of the suspension of the sentence. While the motion to reconsider was filed in the appropriate original jurisdiction, Keys had begun to serve his sentence and was under the custody of the Mississippi Department of Corrections. As a result, both the trial court and the Court of Appeals were without jurisdiction. Therefore, the Court Appeals dismissed the appeal.

Appeal Dismissed - 2014-CP-01179-COA (Sept. 27, 2016)

Opinion by Judge James

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

Pro se for Appellant - Alicia M. Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Horacio Hernandez](#)

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KNIGHT V. TYLER HOLMES MEMORIAL HOSPITAL

CIVIL - MEDICAL MALPRACTICE

CIVIL PROCEDURE - DISCOVERY - STANDARD OF REVIEW - The discovery orders of the trial court will not be disturbed unless there has been an abuse of discretion

MEDICAL MALPRACTICE - PLAINTIFF'S BURDEN - SUMMARY JUDGMENT - In cases involving claims of medical malpractice, the plaintiff must prove the following elements through expert testimony in order to establish a prima facie case: (1) the existence of a duty by the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) a failure to conform to the required standard; and (3) an injury to the plaintiff proximately caused by the breach of such duty by the defendant

CIVIL APPEALS - CITING AUTHORITY - PROCEDURAL BAR - The failure to support an issue on appeal with authority is a procedural bar, and a reviewing court is not required to consider the claims

FACTS

Ezell Knight was hospitalized at Tyler Holmes Memorial Hospital (the Hospital) for several months and died shortly thereafter. Kathryn Knight, on behalf of Ezell and Ezell's beneficiaries, filed a wrongful death lawsuit against the Hospital. Kathryn timely submitted an unsworn expert designation but later attempted to amend or supplement the designation. The Hospital objected, and filed a motion for summary judgment as well as a motion to recover costs from a deposition cancelled by Kathryn's counsel. Kathryn responded by submitting an additional expert designation and affidavit without permission from the circuit court. The circuit court granted the Hospital's motions while denying Kathryn's. Kathryn appealed.

ISSUES

Whether the trial court erred in (1) dismissing Kathryn's motion to amend or supplement her expert designation; (2) granting the Hospital's motion for summary judgment; and (3) granting the Hospital's motion to recover deposition costs.

HOLDING

(1) Because Kathryn never presented a plausible reason for why she should have been permitted to amend or supplement her expert designation, the circuit court properly denied Kathryn's motion. (2) Because Kathryn's expert designation did not address the duty of care or a breached duty of care, summary judgment in favor of the Hospital was

proper. (3) Because Kathryn failed to cite any authority in support of her contentions that the circuit court's judgment should be reversed with regard to the deposition, the Court of Appeals refused to overturn the judgment. Therefore, the judgment of the Montgomery County Circuit Court was affirmed.

Affirmed - 2014-CA-01607-COA (Sept. 27, 2016)

Opinion by Judge Ishee

Hon. Joseph H. Loper Jr. (Montgomery County Circuit Court)

Carlos E. Moore, Tameika L. Bennett & Darryl A. Wilson for Appellant - Tommie G. Williams & Tommie G. Williams Jr. for Appellee

Briefed by [Davis Vaughn](#)

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MELTON V. STATE

CIVIL – POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - *STRICKLAND* - To prove the ineffectiveness of counsel, the defendant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense

CIVIL PROCEDURE - MOTION FOR POST-CONVICTION RELIEF - SUMMARY DISMISSAL - Pursuant to Miss. Code Ann. § 99-39-11(2), a trial court may summarily dismiss a motion for post-conviction relief if, based on the face of the motion, exhibits, and prior proceedings, it plainly appears that the movant is not entitled to any relief

EVIDENCE - PROOF OF ANOTHER ACT - RELATED TRANSACTIONS - Proof of another act is admissible when the other act is so interrelated to the charged crime that it constitutes either a single transaction or occurrence or a closely related series of transactions or occurrences.

FACTS

Barry Lemax Melton was convicted of possession of a controlled substance with intent to sell or distribute. Melton filed a motion for post-conviction relief alleging that his counsel was ineffective for failing to object at trial to the admission of an un-redacted statement Melton gave to law enforcement in an interview in which Melton described his production, sale, and consumption of methamphetamine the day he was arrested. The Harrison County Circuit Court denied Melton's motion for post-conviction relief. Melton appealed.

