

MISSISSIPPI SUPREME COURT DECISIONS – NOVEMBER 5, 2020**SUPREME COURT - CIVIL CASES****FOLSON V. FULCO****CIVIL - ELECTION CONTEST**

ELECTION LAW - ELECTION CONTEST - LEGAL VOTES - After a determination of which candidate received the greatest number of legal votes pursuant to Miss. Code Ann. § 23-15-951, the trial court must determine whether the election conformed to the will of the voters when a significant number of illegal votes has been received

ELECTION LAW - ELECTION CONTEST - SPECIAL ELECTION ORDERS - The two-pronged test set forth in *Russell* requires a special election when enough illegal votes were cast for the contestee to change the result of the election and when so many votes are disqualified that the will of the voters is impossible to discern

ELECTION LAW - ELECTION CONTEST - SPECIAL ELECTION ORDERS - A percentage of disqualified votes that is less than thirty percent may be deemed significant enough to warrant a special election if considered in conjunction with the result of the election being changed or doubts about whether the election conformed to the will of the voters

ELECTION LAW - CONDUCT OF ELECTION - SPECIAL ELECTIONS - Pursuant to Miss. Code Ann. § 23-15-833, special elections shall be held, conducted and returned in the same manner as general elections

FACTS

In the 2019 general election for sheriff of Yalobusha County, Mark Fulco was declared the winner by a margin of two votes. Luther Folson, Jr. contested the election, claiming that he would have won the election but for multiple absentee vote violations. The parties stipulated that illegal votes were commingled with legal votes. The trial court invalidated the absentee ballots from the precincts where intermingling occurred and ordered that a special election be held because the commingling of the illegal absentee votes with legal absentee votes made it impossible to discern the will of the voters. Fulco later filed a motion for clarification, asking the trial court to clarify its order and declare that only voters that were duly registered and qualified to vote in the precincts for the general election be allowed to vote in the special election. The trial court denied Fulco's motion for clarification. Folson appealed, and Fulco cross-appealed.

ISSUES

Whether (1) a special election was the appropriate remedy and (2) newly registered voters who had not voted in the general election should be allowed to vote in the court-ordered special election.

HOLDING

(1) Because the invalidation of votes due to illegal votes being commingled with legal votes was sufficient to change the result of the election and make the will of the voters unascertainable, the trial court did not err in ordering a special election. (2) Because the special election would be a new election, and because Mississippi law allows an elector to vote in any election as long as the elector satisfies the necessary voting requirements, the trial court did not err in denying Fulco's motion for clarification. Therefore, the Supreme Court affirmed the judgment of the Yalobusha County Circuit Court.

On Direct Appeal: Affirmed. On Cross Appeal: Affirmed - 2020-EC-00257-SCT (Nov. 5, 2020)

Opinion by Presiding Justice Kitchens

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

Willie Griffin for Appellant - Kent E. Smith & Thomas A. Waller for Appellee

Briefed by [Mckenzie Williamson](#)

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SUPREME COURT - CRIMINAL CASES

SCOTT V. STATE

CRIMINAL - FELONY

EVIDENCE - ADMISSIBILITY - PRIOR BAD ACTS - Evidence of other bad acts is admissible when the evidence completes the story and where the other bad act is so interrelated, or closely related, as to constitute a single transaction or occurrence

CRIMINAL LAW - INDICTMENT - ELEMENTS - Pursuant to *Maxie*, an indictment must set forth two elements: (1) an intent to commit the offense and (2) an overt act toward its commission

CRIMINAL LAW - INDICTMENT - NOTICE - An indictment that uses the word “attempt” is sufficient to put the defendant on notice that the attempt failed

FACTS

In August 2017, Louis Winston Scott impersonated an undercover police officer and pulled Amber Williams over. After pulling over, Scott exited his car, approached Williams’s driver side window, and placed a knife against Williams’s shoulder. Williams was able to drive away quickly. Once she was sure that she was not being followed, Williams reported the incident to the police and shared a warning on Facebook. Investigators heard about Williams’s incident and noted the similarities of a crime committed in Union County on the same night. Although the descriptions of the perpetrator’s appearance, dress, and vehicle were similar, the victim was kidnapped at knifepoint and raped in the Union County incident. After law enforcement received a tip that Scott was involved, a warrant was issued for Scott’s arrest. Scott was arrested and additional incriminating evidence was later discovered, including the fact that he downloaded an app called “Free Police Light App” on the night of the crimes. The jury convicted Scott of attempted kidnapping, and because Scott had two prior convictions for sexual battery, he was found to be a habitual offender. Scott was sentenced to life without the possibility of parole. Scott appealed.

