

MISSISSIPPI SUPREME COURT DECISIONS – OCTOBER 19, 2017**SUPREME COURT - CIVIL CASES****CLARKSDALE MUN. SCH. DIST. V. STATE****CIVIL - OTHER**

CIVIL PROCEDURE - MOTION FOR JUDGMENT ON PLEADINGS - CONVERSION - Miss. R. Civ. P 12(c) provides that if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment

CONSTITUTIONAL LAW - LEGISLATIVE DUTIES - APPROPRIATIONS - For funding of a program to be a constitutional duty, such duty would have to arise from the language of the constitution itself, or be the only way for the Legislature to satisfy its constitutional obligation

CIVIL PROCEDURE - STATUTORY INTERPRETATION - The function of the court is not to decide what a statute should provide, but to determine what it does provide

FACTS

Twenty-one Mississippi public school districts claimed that Miss. Code Ann. § 37-151-6 mandated the Legislature to fully fund the Mississippi Adequate Education Program (MAEP) and that the legislature failed to do so in the subsequent appropriation bills. The school districts sought remedy for the value of the missing funding, specifically \$235 million. The State moved for judgment on the pleadings which was granted by the chancery court. The chancery court found the funding not to be mandatory. The school districts appealed.

ISSUES

Whether (1) the chancery court erred in failing to convert the State's motion for judgment on the pleadings into a motion for summary judgment; (2) Miss. Code Ann. § 37-151-6 is the general law mandate of Miss. Const. art 8, § 201; and (3) Miss. Code Ann. § 37-151-6 is mandatory.

HOLDING

(1) Because the exhibits attached to the motion were merely copies of the relevant law, it was not necessary for the chancery court to convert the motion for judgment on the pleadings into a motion for summary judgment. (2) Because the school districts failed to provide evidence that the Mississippi Constitution required the funding of Miss. Code Ann. § 37-151-6, the issue was without merit. (3) Because Miss. Code Ann. § 37-151-6 placed no obligation on the governor to approve an appropriations bill that funded MAEP, its funding was not mandatory. Therefore, the Supreme Court affirmed the judgment of the Hinds County Chancery Court.

CONCURRENCES

Justice Maxwell, in a special concurrence, argued that regardless of whether the funding was mandatory, the court could not provide a remedy because the Judiciary lacks the constitutional authority to allocate state funds that the Legislature never apportioned.

Justice Coleman concurred in result only, arguing that this case should be focused on whether the Legislature must pass an appropriations bill that includes the funding, not whether the governor must approve it. He also argued that passing an appropriations bill that conflicts with the language of the general law temporarily amends or suspends the general law.

Affirmed - 2015-CA-01227-SCT (Oct. 19, 2017)

En Banc Opinion by Justice King - Concurrences by Justices Maxwell & Coleman
Hon. William H. Singletary (Hinds County Chancery Court)
D. Ronald Musgrove, Michael Shelton Smith II, Michael V. Ratliff, Dorian E. Turner, Casey Langston Lott, Dustin Colt Childers, Joe-Colby Ray Langston, Jesse Mitchell III, Jeffrey Matthew Graves, & Blake Damon Smith for Appellants - Justin L. Matheny & Harold Edward Pizzetta III (Att’y Gen. Office) for Appellee
Briefed by [Tyler Alcorn](#)

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JOHNSON & JOHNSON, INC. v. FORTENBERRY

CIVIL - PERSONAL INJURY

PRODUCTS LIABILITY - FAILURE TO WARN - MISSISSIPPI PRODUCTS LIABILITY ACT - Pursuant to Miss. Code Ann § 11-1-63(a)(i)-(iii), a manufacturer is liable under a failure-to-warn theory if the product failed to contain adequate warnings, the inadequate warnings rendered the product unreasonably dangerous to the user or consumer, and the inadequate warning proximately caused the damages for which recovery is sought

TORTS - NEGLIGENT MISREPRESENTATION - PRIMA FACIE ELEMENTS - In order to establish a prima facie case of negligent misrepresentation, a plaintiff is required to show: (1) a misrepresentation or omission of a fact; (2) that the representation or omission is material or significant; (3) that the defendant failed to exercise that degree of diligence and expertise the public is entitled to expect of it; (4) that the plaintiff reasonably relied on the defendant’s representations; and (5) that the plaintiff suffered damages as a direct and proximate result of his reasonable reliance

CIVIL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR - A new trial may be granted in a number of circumstances, such as when the jury has been confused by faulty jury instructions

CIVIL PROCEDURE - JURY DETERMINATION - DAMAGES - Recoverable damages must be reasonably certain in respect to the efficient cause from which they proceed, and the burden is on claimant to show by a preponderance of the evidence that the defendant was the wrongful author of that cause

CIVIL PROCEDURE - IMPROPER ARGUMENTS - JURY ADMONISHMENT - The trial court is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment

CIVIL PROCEDURE - PUNITIVE DAMAGES - SUBMISSION TO JURY - When deciding whether to submit the issue of punitive damages to a trier of fact, the trial court looks at the totality of the circumstances, as revealed in the record, to determine if a reasonable, hypothetical trier of fact could find either malice or gross neglect/reckless disregard

FACTS

In 1998, Louise Taylor began suffering psychotic episodes. To combat these episodes, Taylor’s psychiatrist Richard Rhoden subsequently prescribed her a number of antipsychotics. After facing issues with a few antipsychotics, Rhoden prescribed Risperdal, an antipsychotic manufactured, sold, and distributed under Ortho-McNeil Janssen Pharmaceuticals (a subsidiary of Johnson & Johnson). Risperdal carried the FDA approved class label warning of its association with tardive dyskinesia, a movement disorder characterized by uncontrollable movements. After Rhoden informed both Taylor and her niece, Brenda Fortenberry, of the risk of developing tardive dyskinesia, Taylor proceeded to take Risperdal between 1999 and 2001 and developed tardive dyskinesia. Taylor filed a complaint against Ortho-McNeil Janssen Pharmaceuticals and Johnson & Johnson (collectively “Janssen”). At trial, the jury found that Taylor was harmed by Risperdal due to Janssen’s failure to provide adequate warnings or instructions along with negligent marketing and misrepresentation. Arguing entitlement to judgment as a matter of law, improper jury instruction, improper deference of economic damages to the jury, and inflammatory statements by opposing counsel, Janssen appealed. Arguing that the trial court abused its discretion by refusing to allow the trial to proceed to a punitive damages phase, Taylor cross-appealed.

ISSUES

Whether (1) Janssen was entitled to judgment as a matter of law on Taylor's failure to warn claim; (2) Janssen was entitled to judgment as a matter of law on Taylor's negligent misrepresentation claim; (3) Janssen was entitled to a new trial based on improper jury instructions; (4) Janssen was entitled to a new trial because economic damages should not have gone to the jury; (5) Janssen was entitled to a new trial because of Taylor's counsel's closing statements; and (6) on cross appeal, the evidence warranted a punitive damages proceeding.