ISSUE

Whether the trial court erred in denying Melton's motion for post-conviction relief.

HOLDING

Because Melton's interview statement about distributing methamphetamine on the day of the arrest indicates a closely related transaction, the statement was admissible, and because there was no evidence that counsel's failure to challenge the interview statement prejudiced Melton, the trial court did not err by denying Melton's motion for post-conviction relief. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2015-CP-00697-COA (Sept. 27, 2016)

Opinion by Judge Fair

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court)

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

Briefed by [Allison Bruff](#)

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RUIZ V. STATE

CIVIL – OTHER

MISSISSIPPI UNIFORM CONTROLLED SUBSTANCES LAW - VIOLATION - FORFEITURE - In determining whether forfeiture is appropriate, the trial court must evaluate whether, given all the evidence considered together, a rational trier of fact may have found by a preponderance of the evidence that the currency was possessed by the claimant with the intent to be used in connection with an illegal narcotics trafficking scheme

MISSISSIPPI UNIFORM CONTROLLED SUBSTANCES LAW - FORFEITURE - STANDARD OF REVIEW - The appropriate standard of review in forfeiture cases is the “substantial evidence/clearly erroneous” test

FACTS

On November 8, 2012, Apolinar Terrero Ruiz was pulled over for a traffic stop by officers with the Harrison County Sheriff's Department. Ruiz, a United States citizen, was presented with and subsequently signed a document, written in his native Spanish, granting consent to search the vehicle. When questioned in English whether any weapons, illegal objects, or large sums of money were in the car, Ruiz responded that there were not. Following a search, \$56,000 in cash was found in a secret compartment in the vehicle. Ruiz testified that he had been traveling to Houston, Texas, to visit his pregnant daughter, and was transporting the money to invest in a grocery store with her. The vehicle was removed to a nearby work center for a further search, where officers discovered residue in the compartment that they testified “appeared to be marijuana” debris. However, this material was not preserved, collected, or tested, and Ruiz was not questioned about or shown the residue. Ruiz was later released without being charged with any crime, and the vehicle was returned to him. The money, however, was seized. The Harrison County Circuit Court held a trial to consider whether the money should be forfeited. The Court determined that the sheriff's department had met its burden of proof showing that the money was intended to be used or had been used in connection with illegal drug sales or distribution, and ordered the funds forfeited to the sheriff's office. Ruiz appealed.

ISSUE

Whether the trial court erred in determining that the seized funds were properly subject to forfeiture.

HOLDING

Because the unpreserved residue evidence was the only alleged element that directly indicated illegal narcotics were involved, and because there were no additional factors present that would show, by a preponderance of the evidence, that the money in question was used in exchange for drugs, the state did not meet its burden of proof, and the circuit court erred in forfeiting the funds. Therefore, the Court of Appeals reversed and rendered the Harrison County Circuit Court's judgment, and ordered the funds returned to Ruiz.

DISSENT

Judge Carlton argued that a forfeiture proceeding, as an action in rem, requires only that the state prove all facts requisite to the forfeiture by a preponderance of the evidence. Moreover, a trier of fact, as in any civil action, may act on circumstantial as well as direct evidence. Because the record reflected sufficient evidence for a reasonable factfinder to conclude that Ruiz and the \$56,000 in currency violated the Mississippi Uniform Controlled Substances Law, Judge Carlton would have affirmed the circuit court's judgment ordering forfeiture.

Reversed and Rendered - 2015-CA-00342-COA (Sept. 27, 2016)

En Banc Opinion by Judge Ishee – Dissent by Judge Carlton

Hon. Lisa P. Dodson (Harrison County Circuit Court)

Tim C. Holleman & Patrick Taylor Guild for Appellant – Joel Smith, Alison B. Baker & Jason M. Josef for Appellee

Briefed by [James Kelly](#)

BUCKNER V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - COURT REPORTER - DUTY - When a defendant timely and properly perfects an appeal, it is the duty of the court reporter to prepare and file a transcript and to certify the transcript as an accurate account of the proceedings

APPELLATE PROCEDURE - LACK OF TRIAL COURT TRANSCRIPT - EFFECT - No meaningful appeal or post-conviction proceeding can be had where no transcript or equivalent picture of the trial proceeding exists