ISSUES

Whether (1) the circuit court erred in admitting evidence of the second attack on the basis that it was more prejudicial than probative; (2) the indictment was defective because it failed to specifically allege Scott failed in the kidnapping attempt; and (3) the circuit court erred by constructively amending his indictment since the circuit court instructed the jury that it had to find Scott failed in his attempt.

HOLDING

(1) Because the evidence of the second attack told the complete story of the crime, was so interrelated to the crime in question, and the admitted evidence was not unfairly prejudicial, the claim that the circuit court erred in admitting evidence of the second attack was without merit. (2) Because it is not necessary to allege failure in the indictment for attempt, and because the indictment properly put Scott on notice of the allegations against him, the indictment was not defective. (3) Because the jury instruction properly stated the law, the Court of Appeals found no constructive amendment of Scott’s indictment and no error. Therefore, the Supreme Court affirmed the judgment of the Lee County Circuit Court.

Affirmed - 2019-KA-00928-SCT (Nov. 5, 2020)

Opinion by Justice Ishee

Hon. John R. White (Lee County Circuit Court)

George T. Holmes & Mollie Marie McMillin (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att’y Gen. Office) for Appellee

Briefed by [Schyler Burney](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – NOVEMBER 3, 2020
COURT OF APPEALS - CIVIL CASES

JONES V. OXFORD CTR. INC.

CIVIL - PERSONAL INJURY

TORTS - EMPLOYER DUTY - INDEPENDENT CONTRACTOR - An employer is under a duty to provide an independent contractor with a reasonably safe work environment or give warning of a danger

TORTS - NEGLIGENCE - EMPLOYER'S DUTY - An employer's duty to protect the independent contractor is absolved when the danger is inherent to, arises from, or is intimately connected to the work that the independent contractor is to perform

FACTS

In January 2013, Ron Jones, a dump truck operator and independent contractor, was instructed to pick up a load of gravel, take it to the Oxford Center, and spread the gravel around. While Jones was dumping and spreading the gravel, Jones's trailer began to tip over, which subsequently caused his cab to roll over onto its side. Jones was able to exit the cab, and he eventually went to a doctor for examination and treatment of his pain. Jones filed suit, alleging the Oxford Center negligently instructed him where to place and drive his vehicle, which caused the accident. Jones also alleged that the Oxford Center negligently and carelessly maintained the roadway and worksite. Following discovery, the Oxford Center filed a motion for summary judgment. The circuit court granted the Oxford Center's motion and dismissed Jones' suit with prejudice, finding that Jones presenting no evidence showing that the premises were in a defective or dangerous condition or that the Oxford Center had any notice, was aware, or should have been aware that the premises were dangerous at all. Jones presented no evidence to support any claim of negligence. Jones appealed.

ISSUE

Whether the trial court erred in granting summary judgment in favor of the Oxford Center.

HOLDING

(1) Because Jones's employer was absolved of any duty to protect Jones, because Jones was engaged in actions that were intimately connected with his work, and because Jones presented no evidence of any negligence or breach of duty, the trial court did not err in granting the Oxford Center's motion for summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Lafayette County Circuit Court.

Affirmed - 2019-CA-00343-COA (Nov. 3, 2020)

Opinion by Judge Westbrook

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

Carter Dobbs Jr. for Appellant - Wade G. Manor for Appellee

Briefed by [Ashley Pruitt](#)

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JUMPER V. OLIVE BRANCH FAMILY MED. CLINIC

CIVIL - MEDICAL MALPRACTICE

CIVIL PROCEDURE - MOTION PRACTICE - SUMMARY JUDGMENT - Miss. R. Civ. P. 56 requires summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law"

TORTS - MEDICAL MALPRACTICE - BURDEN - In a medical malpractice case, the burden is on the plaintiff to provide proof at trial, and in turn, at the summary judgment stage; the plaintiff must also offer significant and probative valued evidence to overcome a defendant's claim that no genuine issue of material fact exists at the time of summary judgment

