

MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 5, 2021**COURT OF APPEALS - CIVIL CASES****ALEXANDER V. MUSGROVE****CIVIL - REAL PROPERTY**

PROPERTY - REDEMPTION - NOTICE - Miss. Code Ann. § 27-43-3 addresses the specific way in which redemption notice must be given to the record owner, namely by service of personal notice, mailing by registered or certified mail, and by publication

CIVIL PROCEDURE - AMENDING PLEADINGS - CONSOLIDATION - Miss. R. Civ. P. 42(a) provides that when “actions involving a common question of law or fact are pending before the court, it may order . . . the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay”

APPELLATE PROCEDURE - REMEDIES - ATTORNEY'S FEES - Miss. R. App. P. 36(c) provides that the only costs that may be assessed to the appellee are “costs incurred in the preparation and transmission of the record, the costs of the reporter’s transcript, if necessary, for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the appeal”

FACTS

In 1982, Lib Vanderford conveyed forty acres of property in Lawrence County to Patsy Phillips Musgrove, but reserved in a life estate all timber on the property to himself. In 1990, James Alexander purchased the property by tax sale because property taxes had not been paid. In 1993, Sherrod Rayborn, the Lawrence County Chancery Court clerk, conveyed a tax deed to Alexander. Soon after the deed was conveyed to Alexander, Musgrove filed a complaint in the Lawrence County Chancery Court, seeking to cancel the tax deed and to confirm title in her and asserting that the 1990 tax sale was void because Rayborn failed to comply with redemption-notice provisions set forth in Miss. Code Ann. § 27-43-3. In his answer, Rayborn admitted that no notice had been properly issued to the sheriff of Musgrove’s county, no certified copy of the notice had been mailed to Musgrove, and no notice had been properly published regarding the maturing tax sale. While the lawsuit was pending, Alexander again purchased the property in 1993 at a tax sale after 1992 property taxes had not been paid. Alexander would not receive a tax deed from the sale until 1998. In 1994, Alexander cleared and sold a portion of timber on the disputed property until Musgrove and Vanderford demanded he cease all operations. In response to the 1998 tax deed, Musgrove filed an amended complaint to set the deed aside and to consolidate her case with a timber interpleader action that the Vanderford estate had filed in 1995. After his passing and during litigation, Vanderford’s heirs signed quitclaim deeds to their timber rights to Musgrove. Musgrove filed a motion for summary judgment in 2006, which was granted in light of Rayborn’s proven failure to meet the redemption-notice requirements in Miss. Code Ann. § 27-43-3. On Alexander’s appeal in 2011, the Court of Appeals found that the Lawrence County Chancery Court had only addressed the issue of the first tax deed without regard to the second tax deed, the timber dispute, and certain reimbursements to Alexander. As a result, the Court of Appeals reversed and remanded the case. In 2017, the remanded case was taken to trial, where Musgrove’s counsel presented evidence showing Rayborn had again failed to meet the statutory requirements for redemption notice in the second tax sale. In 2019, the Lawrence County Chancery Court, in its Judgment Upon Remand, found that the 1998 tax deed was void for lack of proper notice under Miss. Code Ann. § 27-43-3, Musgrove was entitled to timber proceeds, and Alexander was entitled to reimbursements for the property taxes he paid. Alexander appealed.

ISSUES

Whether the chancery court erred in (1) determining that Musgrove was the proper party to be notified of a statutory right of redemption for the two tax sales; (2) issuing the Judgment Upon Remand before determining the owner of the

timber interest; (3) consolidating Musgrove's action with Vanderford's timber interpleader action; (4) awarding the timber proceeds to Musgrove; (5) calculating Alexander's reimbursements for paid property taxes, plus interest; and (6) failing to include Alexander's attorney's fees as appeal costs relating to his first appeal.

HOLDING

(1) Because the two tax deeds were voided due to statutory redemption notice deficiencies, Musgrove was the rightful owner of the property. (2) Because Alexander failed to schedule a hearing and provide notice to Musgrove regarding the question of timber interest, and because Vanderford's heirs had already signed quitclaim timber interest deeds to Musgrove, the Judgment Upon Remand was not prematurely issued. (3) Because the two actions plainly involved a common question of law or fact, the actions were properly consolidated. (4) Because Musgrove owned the timber rights, Musgrove was entitled to the timber proceeds. (5) Because substantial credible evidence reflected carefully itemized receipts and proper interest rate values, Alexander's reimbursements were properly calculated. (6) Because costs of appeal do not include attorney's fees, and because Alexander failed to file anything related to recouping attorney's fees, the issue was procedurally barred on appeal. Therefore, the Court of Appeals affirmed the judgment of the Lawrence County Chancery Court.