HOLDING

(1) Because the Risperdal label warned Dr. Rhoden specifically of the danger of tardive dyskinesia in no uncertain terms, the label was sufficiently adequate as a matter of law. (2) Because a jury question existed as to whether a material misrepresentation or omission existed in the marketing materials and information, whether Dr. Rhoden relied on Janssen's alleged misrepresentation or omission, and whether Taylor suffered damages as a direct and proximate result of Dr. Rhoden's alleged reliance, Janssen was not entitled to judgment as a matter of law on Taylor's negligent misrepresentation claim. (3) Because the trial court's jury instructions failed to include an essential element of a negligent misrepresentation claim, the instructions were fatally defective and Janssen was entitled to a new trial. (4) Because the jury took notice of Janssen's argument that it should not be held responsible for any physical or mental problems unrelated to Taylor's use of Risperdal, the jury's determination of damages was not unreasonable. (5) Because Janssen's objection to the closing statement as being unsupported by the evidence adduced at trial was proper, the trial court should have admonished the jury and instructed it to disregard the improper comment. (6) Because the trial court determined initially whether to submit punitive damages to the jury, and in making its determination, considered all the evidence submitted at trial, the trial court acted properly as the gatekeeper. Therefore, the Supreme Court reversed and rendered in part, and reversed and remanded in part, the judgment of the Copiah County Circuit Court.

PARTIAL CONCURRENCE/DISSENT

Presiding Justice Kitchens argued that the Court improperly substituted its judgment for that of the jury. The question of adequacy of FDA approved labeling is a question of fact, which should be determined by the jury. Labels on Risperdal were on every antipsychotic, and were effectively meaningless, "cookie-cutter information." Kitchens disagrees that the use of marketing materials expanded the adequate warnings claim beyond the statutory scope of Miss. Code. § 11-1-63(a). Reasonable and fair-minded jurors exercising impartial judgment could have believed that Janssen's marketing campaign rendered the Risperdal warnings inadequate by failing to inform Dr. Rhoden of the substantive tardive dyskinesia risk associated with Risperdal.

On Direct Appeal, Reversed & Rendered in Part, Reversed & Remanded in Part; On Cross-Appeal, Affirmed - 2015-CT-00710-SCT (Oct. 19, 2017)

Opinion by Justice Coleman - Partial Concurrence/Dissent by Presiding Justice Kitchens

Hon. Lamar Pickard (Copiah County Circuit Court)

Kathleen Elizabeth Carrington, Donna Brown Jacobs, Paul V. Cassisa Jr., Adam Julius Spicer, & Christy D. Jones for Appellants - David Neil McCarty, Timothy W. Porter, John Timothy Givens, & Patrick Malouf for Appellee

Briefed by [Hale Neilson & Katie Berry](#)

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PERKINS V. MCADAMS

CIVIL - ELECTION CONTEST

ELECTION VOTING - FAILURE TO DISTRIBUTE BALLOT - SUITABLE SUBSTITUTE - Pursuant to Miss. Code Ann. § 23-15-249, the failure to distribute to the different voting places the pollbooks containing the alphabetical list of voters, or the ballot boxes provided for, shall not prevent the holding of an election; in such case the poll managers shall proceed to hold the election without the books and ballot boxes, and shall provide some suitable substitute for the ballot boxes, and conform as nearly as possible to the law in the reception and disposition of the official ballots

CIVIL PROCEDURE - SUMMARY JUDGMENT DENIAL - ATTORNEY'S FEES - Pursuant to Miss. R. Civ. P. Rule 56(h), if summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorney's fees

FACTS

Sheriel Perkins and Carolyn McAdams ran in a mayoral race in 2013. Perkins lost by 206 votes, and subsequently filed an election contest against McAdams alleging illegal voting and fraud. After McAdams removed the action to federal court, Perkins dropped her federal claims. The federal court then remanded the case to the Leflore County Circuit Court. Following the remand, McAdams filed for summary judgment, which the court denied and expressly reserved consideration of costs until a "final hearing of this cause." At trial, Perkins produced evidence that fifty-two absentee ballots were wrongfully counted and a nominal number of affidavit ballots were wrongly rejected. Aside from that evidence, Perkins offered no additional evidentiary support for remaining claims on illegality and fraud. The trial court granted McAdams's motion for directed verdict and entered a judgment in McAdams's favor. Perkins appealed. Perkins appeal was moot due to the mayoral term having ended. However, Perkins asserted the public-interest exception to the mootness doctrine. Raising two issues related to attorney's fees, McAdams cross-appealed.

ISSUES

Whether (1) the public-interest exception to the mootness doctrine applied; (2) the trial court erred in denying McAdams's post-trial motion to alter judgment to include a sanction of attorney's fees; and (3) the trial court erred in awarding Perkins \$6,440 in attorney's fees.

HOLDING

(1) Because the election materials, not the voters, ended up in the wrong precincts, and the poll managers provided a suitable substitute for the misdelivery of election materials, there was no illegal-voting issue that warranted application of the public-interest exception to the mootness doctrine. (2) Because Perkins showed there had been some confusion in two precincts that heavily favored McAdams, her petition was not frivolous and thus the trial court properly denied McAdams's post-trial motion requesting sanctions. (3) Because the \$6,440 fee award was based on the erroneously belief such award was mandatory, the trial court erred in awarding Perkins said fee. While Rule 56(h) mandates the award of reasonable expenses, it provides that attorney's fees are discretionary and must be based on a finding that the summary judgment motion was without reasonable cause. Therefore, the Supreme Court dismissed Perkins's direct appeal as moot. On cross-appeal, the Supreme Court affirmed in part, and reversed and remanded in part, the judgment of the Leflore County Circuit Court.

On Direct Appeal, Dismissed as Moot; On Cross-Appeal, Affirmed in Part, Reversed & Remanded in Part - 2016-EC-00407-SCT (Oct. 19, 2017)

Opinion by Justice Maxwell

Hon. Henry L. Lackey (Leflore County Circuit Court)

Willie James Perkins Sr. for Appellant - Kathleen Elizabeth Carrington, Mark W. Garriga, & Lemuel E. Montgomery III for Appellee

Briefed by [Charlotte Cooper](#)

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SPRINGER V. AUSBERN CONSTR. CO.

CIVIL - TORTS - OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

MISS. TORT CLAIMS ACT - WAIVER OF IMMUNITY - Miss. Code Ann. § 11-46-5(1) waives immunity of the State and its political subdivisions from claims for money damages arising out of the torts of their employees acting within the course and scope of their employment

MISS. TORT CLAIMS ACT - WAIVER OF IMMUNITY - FRAUD - Pursuant to Miss. Code Ann. § 11-46-5(2), a governmental employee is not considered to be acting within the scope of his employment and the government shall not be liable if the employee's conduct constituted fraud, malice, libel, slander, or defamation

MISS. TORT CLAIMS ACT - NOTICE REQUIREMENTS - APPLICABILITY - Claims for tortious breach of contract, which may be proven without proof of malice, are subject to the pre-suit notice requirements of the Mississippi Tort Claims Act; in contract, claims for tortious interference with a contract, which require proof of malice as an essential element, are not subject to the pre-suit notice requirements of the Mississippi Tort Claims Act

FACTS

Ausbern Construction Co., Inc. placed the lowest bid on a road-construction project for Chickasaw County, Mississippi. Edward Springer estimated 7,689 cubic yards of material would be needed. However, the project actually required 17,700 cubic yards. Ausbern filed a formal claim for payment for the overage with the State Aid Office (SAO). The SAO corresponded with Ausbern and acknowledged the error. In an attempt to mitigate any damages, The SAO offered Ausbern \$8.00 per cubic yard for the overage rather than the \$19.50 the contract specified. Ausbern declined to negotiate and filed suit, alleging breach of contract against Chickasaw County and against Springer in his individual capacity for tortious interference. A jury awarded Ausbern \$387,793.50 against Chickasaw County for the breach of contract and \$182,500 against Springer. Springer appealed and the Court of Appeals reversed for failure to perfect service under the Mississippi Tort Claims Act and failure to prove malice by Springer. Ausbern petitioned for writ of certiorari.