CIVIL PROCEDURE - NEW TRIAL - DISCRETION - Whether to grant or deny a new trial motion is within the trial court's discretion and should only be granted if the trial court, upon review of the entire record, finds that a miscarriage of justice has occurred

FACTS

Dr. Ulric Duncan, a gastroenterologist with Delta Gastroenterology Center ("DGC") referred Annie Jumper to the Olive Branch Medical Clinic ("OBFMC"). Jumper saw Mary Grant, a nurse practitioner, and complained about epigastric pain and significant weight loss. Jumper returned to OBFMC and the clinic ordered a blood test, which showed a blood sugar level of 308. An OBFMC nurse testified that she notified Jumper of these results, which usually indicate a sign of diabetes and the need for further testing. At trial, Jumper disputed whether OBFMC notified her of these results. Jumper continued to attend appointments at DGC, where Dr. Duncan performed several invasive surgeries. Dr. Duncan never ordered Jumper's blood to be drawn or tested her for diabetes despite Jumper's family history of diabetes. Jumper was later hospitalized because of deep-vein thrombosis. The results showed that Jumper's blood sugar had been uncontrolled for at least six months. After the hospitalization, Jumper filed a complaint against OBFMC, Dr. Duncan, and Nurse Charla Wilson at OBFMC, alleging that their failure to diagnose her with diabetes deviated from the applicable standard of care, resulting in exacerbation of dental and eye problems, worsening her diabetic condition, and vascular injuries. Dr. Duncan filed a motion for summary judgment, claiming Jumper failed to identify an expert to provide proof as to the elements required to prove a medical negligence claim. The trial court granted summary judgment to Dr. Duncan, and OBFMC and Wilson proceeded to trial. Jumper filed a motion in limine to prevent OBFMC and Wilson from mentioning any other medical providers or placing blame on Dr. Duncan for failing to diagnose the diabetes. Specifically, Jumper sought to prevent them from "pointing the finger at an empty chair." The trial court denied the motion, but limited the defendants' cross-examination. OBFMC and Wilson were allowed to introduce evidence regarding Dr. Duncan's alleged breach of the standard of care through Jumper's expert witness, but the trial judge limited the evidence regarding Dr. Duncan's alleged negligence. The jury returned a verdict in favor of OBFMC and Wilson. Jumper timely filed a motion for a new trial, claiming that OBFMC and Wilson should have been prohibited from alleging Dr. Duncan was liable or breached the standard of care since they did not oppose Dr. Duncan's motion for summary judgment. The trial court denied the motion. Jumper appealed.

ISSUES

Whether the trial court erred in (1) granting summary judgment in favor of Dr. Duncan and (2) denying the motion for a new trial.

HOLDING

(1) Because Dr. Sutton's expert testimony failed to establish a prima facie case of medical negligence, the trial court properly granted summary judgment. (2) Because the trial court properly allowed a "wide-open" cross-examination of Jumper's expert witness and properly limited the admission of evidence to relevant matters, this issue was without merit. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Affirmed - 2019-CA-00035-COA (Nov. 3, 2020)

Opinion by Judge Greenlee

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

Daniel M. Czamanske Jr. for Appellant - Tommie Gregory Williams Jr., Tommie G Williams, & Kevin O'Neal Baskette for Appellees

Briefed by [Rachel Fewell](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

HILL V. STATE

CIVIL - POST CONVICTION RELIEF

POST-CONVICTION RELIEF - SENTENCING - MITIGATION - In considering whether to apply the departure from the sentence prescribed pursuant to Miss. Code Ann. § 41-29-139(h), the court shall conclude that (1) the offender was not a leader of the criminal enterprise; (2) the offender did not use violence or a weapon during the crime; (3) the offense did not result in a death or serious bodily injury of a person not a party to the criminal enterprise; and (4) the interests of justice are not served by the imposition of the prescribed mandatory sentence

POST-CONVICTION RELIEF - SENTENCING - DISCRETION - Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute

POST-CONVICTION RELIEF - SENTENCING - APPELLATE REVIEW - As a general rule, a sentence that does not exceed the maximum term allowed by statute cannot be disturbed on appeal

FACTS

In May 2016, Jamar Hill was indicted for trafficking cocaine, which was enhanced by possession of a firearm, conspiracy to traffic cocaine, and possession of less than thirty grams of marijuana. Hill pled guilty to all charges, but the trial court presented him another opportunity to speak before sentencing. Hill declined the offer, and the trial court sentenced him to twenty-five years in the custody of the Mississippi Department of Corrections (“MDOC”) for trafficking, with eight years suspended and seventeen to serve. He was also sentenced to five years in the MDOC’s custody for conspiracy, with all five years suspended. The circuit court ordered the sentences to run concurrently and placed Hill on five years of post-release supervision. Hill filed for post-conviction relief in March 2019, and the circuit court found that the motion had no merit. Hill appealed.