Affirmed - 2019-CP-01364-COA (Jan. 5, 2020)

Opinion by Presiding Judge Carlton

Hon. David Shoemake (Lawrence County Chancery Court)

Pro se for Appellant - Joe Robert Norton IV for Appellee

Briefed by [Rod Bridges](#)

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BUFFINGTON V. STATE

CIVIL - OTHER

CONTEMPT OF COURT - CRIMINAL CONTEMPT - DIRECT CONTEMPT - Direct criminal contempt involves words spoken or actions committed in the presence of the court; the punishment for direct contempt may be meted out instantly by the judge in whose presence the offensive conduct was committed

CONTEMPT OF COURT - CRIMINAL CONTEMPT - CONSTRUCTIVE CONTEMPT - Constructive contempt involves actions which are committed outside the presence of the court; defendants charged with constructive contempt must be provided with procedural due process safeguards, including a specification of charges, notice, and a hearing

FACTS

After taking office in 2011, Judge David Shoemake presided over the child-custody matters of Lauren Blakeney and Verba Shoemaker. J. Larry Buffington began representing Blakeney in December 2018. On December 26, 2018 Buffington filed a petition that included an assertion that the child's best interest had been ignored. In April 2019, Buffington filed a civil lawsuit against Judge Shoemake on behalf of clients he represented in a different matter. On May 3, 2019, citing the civil lawsuit as the basis, Buffington filed a motion for Judge Shoemake to recuse himself from the custody dispute between Blakeney and Shoemaker. On May 5, 2019, Judge Shoemake was served with a summons for the civil lawsuit. The next day, Judge Shoemake conducted a pretrial conference on the ongoing custody-child matter between Blakeney and Shoemaker. During the conference, Judge Shoemake inquired about the language Buffington used in the December petition. The discussion yielded disagreements and Judge Shoemake instructed Buffington to keep his voice down, warning him that he had crossed the line and was being disrespectful. Buffington referenced the recusal motion, although Judge Shoemake had not yet been served with the it, and Judge Shoemake warned Buffington he was crossing the line by bringing up outside matters. Judge Shoemake told Buffington that he was being disrespectful to the court, disrupting the forum, and was trying to impugn the integrity of the court. After Buffington made further comments pertaining to their disagreement, Judge Shoemake held Buffington in direct criminal contempt for his disrespectful conduct during the pretrial proceedings. In doing so, Judge Shoemake read into the record several prior

instances where Buffington’s behavior had been argumentative, disrespectful, and contemptuous. Judge Shoemake specified that his recitation of Buffington’s prior conduct was for background purposes and did not serve as the basis for the criminal-contempt holding. On May 9, 2019 Judge Shoemake entered an order nunc pro tunc to May 6 and ordered Buffington to serve twenty-four hours in the Smith County jail and set bail at \$1,000. Buffington appealed.

ISSUE

Whether the trial court erred in holding Buffington in direct criminal contempt.

HOLDING

Because much of the alleged contemptuous conduct that Judge Shoemake referenced occurred outside of his presence, and thus fell under the classification of constructive criminal contempt, the trial court erred in holding Buffington in direct criminal contempt. Therefore, the Court of Appeals reversed and remanded the judgment of the Smith County Chancery Court.

Reversed & Remanded - 2019-CA-00880-COA (Jan. 5, 2021)

Opinion by Judge Greenlee

Hon. David Shoemake (Smith County Chancery Court)

Christopher Randall Purdum for Appellant - Matthew Wyatt Walton & Ashley Sulser (Att’y Gen. Office) for Appellee

Briefed by [Glory Crocco](#)

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JONES V. UNIV. OF MISS. MED. CTR.