ISSUE

Whether Ausbern's claim for tortious interference with a contract was subject to the pre-suit notice requirement of the Mississippi Tort Claims Act.

HOLDING

Because tortious interference with a contract requires proof of malice, and because Miss. Code Ann. § 11-46-5(2) provides that torts constituting malice are not within the course and scope of employment, Ausbern's claim was not subject to the pre-suit notice requirement of the Mississippi Tort Claims Act. However, the Supreme Court affirmed the Court of Appeals' judgment on this dispositive issue of no evidence of malice. The Supreme Court clarified that *Whiting* did not implicitly overrule *Zumwalt* or *McGehee*. The Supreme Court announced that *Whiting* was overruled to the extent that *Whiting* held tortious interference with contract claims were subject to pre-suit notice requirements of the Mississippi Tort Claims Act. Therefore, the Supreme Court affirmed the judgment of the Court of Appeals.

Affirmed - 2014-CT-01190-SCT (Oct. 19, 2017)

En Banc Opinion by Justice Coleman

Hon. Andrew K. Howorth (Chickasaw County Circuit Court)

Rex. F. Sanderson & Barrett Jerome Clisby for Appellant - Mark D. Herbert, Sabrina Bosarge Ruffin, & Bradford Coleman Ray for Appellee

Briefed by [Andrew P. Cicero, III](#)

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SUPREME COURT - POST-CONVICTION RELIEF

PITCHFORD V. STATE

CRIMINAL - DEATH PENALTY - POST-CONVICTION

CRIMINAL PROCEDURE - COMPETENCY - RATIONAL UNDERSTANDING - The standard for competency to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding as well as a rational and factual understanding of the proceedings against him

POST-CONVICTION RELIEF - COMPETENCY - RETROSPECTIVE HEARING - A retrospective competency hearing is in compliance with Rule 9.06 of the Uniform Rules of Circuit and County Court Practice and does not violate the defendant's due process rights when the facts of the case allow for it; a trial court is obligated to hold a competency hearing only where there is sufficient doubt about a defendant's competence

FACTS

On November 7, 2004, the body of Reuben Britt was discovered at the entrance of the Crossroads Grocery store in Grenada, Mississippi. Grenada County Sheriff's Department responded to the scene and concluded that Britt had been shot with two different types of firearms. Missing from the scene were a cash register, cash, and a .38 caliber revolver belonging to Britt. Investigators received further information that a vehicle owned by Terry Pitchford matched the description of the vehicle used by Britt's assailants and that Pitchford had been part of a previous robbery attempt at the store days prior to Britt's killing. Based on this information, investigators went to Pitchford's residence, where they found a car matching the description. A search of Pitchford's car produced Britt's .38 caliber revolver. Pitchford later confessed that he and Eric Bullins had gone to the store to rob it. Pitchford said Bullins had shot Britt three times and that Pitchford had fired shots into the floor. Pitchford also told investigators that he had attempted to rob the store a week prior to Britt's killing. Pitchford was indicted in January 2005 for capital murder. In February 2005, Pitchford's counsel filed a motion contending that Pitchford had a history of mental health issues and asking the court to provide a psychologist or psychiatrist to conduct a mental health examination. Pursuant to that motion and to agreement by the parties, the trial court ordered that Pitchford be evaluated at the Mississippi State Hospital to determine if he was competent to stand trial. In January 2006, Pitchford was evaluated and tested by doctors at the state hospital, who unanimously concluded that Pitchford was competent to stand trial. They noted that testing and observation indicated Pitchford was attempting to malingering symptoms of mental illness. No formal competency hearing was held. In February 2006, the court held a hearing to consider a motion for continuance filed by the defense, stating that an independent mental evaluation of Pitchford was necessary. The trial court denied the defense's request for continuance, finding that the doctors from the state hospital had conducted a thorough evaluation. The case proceeded to trial on February 6, 2006, where a jury found Pitchford guilty of capital murder and imposed the death penalty. The Mississippi Supreme Court affirmed Pitchford's conviction and death sentence on direct appeal. Pitchford thereafter sought leave from the Supreme Court to proceed in the trial court with a PCR petition. Pitchford raised a number of claims, including the claim that he was denied a competency hearing prior to his trial for capital murder. The Supreme Court denied all claims except Pitchford's claim pertaining to a competency hearing, ordering that the matter be remanded to the trial court for a hearing on whether Pitchford was competent to stand trial at the time the criminal trial took place in February 2006. The hearing was held on May 11 and 12, 2015. The trial court found that Pitchford had failed to prove by a preponderance of the evidence that he was not competent to stand trial in February 2006 and denied Pitchford's PCR claim. Pitchford appealed.

ISSUES

Whether the trial court erred in determining that (1) the 2015 retrospective competency hearing satisfied Rule 9.06's mandates, and (2) the State's experts failed to apply the proper standard for competency.

HOLDING

(1) Because a retrospective competency hearing does not violate a defendant's due process rights when there is sufficient information to determine defendant's competence to stand trial, the trial court correctly found that Pitchford's 2015 retrospective hearing satisfied Rule 9.06. (2) Because the 2006 competency evaluation report clearly found that Pitchford possessed sufficient competency to consult with an attorney and a rational and factual understanding of the nature and object of the legal proceedings against him, the trial court correctly determined that Pitchford possessed competency to stand trial. Therefore, the Supreme Court affirmed the judgment of the Grenada County Circuit Court.

CONCURRENCE

Presiding Justice Kitchens concurred in result only, arguing that the Supreme Court had previously established that a retrospective competency hearing is not an appropriate remedy for the failure to hold a pretrial competency hearing when one was required by Rule 9.06, and that the majority's decision conflicts with Rule 9.06 and contravenes stare decisis. Further, Presiding Justice Kitchens determined that it was unnecessary for the Supreme Court to overrule

Coleman because Pitchford was procedurally barred from challenging the prior order for a retrospective competency hearing.