ISSUE

Whether the circuit court violated Hill’s right to due process when it denied his post-conviction relief motion without considering the mitigating factors outlined in Miss. Code Ann. § 41-29-139(h).

HOLDING

Because a weapon was present during the commission of Hill’s crime, because the trial court did not give Hill the maximum sentence, and because the trial court offered Hill an opportunity to seek more leniency at sentencing but he denied it, the circuit court did not deny Hill’s right to due process when it waived its discretionary authority to mitigate the sentence. Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit Court.

Affirmed - 2019-CA-01429-COA (Nov. 3, 2020)

Opinion by Judge Westbrook

Hon. David H. Strong Jr. (Pike County Circuit Court)

Dennis Charles Sweet IV for Appellant - Lauren Gabrielle Cantrell (Att’y Gen. Office) for Appellee

Briefed by [Jacob D. Hamm](#)

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COURT OF APPEALS - CRIMINAL CASES

LOTT V. STATE

CRIMINAL - FELONY

EVIDENCE - WITNESSES - CREDIBILITY - The credibility of a witness is solely for the jury to weigh and consider; the jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed

EVIDENCE - IMPEACHMENT - INCONSISTENT TESTIMONY - The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity

FACTS

William Cromwell, acting as a confidential informant (“CI”) in exchange for consideration on his pending drug possession charges, met with Twelfth Circuit Narcotics Enforcement Team (“Metro Narcotics”) agents to discuss a plan to purchase methamphetamine from Thomas Lott. The agents searched Cromwell’s person and car to ensure he had no drugs, paraphernalia, or other evidence in his possession. The agents gave Cromwell seventy-one dollars in marked currency for the purchase and a camera to record the transaction. Because agents testified that the camera was unreliable and incapable of recording for over eighty minutes, Cromwell was also given a cell phone. Agent Brewer followed Cromwell to Lott’s house, confirmed that Cromwell’s car was parked at Lott’s house, and moved to a stake-out position. The surveillance equipment ultimately failed and, after its failure, Agent Brewer testified that he and a patrol deputy went to Lott’s house to ensure that Cromwell was safe. Although the equipment failed, it captured Lott’s and Cromwell’s discussion regarding the sale of one gram of methamphetamine for fifty dollars, which was played for the jury. However, the equipment did not record the transfer of the methamphetamine, and Cromwell’s written statement contradicted his testimony at trial. At trial, Cromwell testified that he did not see who brought the drugs to Lott, but he was told that it was “a guy named Arm.” Cromwell then testified that he gave Lott five ten-dollar bills and then Lott handed him a gram of methamphetamine. In his written statement, which was read to the jury at trial, Cromwell stated that “Armonzo Hilton, AKA, ‘Arm’ handed the meth to [Lott].” After the jury trial, Lott was convicted of one count of selling a controlled substance and sentenced to serve eight years. Lott filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial. The Forrest County Circuit Court denied the motion. Lott appealed.

ISSUE

Whether Cromwell’s testimony was unreliable and could not sustain Lott’s conviction for the sale of a controlled substance.

HOLDING

Because the jury had the opportunity to evaluate Cromwell’s testimony about his prior arrests and his arrangement with Metro Narcotics as a confidential informant, because the verdict against Lott was not against the overwhelming weight of the evidence, and because the jury was charged with the responsibility of weighing conflicting evidence and witness credibility, reasonable jurors could have found Lott guilty with the evidence presented at trial and affirming the judgment would not sanction an unconscionable injustice. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2019-KA-01138-COA (Nov. 3, 2020)

Opinion by Judge Westbrook

Hon. Jon Mark Weathers (Forrest County Circuit Court)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth & Ashley Lauren Sulser (Att’y Gen. Office) for Appellee

Briefed by [Mackinlee Rogers](#)

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