CIVIL - WORKERS' COMPENSATION

EVIDENCE - DISCLOSURES - EX PARTE COMMUNICATIONS - The two-prong rule pertaining to ex parte communications states that (1) notice should be given to the plaintiff in order for communication to occur between the treating physician and the defense attorney and (2) the plaintiff must acquiesce to that communication

EVIDENCE - WORKERS' COMPENSATION - PATIENT-PHYSICIAN PRIVILEGE - Miss. Code Ann. § 71-3-15(6) provides that, under workers’ compensation law, the patient-physician privilege is removed for medical and surgical treatment

CIVIL PROCEDURE - NOTICE - TESTIMONY - Miss. R. Civ. P. 31(a) allows a party to take the testimony of any person by written questions upon service of notice on the opposing party

FACTS

Frances Jones was a respiratory therapist employed by the University of Mississippi Medical Center. In July 2016, Jones allegedly suffered a work-related injury to her back, neck, and wrist when a chair at work began to collapse on her. Her employer and its insurance carrier (collectively, “UMMC”) admitted the compensability of the injury. The dispute arose around the extent of disability resulting from Jones’s work injury. Jones’s first attorney referred her to Dr. Michael Patterson, who placed her at maximum medical improvement (“MMI”) in February 2017. Jones admitted to Dr. Patterson that she had been in a car accident in December 2016. Dr. Patterson opined that after her work injury, but before her car accident, there were no conditions that would have precluded Jones from working at her prior level of work, that her work injury was “trivial at best” and her injury was related more to her “morbid obesity and general deconditioning.” Dr. Phillip Blount subsequently treated Jones for an employer medical examination, and he also stated that Jones had reached MMI from her work injury and that she could return to previous activity levels. Three consecutive attorneys moved to withdraw as her counsel. In May 2019, Jones, representing herself, filed a “motion to quash” seeking to exclude some of Dr. Patterson’s report. An administrative judge entered an order finding that Jones did not sustain any permanent occupational disability due to her work injury and Jones did not require further treatment for the work injury. Jones appealed the administrative judge’s decision to the Mississippi Workers’ Compensation Commission (“Commission”). The Commission entered an order affirming the administrative judge’s order. Jones appealed.

ISSUES

Whether (1) the administrative judge’s decision, which the Commission adopted, erred in considering medical evidence obtained from Jones’s treating physician through an alleged ex parte contact between UMMC’s lawyer and Jones’s treating physician; (2) Jones was “ambushed” by Dr. Patterson’s letter report and the administrative judge erred by allowing the hearing to continue without Dr. Patterson’s deposition or appearance in court for cross examination of the letter; and (3) the Commission’s decision, adopting in full the administrative judge’s detailed order, was not supported by substantial evidence.

HOLDING

(1) Because under workers’ compensation law, the patient-physician privilege is removed for medical and surgical treatment, because notice was given to Jones for communication to occur between UMMC’s counsel and Dr. Patterson, and because Jones’ acquiesced to that communication through her attorney, the administrative judge’s decision considering medical evidence through an alleged ex parte contact was not in error. (2) Because Jones and her attorneys had ample time to request a second medical opinion, depose Dr. Patterson, or send Dr. Patterson an additional questionnaire, this issue was found to be without merit. (3) Because the administrative judge thoroughly questioned Jones at the hearing, and because it was plain that all the evidence before the administrative judge was analyzed, the Commission’s order was supported by substantial evidence. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers’ Compensation.

Affirmed - 2020-WC-00412-COA (Jan. 5, 2021)

Opinion by Presiding Judge Carlton

Mississippi Workers’ Compensation Commission

Pro se for Appellant - Courtney Titus Davis & Justin Drewery Hasley for Appellees

Briefed by [MaryScott Polk](#)

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PATTERSON V. MISS. DEP’T OF EMP’T. SEC.

CIVIL - STATE BOARDS & AGENCIES

EMPLOYMENT LAW - UNEMPLOYMENT BENEFITS - DISQUALIFICATION - An employee is disqualified from receiving unemployment benefits if he or she left work voluntarily without good cause

EMPLOYMENT LAW - REDUCTIONS - GOOD CAUSE - A substantial reduction in earnings is generally regarded as good cause for leaving one’s employment, but the surrounding circumstances should be considered

EMPLOYMENT LAW - REDUCTIONS - SUBSTANTIAL AMOUNT - The amount considered “substantial” for good cause is a pay reduction where the employee could no longer continue working and pay necessary living expenses, such as rent and childcare