Post-Conviction Relief Denied - 2015-CA-01818-SCT (Oct. 19, 2017)

En Banc Opinion by Justice Beam - Concurrence by Presiding Justice Kitchens

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

Jamila Alexander Virgil & Louwlynn Vanzetta Williams (Office of Capital Post-Conviction Counsel) for Appellant - Cameron

Leigh Benton (Att’y Gen. Office) for Appellee

Briefed by [Emily Warwick](#)

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SUPREME COURT - CRIMINAL CASES

MARTIN V. STATE

CRIMINAL - FELONY

TRAFFIC STOP - PROBABLE CAUSE - MISTAKE OF LAW - In the event probable cause is based on a mistake of law, as long as the probable cause is based on good faith and a reasonable basis, then it is valid

TRAFFIC STOP - SEARCH & SEIZURE - REASONABLE DETENTION OF SUSPECT - If the officer develops reasonable suspicion of additional criminal activity during his investigation of the circumstances that originally caused the stop, he may further detain its occupants for a reasonable time while appropriately attempting to dispel this reasonable suspicion

SENTENCING - HABITUAL OFFENDER - SEPARATE SENTENCES - The language of the Mississippi habitual offender statute (Miss. Code Ann. § 99-19-81) requires sentencing to separate terms, but it does not require that they be served separately; concurrent sentences constitute “separate terms” for purposes of sentencing a defendant as a recidivist

FACTS

While traveling on I-20, Officer Jason Johns observed Kendall Martin cross over the right lane fog line. Johns then pulled his vehicle into the left lane beside Martin to observe how many occupants were in the vehicle and whether Martin was wearing a seatbelt. Johns then dropped back behind Martin and observed him hit the right lane fog line or drive very close to it. Johns initiated a traffic stop and smelled what he believed to be air fresheners and marijuana in Martin’s vehicle. Johns requested to search the vehicle, and Martin consented. Johns then discovered 9.9 pounds of marijuana in Martin’s vehicle. At trial, Martin moved to suppress evidence, arguing the search and seizure violated his Fourth Amendment rights. The trial court found there was sufficient probable cause for the stop, and there was no unreasonable delay in searching the vehicle. A jury found Martin guilty of possession of more than one kilogram of marijuana with intent to distribute. Martin had been convicted of four prior felonies and sentenced to serve his sentences concurrently. Because of his prior felonies he was sentenced as a habitual offender to sixty years in prison without the possibility of parole. Martin appealed.

ISSUES

Whether (1) Johns had sufficient probable cause to stop Martin for careless driving, (2) the stop was unconstitutionally extended, and (3) Martin was properly sentenced as a habitual offender.

HOLDING

(1) Because Johns observed Martin’s vehicle cross the fog line once and again approach or bump the fog line, and other courts have held that crossing or bumping the fog line is probable cause that a defendant violated the Mississippi Careless Driving Statute, Johns had sufficient probable cause to stop Martin for careless driving. (2) Because Johns had probable cause to search the vehicle upon smelling marijuana, and Martin consented to the search, the stop was not

unconstitutionally extended. (3) Because concurrent sentences are separate sentences under Miss. Code Ann. § 99-19-81, Martin was properly sentenced as a habitual offender. Therefore, the Supreme Court affirmed the judgment of the Rankin County Circuit Court.

DISSENT

Presiding Justice Kitchens argued that no violation of the careless driving statute occurs when a person drives very close to the fog line. Further, he contended that a single instance of crossing or bumping the fog line, without more, does not provide probable cause for an officer to initiate a careless driving traffic stop. He would hold that Johns did not have sufficient probable cause to stop Martin for careless driving.

Affirmed - 2015-KA-00772-SCT (Oct. 19, 2017)

En Banc Opinion by Justice Coleman - Dissent by Presiding Justice Kitchens
Hon. William E. Chapman III (Rankin County Circuit Court)
Todd. A. Coker for Appellant - Billy L. Gore (Att’y Gen. Office) for Appellee
Briefed by [Nathan Simpson](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – OCTOBER 17, 2017

COURT OF APPEALS - CIVIL CASES

ALPERT V. CITY OF BILOXI

CIVIL - OTHER

CIVIL PROCEDURE - MUNICIPALITY DECISIONS - STANDARD OF REVIEW - While courts typically employ a limited standard of review for decisions made by a municipal board, courts review a board’s decisions about questions of law under the de novo standard

CIVIL PROCEDURE - PUBLIC ROADS - EMINENT DOMAIN - Because owners of private property adjacent to public roads do not own the public roads, their property rights are not violated, and there is no taking when the roads undergo reconstruction

FACTS

Pursuant to an application submitted by Boyd Gaming Corporation (“Boyd”), the Biloxi Planning Commission (“Planning Commission”) conducted a public hearing to determine whether to vacate and realign a portion of Fayard Street. Boyd wanted to realign Fayard Street, which operated as a public right-of-way, with Bayview Avenue, which was a five-lane thoroughfare. However, a pawn shop owner named Alpert opposed this change to the intersection. Alpert argued that customers had used Fayard Street for parking for the past fifteen years, and the proposed renovations would eliminate the parking spaces available and ultimately destroy his business. Boyd, on the other hand, claimed at a public hearing that this realignment would provide better safety for pedestrians, create a larger turning radius for drivers, and allot fifteen feet of additional land to Alpert’s pawn shop. The Planning Commission approved Boyd’s application, and Alpert appealed. He requested another public hearing, which was denied. After the Planning Commission’s approval, the Biloxi City Council (“City Council”) heard a presentation by Boyd and discussed the consequences of approving Boyd’s application. The City Council eventually adopted a resolution that approved the application, and Alpert appealed the City Council’s decision to the circuit court. Yet, before the circuit court heard the case, the City Council conducted a special meeting to consider amendments to the resolution. Alpert attended and argued that the proposed renovations harmed his business and violated the Biloxi City Code. The City Council thus reserved the amendment question. The circuit court held a hearing to address Alpert’s concerns, and it affirmed the City Council’s decision. Alpert appealed.

ISSUES

Whether the City’s resolution approving Boyd’s application (1) would deny access to the pawn shop and violate Alpert’s rights, and (2) create a more dangerous intersection.

HOLDING

(1) Because Fayard Street is a public street and Alpert was merely permitted to use it for parking, Alpert’s property rights were not violated, and no taking occurred. (2) Because the Planning Commission and the City Council considered substantial facts regarding Boyd’s application, including citizens’ health, safety, and welfare, as well as alternative plans for reconstruction, both entities justified their findings that the realignment proved beneficial. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2016-CC-01121-COA (Oct. 17, 2017)

Opinion by Presiding Judge Griffis

Hon. Lawrence Paul Bourgeois Jr. (Harrison County Circuit Court, Second Judicial Dist.)

Wayne L. Hengen for Appellants - David A. Wheeler & Gerald Henry Blessey for Appellee

Briefed by [Katherine Farese](#)

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BROWN V. PROF’L BLDG. SERVS., INC.