APPELLATE PROCEDURE - LACK OF TRIAL COURT TRANSCRIPT - APPELLANT SUPPLEMENTATION - M.R.A.P. 10(c) provides that an appellant may supplement missing portions of the record of the court proceedings by the best available means, including recollection, provided that he does so within 60 days after filing notice of appeal and serves notice to the appellee

APPELLATE PROCEDURE - LACK OF TRIAL COURT TRANSCRIPT - TRIAL COURT SUPPLEMENTATION - A trial court may supplement missing portions of the record, but in order for its statement to be considered by the appellate court, the statement must constitute a sufficient equivalent of the original record in that, at a minimum, it includes enough material information specific to the claims raised for the judge to fairly consider the merits of each issue

FACTS

Latanya Buckner was convicted of armed robbery and carjacking by the Hinds County Circuit Court. Buckner sought to appeal the convictions; however, before the court reporter could prepare a transcript of the trial court proceedings, the court reporter died, and thus, a complete and accurate transcription from the trial-court level did not exist. Buckner appealed.

ISSUE

Whether lack of a complete and accurate trial transcript violates a defendant's due process rights and prohibits a meaningful appellate review.

HOLDING

Because of the death of the court reporter, a full and accurate transcription of the trial court proceedings did not exist. This resulted in the Court of Appeals inability to conduct a meaningful appellate review. Therefore, the Court of Appeals reversed the judgment of the Hinds County Circuit Court and remanded the case for a new trial.

Reversed & Remanded - 2013-KA-00831-COA (Sept. 27, 2016)

Opinion by Presiding Judge Griffis

Hon. Jeff Weill Sr. (Hinds County Circuit Court)

Charles Richard Mullins for Appellant - Jeffrey A. Klingfuss (Atty. Gen. Office) for Appellee

Briefed by [Bethany Poppelreiter](#)

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PRITCHETT V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SENTENCING - SUBSEQUENT OFFENDER - Pursuant to Miss. Code. Ann. § 41-29-147, a subsequent drug offender is eligible for enhanced sentencing

EVIDENCE - RELEVANCE - PRIOR CONVICTIONS - Pursuant to Miss. R. Evid. 404(b), evidence of other crimes is not admissible to prove the character of a person, but it may be admissible for other purposes such as proving intent, preparation, knowledge or identity

EVIDENCE - RELEVANCE - VALID ALTERNATIVE PURPOSE - Pursuant to Miss. R. Evid. 403, for evidence about the defendant's past convictions to be admissible, the evidence must be relevant to prove a material issue other than the defendant's character, and the probative value of the evidence must outweigh the prejudicial effect

EVIDENCE - ADMISSIBILITY - HARMLESS ERROR - Erroneous admissions of prior convictions constitute harmless error where the same result would have been reached without the challenged convictions

EVIDENCE - ADMISSIBILITY - POLICE OFFICER TESTIMONY - Testimony by a police officer of prior encounters with the defendant that are unrelated to the present charge is admissible as evidence

FACTS

As a result of an undercover drug purchase by Officer Tiffany Menotti ("Menotti"), Gregory Pritchett ("Pritchett") was found guilty of the transfer of a controlled substance and was subject to enhanced sentencing because he was a subsequent drug offender. The Harrison County Circuit Court sentenced Pritchett to sixteen years in prison, without the possibility of parole or probation. After the sentencing, the trial court denied Pritchett's motions for a new trial or, in the alternative, a judgment notwithstanding the verdict and a pro se motion for reconsideration of his sentence. Pritchett appealed.

ISSUES

Whether the trial court erred in (1) permitting evidence of Pritchett's prior drug conviction and (2) allowing testimony about Pritchett's previous encounter with Officer Menotti.

HOLDING

(1) Because the trial court conducted a proper Rule 403 balancing test and gave the jury a limiting instruction regarding the evidence and because the error would be harmless if error occurred, the trial court did not abuse its discretion in admitting the evidence of Pritchett's prior conviction. (2) Because the repeated narcotics sales in a short span of time may constitute part of a common scheme or plan, the trial court properly admitted Menotti's testimony regarding her previous encounter with Pritchett. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2015-KA-00898-COA (Sept. 27, 2016)

Opinion by Presiding Judge Griffis

Hon. Lisa P. Dodson (Harrison County Circuit Court)

George T. Holmes & Erin Elizabeth Pridgen (Pub. Def. Office) for Appellant - Jeffrey A. Klingfuss (Att'y Gen. Office) for Appellee

Briefed by [Kaylee Beauchamp](#)

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