CIVIL - PERSONAL INJURY

EVIDENCE - ADMISSIBILITY - PHOTOGRAPHS - Some probative value is the only requirement needed in order to support a trial judge’s decision to admit photographs into evidence; the mere fact that the photographs were taken at a time when conditions were somewhat changed does not render such photographs admissible so long as the changes are carefully pointed out to the jury

EVIDENCE - ADMISSION/EXCLUSION - REVERSAL - For a case to be reversed based on the admission or exclusion of evidence, a party must be actually prejudiced, harmed, or have a substantial right adversely affected

EVIDENCE - ADMISSIBILITY - EXPERT TESTIMONY - The proponent of expert testimony must show by a preponderance of the evidence that the expert is qualified, that he possesses scientific knowledge that will assist the jury, and that his testimony is based on sufficient facts and data and reliable principles and methods

FACTS

Curtis Brown was the clubhouse manager at Colonial Country Club in Jackson. While walking around the clubhouse to make sure the doors were locked at the end of his shift in September 2012, Brown fell over a chair that was allegedly “right in the doorway” to the grill. He immediately felt intense pain in both of his knees and passed out. Brown was diagnosed with bilateral patellar tendon ruptures and doctors performed surgery. Brown filed a complaint against Professional Building Services, Inc. (“PBS”) alleging negligence and the jury returned a verdict in favor of PBS. The circuit court denied Brown’s post-trial motions and entered final judgment on the jury verdict. Brown appealed.

ISSUES

Whether the trial judge abused his discretion by (1) overruling Brown’s objection to a photo of a chair in the doorway to the grill; and (2) allowing a defense expert in biomechanics to testify that Brown’s claim that he suffered bilateral patellar tendon ruptures by walking into a chair was not plausible.

HOLDING

(1) Because the jury heard testimony regarding the lighting in the room at the time of the accident and was capable of understanding that there was more light in the photo than on the night in question, the trial judge did not abuse his discretion by admitting the photo of a chair in the grill doorway. (2) Because the expert’s testimony was based on his training and experience in engineering and medicine—in addition to Brown’s failure to refute the expert’s supporting

studies—the trial judge did not abuse his discretion by allowing the testimony of the expert in biomechanics. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

DISSENT

Judge Westbrook contended that the admission of the photo recreating the accident scene was reversible error. She argued that PBS counsel’s brief explanation of the recreated picture to the jury did not comport with the trial judge’s order regarding the admissibility of the photo and was of no consequence when evaluating the photograph’s admissibility. Additionally, she concluded that the trial court abused its discretion in admitting the defense expert’s testimony because he was a biomechanics expert and was not qualified as an orthopedic surgeon or had never treated or performed a patellar tendon surgery. Moreover, PBS’s counsel never elicited testimony regarding the principles and methodology that allowed him to arrive at his conclusions. She would reverse and remand this case for a new trial.

Affirmed - 2016-CA-00818-COA (Oct. 17, 2017)

En Banc Opinion by Judge Wilson Dissent by Judge Westbrook

Hon. Jeff Weill Sr. (Hinds County Circuit Court, First Judicial Dist.)

Steven Hiser Funderburg & Craig Robert Sessums for Appellant - Jason Hood Strong, Robert L. Gibbs & Richard Benjamin McMurtray for Appellee

Briefed by [Mary-Katherine Black](#)

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RAYNER V. SIMS

CIVIL - CUSTODY

CIVIL - CHILD CUSTODY - JOINT CUSTODY - Miss. Code Ann. § 93-5-24(3) provides that joint custody may be awarded in the discretion of the court, upon application of one or both parents; joint custody is for the chancellor to determine as he or she is in the best position to evaluate the credibility, sincerity, capabilities and intentions of the parties

CIVIL - CHILD CUSTODY - ALBRIGHT FACTORS - The chancellor is only required to address those *Albright* factors that are applicable to the case before him

CIVIL - CHILD SUPPORT - PARENTAL ALLOCATION - Miss. Code Ann. § 43-19-101(1) provides that 14% of a party’s adjusted gross income should be awarded for the support of one child; this percentage applies unless the court makes a written finding or specific finding on the record that an application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in § 43-19-103

CIVIL - CHILD SUPPORT - SHARED CUSTODY - Miss. Code Ann. § 43-19-103 (g) provides that the particular shared parental arrangement is a factor the chancellor may consider in his adjustment of the statutory guidelines established by § 43-19-101(1)

FACTS

Sarah McKenzie Rayner and Chance D. Sims are the natural parents of a female child, Frances. Rayner and Sims lived together briefly after Frances was born in 2013, but the two never married. Sims filed a for an adjudication of paternity and for custody, where he requested custody of Frances or at least joint custody. Rayner filed an answer and requested physical custody of Frances and that Sims only have restricted visitation rights, limited to supervised day-time visits. Following trial, the chancellor awarded the parties joint legal and shared physical custody of Frances. Additionally, the chancellor ordered each party pay child support “based upon 14 percent of each party’s adjusted-gross income” and “in proportion to their periods of shared custody and their incomes.” Rayner filed a motion to reconsider, which the chancellor denied. Rayner appealed.

ISSUES

Whether the chancellor erred in (1) granting joint-physical custody, (2) failing to consider all of the *Albright* factors when making his custody determination, and (3) computing the child-support obligation of each party.

HOLDING

(1) Because the record did not reflect any inability to cooperatively share custody, the chancellor's award of joint-physical custody was not manifestly wrong. (2) Because of the amount of evidence adduced at trial relevant to the *Albright* factors, including the three factors the chancellor did not specifically note, and the fact that each parent was shown to be a good and fit parent, the chancellor's failure to specifically address each factor was not reversible error. (3) Because the chancellor's computation of the child support was authorized by statute, there was no error in computing the obligation of each party. Therefore, the Court of Appeals affirmed the judgment of the Jones County Chancery Court.

Affirmed - 2016-CA-00496-COA (Oct. 17, 2017)

Opinion by Presiding Judge Griffis

Hon. Franklin C. McKenzie Jr. (Jones County Chancery Court, Second Judicial Dist.)

S. Christopher Farris for Appellant - Nancy E. Steen for Appellee

Briefed by [Maggie Vinzant](#)

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THOMPSON V. MEYER

CIVIL - CONTRACT

CIVIL PROCEDURE - RELIEF FROM JUDGMENT - ATTORNEY MISCONDUCT - Ignorance or carelessness on the part of an attorney does not provide a showing of exceptional circumstances sufficient to provide relief under Miss. R. Civ. P. 60

CIVIL PROCEDURE - RELIEF FROM JUDGMENT - EQUITABLE RELIEF - Miss. R. Civ. P. 60(b)(6), the catch-all provision, provides equitable relief when relief is not warranted by the preceding clauses, or when it is uncertain whether any other clause affords relief

FACTS

In 2003, Joseph Thompson and his wife entered into an agreement creating a joint venture with John Meyer and William Meyer involving the End of the Rainbow Trailer Park. In the agreement, the Thompsons agreed to sign over all rights to the property, and in exchange, the Meyers agreed to pay the existing debt on the property in furtherance of purchasing it. The Meyers also agreed to remit to the Thompsons any rents collected in excess of the amount needed to service the debt. In 2005, the Meyers sent a letter to the Thompsons that declared the contract null and void, claiming the Thompsons had encumbered the property with further debt after transferring it to the Meyers, in violation of the partnership agreement. Aggrieved by the Meyers's failure to abide by the contract, the Thompsons filed a complaint for a preliminary injunction in 2008. In 2013, the chancellor issued an order directing parties' counsel to attempt to resolve the matter and set a conference date with the court no later than sixty days out. When neither party obliged, the clerk filed a motion to dismiss for want of prosecution, and the chancellor granted the motion. Claiming his attorney failed to notify him of the pending dismissal, Joseph Thompson filed a Rule 60 motion for relief from judgment, and the court denied it. Joseph Thompson appealed.

ISSUE

Whether Joseph Thompson's attorney's actions provided a proper basis to support his Rule 60 motion.

HOLDING

Because neither ignorance nor carelessness on the part of an attorney will provide grounds for relief under Rule 60, and because this specific scenario did not create a special category sufficient to provide grounds for relief, the chancery court

did not err in denying Joseph Thompson's Rule 60 motion. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Chancery Court.

Affirmed - 2016-CA-00806-COA (Oct. 17, 2017)

En Banc Opinion by Presiding Judge Irving

Hon. James B. Persons (Harrison County Chancery Court, Second Judicial Dist.)

Wayne L. Hengen for Appellant - Virgil G. Gillespie for Appellees

Briefed by [Daniel Tankersley](#)

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VASSAR V. VASSAR

CIVIL - DOMESTIC RELATIONS

CIVIL CONTEMPT - INCARCERATION - INABILITY TO PAY - Inability to pay to avoid incarceration is a continuing defense, as imprisonment does not accomplish the goals of the civil contempt decree

DOMESTIC RELATIONS - CHILD SUPPORT - FERGUSONFACTORS - While chancellors need not make findings of fact as to each and every factor set forth in *Ferguson*, they cannot simply mention the guidelines and state that they are following and applying them

DOMESTIC RELATIONS - DIVORCE - CHILD SUPPORT - A court cannot impose support obligations on a parent that are beyond his or her financial ability to pay

DOMESTIC RELATIONS - DIVORCE - ATTORNEY'S FEES - Where neither party is able to pay more than his or her own fees, an award of attorney's fees is inappropriate

FACTS

Amaria Vassar filed for divorce against David Vassar on the grounds of habitual cruel and inhumane treatment and/or irreconcilable differences, and David answered and filed a counter-complaint for divorce on the same grounds. Both Amaria and David sought custody of their two-year-old son Martin. The chancellor entered a temporary order granting David custody of Martin and granting Amaria specified visitation. The chancellor granted David temporary possession of the marital home but ordered Amaria to continue to pay the mortgage and utilities. Later, David filed a petition for contempt alleging that Amaria had stopped paying the mortgage and disconnected the utilities on the marital home in violation of the temporary order. On the day of the trial, both parties agreed to an irreconcilable differences divorce, submitting the issues of child custody, child support, property division, alimony, attorney's fees, and contempt to the chancellor. Amaria and David own a home with a significant mortgage balance; only Amaria is obligated on the promissory note because of David's poor credit history. Before the couple decided to get divorced, David had Amaria civilly committed, alleging that she was suicidal and threatening to hurt him. As a result, she lost her job and was only able to find another for significantly less pay. As a result, Amaria testified that she was unable to pay both her own rent and living expenses and the mortgage note and utilities on the marital home. David was unemployed and claimed to be unable to work due to a back injury. The guardian ad litem (GAL) found that Martin was a happy and physically and mentally healthy child who was "equally comfortable with both" of his parents. The GAL discussed the *Albright* factors and opined that two favored Amaria, two favored David, and the rest favored neither. The GAL ultimately recommended that David be given custody of Martin. The chancellor agreed that David should have custody and awarded Amaria visitation rights. The chancellor ordered Amaria to pay child support and to maintain health insurance for Martin; he also awarded David the exclusive use and possession of the marital home until Martin reached the age of twenty-one. The chancellor ordered Amaria to pay the full mortgage, insurance, and taxes on the home, as well as David's attorney's fees. Lastly, the chancellor found Amaria in contempt because she willfully violated the temporary order by ceasing to pay the mortgage and ordered her incarcerated until she purged herself of contempt. Amaria filed a motion to alter the judgment and for release from incarceration, arguing she was unable to pay the mortgage arrearage.

The court released her from jail after forty-seven days but entered an order denying her post-trial motions. Amaria appealed.

ISSUES

Whether the chancellor erred in (1) awarding David custody of Martin; (2) dividing the marital estate, including awarding David alimony and attorney's fees, and setting child support; and (3) ordering Amaria to be incarcerated for contempt.

HOLDING

(1) Because the chancellor analyzed each of the *Albright* factors and determined that it was in Martin's best interest to be in David's custody based on his greater availability, the awarding of custody was proper. (2) Because the chancellor made a mathematical error in determining Amaria's net income, failed to make a finding as to each *Ferguson* factor, and imposed financial obligations on Amaria that exceeded her ability to pay, the chancellor's division of the marital estate, awarding of alimony and attorney's fees, and setting of child support was improper. (3) Because Amaria was unable to fulfill her obligations under the order, the chancellor erred in having her incarcerated for contempt. Therefore, the Court of Appeals affirmed in part, and reversed and remanded in part, the judgment of the DeSoto County Chancery Court.

Affirmed in Part; Reversed & Remanded in Part (Oct. 17, 2017)

En Banc Opinion by Judge Wilson

Hon. Percy L. Lynchard Jr. (DeSoto County Chancery Court)

Jerry Wesley Hisaw for Appellant - *Pro Se* for Appellee

Briefed by [Sean Grady](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

BRITAIN V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BAR - STATUTE OF LIMITATIONS - A motion for post-conviction collateral relief shall be filed within three years after entry of the judgment of conviction

CRIMINAL PROCEDURE - GUILTY PLEA - WAIVER - A valid guilty plea constitutes a waiver of certain constitutional claims, including illegal search and seizure

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE - PRESUMPTION OF CONDUCT - To overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, the plaintiff must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different

FACTS

Britain entered a plea of guilty to possession of precursors with intent to manufacture a controlled substance, and was sentenced to twenty years, with nineteen years and 171 days suspended, leaving 194 days to serve in the custody of the Mississippi Department of Corrections, followed by five years of reporting post-release supervision, and five years of nonreporting post-release supervision. A petition for revocation of post-release supervision was subsequently filed after Britain violated the terms. At the revocation hearing, Britain admitted that while on post-release supervision, he committed the felony crime of possession of methamphetamine, possession of morphine, and possession of Schedule II, III, IV, and V controlled substances. As a result, the circuit court entered an agreed order of revocation of post-release supervision and sentenced Britain to serve nineteen years and 171 days in the custody of MDOC. Britain filed a motion for post-conviction relief. The circuit court found Britain's claims were time-barred and denied the motion. Britain appealed.

ISSUES

Whether (1) Britain's motion was time barred; (2) Britain was convicted based on an illegal search and seizure; and (3) Britain suffered ineffective assistance of counsel.

HOLDING

(1) Because Britain did not file his PCR motion until four years after his conviction, his claim was time-barred. (2) Because Britain voluntarily and intelligently entered a plea of guilty, he waived his claim to illegal search and seizure. (3) Because his counsel advised Britain on the nature of the charge, lesser-included offenses, and all possible defenses he might have had, Britain could not show that counsel's performance was deficient. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2016-CP-01474-COA (Oct. 17, 2017)

Opinion by Presiding Judge Griffis

Hon. Lester F. Williamson Jr. (Lauderdale County Circuit Court)

Pro se for Appellant - Katy T. Gerber (Att'y Gen. Office) for Appellee

Briefed by [Jay Michael Patterson](#)

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CONWILL V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - GUILTY-PLEA HEARING - MOTION TO AMEND - When an accused fails to object to a motion to amend an indictment during the sentencing phase, he is procedurally barred from doing so on appeal

POST-CONVICTION RELIEF - HABITUAL OFFENDER - PROOF - Under Miss. Code Ann. § 99-19-81, proof of habitual offender status is sufficient where the State demonstrates that a defendant was sentenced to terms in excess of one year

HABITUAL OFFENDER - PEN PACKS - TESTIMONIAL EVIDENCE - Records of previous convictions, known as "pen packs," suffice as evidence and do not require testimonial foundation to authenticate

FACTS

Samuel Conwill was indicted on one count of possession of methamphetamine precursors and one count of possession of methamphetamine. At Conwill's guilty-plea hearing, the State moved to amend the indictment to reflect his habitual offender status and enter records of his previous convictions, known as "pen packs," into evidence as proof of his status as habitual offender. Prior to his guilty-plea hearing, Conwill entered into a plea agreement with the State, where he stipulated his habitual offender status. Conwill argued that he was denied due process and the right to confrontation because records of his previous convictions, known as "pen packs," were admitted into evidence without foundational testimony to certify their accuracy. Conwill appealed.

ISSUES

Whether (1) Conwill was procedurally barred from amending his indictment; and (2) pen packs are insufficient proof of habitual offender status without a testimonial foundation.

HOLDING

(1) Because, at his guilty-plea hearing, Conwill did not object to the State's motion to amend his indictment to reflect his habitual offender status and enter his pen packs into evidence as proof of his status as a habitual offender, he was procedurally barred to object on appeal. (2) Because the preparation and management of pen packs are administrative in nature and do not require scientific analysis of laboratory results by the testing individual, testimonial foundation was

not needed to authenticate pen packs as evidence of Conwill's habitual offender status. Therefore, the Court of Appeals affirmed the judgment of the Clay County Circuit Court.

Affirmed - 2016-CP-00921-COA (Oct. 17, 2017)

Opinion by Judge Westbrook

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

Pro Se for Appellant - Alicia Marie Ainsworth (Att'y Gen. Office) for Appellee

Briefed by [Caroline Loveless](#)

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DUNCAN V. STATE

CIVIL - POST-CONVICTION RELIEF

APPELLATE PROCEDURE - TIMELY FILING REQUIREMENT - DISMISSAL - Miss. R. App. P. 2(a)(1) provides that an appeal shall be dismissed if the notice of appeal was not timely filed

APPELLATE PROCEDURE - REOPENING TIME FOR APPEAL - OUT-OF-TIME APPEAL - Under Miss. R. App. P. 4(h), a trial court may reopen the time for appeal for a period of fourteen days if a party entitled to notice of the entry of a judgment or order did not receive such notice within twenty-one days of its entry and if no party would be prejudiced; the motion to file an out-of-time appeal must be filed within 180 days of entry of the judgement or order or within seven days of receipt of such notice, whichever is earlier

APPELLATE PROCEDURE - OUT-OF-TIME APPEAL - Appellate courts may grant an out-of-time appeal, where justice demands, if a person convicted of a crime and through no fault of his own is effectively denied his right to perfect his appeal within the time prescribed by law

FACTS

Robert Duncan was sentenced to fifteen years in custody for armed robbery, with seven years of the sentence to be served on post-release supervision. While under post-release supervision, Duncan was arrested for burglary. Following admission to the charges and waiving his right to require the State to prove the allegations, Duncan's release was revoked. Duncan filed a petition for post-conviction relief (PCR). The PCR petition was denied on March 6, 2015. On July 5, 2015, Duncan contacted the circuit court alleging he had not received notice of the court's decision regarding his petition and inquired about its status. In response, Duncan received a copy of the court's order denying the petition on July 10, 2015. Duncan filed a motion for leave to file an out-of-time appeal on September 8, 2015. The circuit court granted the motion for leave and reopened the time for Duncan to file an appeal, stating that Duncan had not received a copy of the order denying his PCR motion until September 8, 2015. On November 3, 2015, Duncan filed a notice of appeal.

ISSUES

Whether (1) Duncan's motion for leave to file an out-of-time appeal and notice of appeal were timely filed, and (2) Duncan was entitled to an out-of-time appeal.

HOLDING

(1) Because Duncan failed to timely file his motion for leave to file an out-of-time appeal within the prescribed seven days of receipt of notice and failed to file his notice of appeal within the allotted fourteen days following entry of the order reopening the time for appeal, his motion was untimely. (2) Because Duncan was not without fault in failing to timely file his motion for leave to file an out-of-time appeal and notice of appeal, he was not entitled to an out-of-time appeal. Therefore, the Court of Appeals dismissed the appeal for lack of jurisdiction.

Appeal Dismissed - 2015-CP-01367-COA (Oct. 17, 2017)

En Banc Opinion by Presiding Judge Irving

Hon. Kathy King Jackson (Jackson County Circuit Court)

Pro se for Appellant - Laura Hogan Tedder (Att’y Gen. Office) for Appellee
Briefed by [Marilyn Higdon](#)

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ORR V. STATE

CIVIL - POST-CONVICTION RELIEF

CONSTITUTIONAL LAW - SPEEDY TRIAL - BARKER FACTORS - The United States Supreme Court provided a four-factor balancing test in *Barker v. Wingo* to be used when determining whether a defendant’s right to a speedy trial has been violated: (1) length of delay, (2) the reason for the delay, (3) the defendant’s assertion of his right, and (4) prejudice to the defendant

CRIMINAL LAW - GUILTY PLEA - VALIDITY - A guilty plea is valid and legal only if it is entered voluntarily and intelligently; Mississippi has no requirement that the defendant personally provide a factual basis for his guilty plea

FACTS

Eli Orr was indicted in 2009 on one count of the sale or transfer of cocaine and one count of possession of less than 0.1 gram of a controlled substance. In 2013, the State moved to amend the indictment to charge Orr as a second or subsequent offender. In the middle of trial, Orr decided to plead guilty to the sale or transfer of cocaine. He was sentenced to thirty years in prison and five years of post-release supervision. While in jail, Orr was indicted for possession of a controlled substance. He was sentenced to an additional three years. Orr filed a post-conviction relief petition for his first sentence of the sale or transfer of cocaine. The circuit court denied the petition after an evidentiary hearing. Orr appealed.

ISSUES

Whether (1) Orr’s guilty plea was given voluntarily, (2) the statute of limitations had run on his charge under Miss. Code Ann. § 41-29-139, (3) Orr was denied the right to a speedy trial, and (4) Orr received ineffective counsel.

HOLDING

(1) Because the State gave a detailed account of the charges in Orr’s indictment and Orr showed no signs of intoxication during his plea, Orr’s guilty plea was voluntary. (2) Because the State indicted Orr within the two-year time frame, the limitations period had not expired for Orr’s charge. (3) Because Orr did not assert his right to a speedy trial at any point while awaiting trial and Orr agreed to a number of continuances, his constitutional right to a speedy trial was not violated. Further, even though the four-year delay created a presumption of prejudice, the other factors—including Orr’s failure to offer any evidence of actual prejudice—outweighed the presumption. (4) Because no affidavits were provided to show ineffective assistance and Orr reaffirmed his satisfaction with his attorney’s performance at his plea hearing, Orr did not receive ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

Affirmed - 2016-CP-00916-COA (Oct. 17, 2017)

En Banc Opinion by Judge Fair

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

Pro se for Appellant - Kaylyn Havrilla McClinton (Att’y Gen. Office) for Appellee

Briefed by [Addison K. Watson](#)

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CHATMAN V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - FAILURE TO OBJECT - PLAIN-ERROR - Regardless of whether the error was properly preserved, if a defendant's substantive or fundamental rights are affected, the court may review for plain error

CRIMINAL PROCEDURE - PLAIN-ERROR RULE - APPLICATION - In applying the plain-error rule the court determines: whether the trial court deviated from a legal rule; whether the error is plain, clear, or obvious; and whether the error prejudiced the outcome of the trial; the court will only reverse if the error resulted in a manifest miscarriage of justice

CRIMINAL PROCEDURE - EVIDENCE - SUFFICIENCY - When determining the sufficiency of evidence, the court decides 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

FACTS

Patrick Williams was visiting with his girlfriend, Tanedra Christian, on her front porch when a white car drove by her house, turned around, and came back up the road. Williams abruptly left and walked up the road toward his house. Minutes later, Christian heard gunshots. Toshema Crosby, a local gas station owner, found Williams lying on the ground outside her store with gunshot wounds. He said his shooter was from Friars Point, and when Williams's aunt arrived at the scene he told her "Little Clyde and them" had shot him while driving in a white car. Williams passed away at the scene. The following day, law enforcement arrested Friars Point residents Clyde Chatman, Reginald Cox, and John Battle for the murder. The vehicle, a white Crown Victoria, and the three suspects were tested for gunshot residue and DNA swabbing. Chatman had gunshot residue on his palms and residue was found in the car and on the other suspects. Chatman denied shooting Williams and claimed Williams attacked him and Battle shot Williams. Battle told law enforcement where they dumped the gun, but it was never recovered. All three were co-indicted for deliberate-design murder. Chatman was convicted by the trial court and sentenced to life in prison with eligibility for parole. Chatman filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, which the trial court denied. Chatman appealed.

ISSUES

Whether (1) allowing testimony concerning Battle's statements to police violated Chatman's right to confront witnesses, and (2) the evidence was insufficient to support the verdict or, in the alternative, the verdict was against the overwhelming weight of the evidence.

HOLDING

(1) Because Chatman's attorney failed to object at trial, this issue was waived. However, under the plain-error rule, the court reviewed whether the Confrontation Clause was violated and found that the Confrontation Clause did not apply because the statement was nontestimonial and constituted harmless error. (2) Because Williams was shot in the back, gunshot residue was on Chatman's palms, Williams identified the car and his killers before he died, and forensic evidence contradicts Chatman's claims, the evidence was sufficient to support the verdict. Furthermore, based on the evidence, allowing Chatman's conviction to stand would not sanction an unconscionable injustice. Therefore, the Court of Appeals affirmed the judgment of the Coahoma County Circuit Court.

Affirmed - 2016-KA-01285-COA (Oct. 17, 2017)

Opinion by Judge Barnes

Hon. Charles E. Webster (Coahoma County Circuit Court)

Justin T. Cook (Pub. Def. Office) for Appellant - Laura H. Tedder (Att'y Gen. Office) for Appellee

Briefed by [D. Hunter V. Robertson](#)

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ROBERTS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - CONVICTION - SUFFICIENT EVIDENCE - Evidence is sufficient to sustain a conviction if, 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

EXPERT TESTIMONY - CONFRONTATION RIGHTS - TOXICOLOGY - A supervisor or reviewer of a toxicology examination may testify in lieu of the primary analyst where the surrogate witness was actively involved in the production of the report and had intimate knowledge of the analyses even though he did not perform the tests first hand

CRIMINAL PROCEDURE - PROSECUTORIAL MISCONDUCT - CLOSING ARGUMENT - In order to determine whether a prosecution's "send a message" argument constitutes reversible error, the court must first ask two threshold questions: whether (1) the defense counsel objected to the statement at issue—or the statement was so inflammatory that the judge should have objected on his own motion—and (2) in light of surrounding circumstances, defense counsel invited the statement

CRIMINAL PROCEDURE - PROSECUTORIAL MISCONDUCT - *SPICER* TEST - If the threshold inquiries to a "send a message" argument are met, the court must apply the two-prong *Spicer* test: whether (1) the prosecutor's remarks were improper, and (2) the remarks prejudicially affected the accused's rights

FACTS

Mitchell Roberts was convicted of aggravated DUI after he operated a motor vehicle under the influence of Xanax and negligently caused the death of Arnold Altman Jr. At trial, a supervisor for the toxicology and implied-consent section of the Mississippi Forensics Lab testified as an expert regarding the results of Roberts's blood and urine tests, despite not having directly conducted the testing of Roberts's samples. During the rebuttal closing argument, the prosecutor made the following statements: "It ain't about black/white. It ain't about nothing except you good people in Lauderdale County letting him know that you're not going to allow him to drive impaired on the highway and kill our children." Roberts was sentenced to twenty-five years, with seven years suspended, in the custody of the Mississippi Department of Corrections, followed by five years post-release supervision. Roberts was also ordered to pay all court costs, a \$2,000 fine, and restitution in the amount of \$7,150. The trial court denied Roberts's post-trial motions. Roberts appealed.

ISSUES

Whether the trial court erred in (1) convicting Roberts without sufficient evidence to support the verdict; (2) allowing a technical reviewer to testify in lieu of the actual crime-lab analyst; (3) denying Roberts's motion to suppress due to insufficient probable cause to issue the search warrant; and (4) giving Roberts an unfair trial due to the prosecutor's improper closing arguments.

HOLDING

(1) Because any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt, there was sufficient evidence to support the verdict. (2) Because the Mississippi Supreme Court previously held that a reviewer may testify in lieu of the primary analyst where the surrogate witness was actively involved in the production of the report, the trial court did not err in allowing the reviewer to testify. (3) Because the totality of the circumstances indicate that substantial evidence supports a finding of probable cause necessary to test for drug and alcohol impairment, the trial court properly denied the motion to suppress. (4) Because the prosecutor's "send a message" closing argument was invited by defense counsel and was not so inflammatory that the circuit judge should have objected on his own motion, Roberts failed to meet the threshold inquiries for prosecutorial misconduct. The Court of Appeals also noted that, even if Roberts had met these threshold inquiries, the prosecutor's statement did satisfy the two-prong *Spicer* test. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2016-KA-00659-COA (Oct. 17, 2017)

Opinion by Presiding Judge Griffis

Hon. Lester F. Williamson Jr. (Lauderdale County Circuit Court)

George T. Holmes (Pub. Def. Office) for Appellant - Barbara W. Byrd (Att'y Gen. Office) for Appellee

Briefed by [Jacob Swatley](#)

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