FACTS

Sonya Patterson was employed by Valerie Scott Insurance Agency for five days. Patterson contended that before she started her employment, Valerie and Donnell Scott verbally told Patterson she would be hired as the office manager and her pay range would be from sixteen to seventeen dollars per hour, but nothing was put in writing at the time. After working five days, Patterson received an offer letter from Valerie stating her job title was “agent,” and her pay was \$14.35 per hour. Patterson resigned because her job title and pay rate were not what she was initially told, and she claimed the work environment was “hostile” because Valerie mentioned a past domestic-violence incident involving Patterson several times. Patterson filed an initial claim for unemployment benefits. During a Mississippi Department of Employment Security’s (“MDES”) interview, Patterson claimed Valerie fired her and that Patterson was constantly harassed, but maintained she did not quit. During Valerie’s MDES interview, she claimed Patterson quit and denied that anyone treated Patterson rudely or harassed her. The claims examiner found Patterson voluntarily quit her job without good cause, disqualifying Patterson for unemployment benefits. Patterson appealed. During a telephonic hearing between the administrative law judge (“ALJ”) and Patterson, Patterson testified that if the title and pay had been what Donnell verbally offered, she would not have quit. Patterson admitted Valerie told her that her starting pay could

increase and further admitted she was never under the threat of discharge. The ALJ affirmed the claim examiner's decision finding Patterson voluntarily left her employment. The MDES Board of Review ("Board") affirmed the ALJ's findings. On appeal, the Alcorn County Circuit Court affirmed the Board's decision. Patterson appealed.

ISSUES

Whether Patterson (1) was terminated; (2) had good cause to leave her job voluntarily; and (3) was improperly denied unemployment benefits.

HOLDING

(1) Because Patterson admitted she would have stayed with the agency had her title and pay been what Donnell promised, and because she was under no threat of discharge, substantial evidence supported that Patterson voluntarily left her job. (2) Because Patterson's domestic violence incident was a matter of public record, and because it was unclear whether Patterson expressed her offense about the comments to her or if they continued thereafter, substantial evidence supported that the isolated comments of the incident did not rise to the level of good cause to leave her employment. (3) Because Patterson just started her job and was told it was merely a starting salary, with the possibility of a raise after a positive evaluation, the 10.5% earnings reduction was not considered a substantial reduction to justify unemployment benefits. Therefore, the Court of Appeals affirmed the judgment of the Alcorn County Circuit Court.

Affirmed - 2019-CC-00977-COA (Jan. 5, 2021)

Opinion by Chief Judge Barnes

Hon. Kelly Lee Mims (Alcorn County Circuit Court)

Pro se for Appellant - Albert B. White for Appellees

Briefed by [Lynette Potter](#)

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ROGERS V. THAMES

CIVIL - PERSONAL INJURY

APPELLATE PROCEDURE - ISSUES - WAIVER - Miss. R. App. P. 28(a)(3) provides that an issue not distinctly identified in the opening brief shall be waived and not argued by counsel

EVIDENCE - ADMISSIBILITY - COURT'S DISCRETION - Relevancy and admissibility of evidence are largely within the trial court's discretion and reversal may be had only where that discretion has been abused

CIVIL PROCEDURE - JURY SELECTION - VOIR DIRE - Voir dire is presumed sufficient to ensure a fair and impartial jury; to overcome this presumption, a party must present evidence indicating that the jury was not fair and impartial and show that prejudice resulted from the circuit court's handling of the voir dire

CRIMINAL PROCEDURE - NEW TRIAL - SUFFICIENCY OF EVIDENCE - A new trial will not be ordered unless the court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice; this high standard is necessary because any factual disputes are properly resolved by the jury, not by an appellate court

FACTS

In May 2015, Robert Thames's vehicle collided with the rear of Michael Rogers's truck while Rogers was stopped at a red light in Hattiesburg. The impact caused Rogers's head to go through the rear window of his truck. Rogers declined medical treatment and drove his truck home from the scene. The next day, Rogers went to the emergency room for back and neck pain. In March 2016, Rogers sued Thames, alleging negligence and seeking damages for medical bills, pain and suffering, emotional distress, and lost wages. In his March 2017 deposition, Thames stated that he thought Rogers was going to proceed through the yellow light, but once he noticed that Rogers was stopping, he hit his brakes. Thames admitted that he knew his brakes were not in the best shape. In July 2017, Thames filed a stipulation of negligence, in which he stipulated that his own negligence was the proximate cause of the accident. Thames also filed a motion in limine to exclude the evidence regarding his brakes, arguing that the evidence was irrelevant and that its

privative value was prejudicial. Rogers's complaint against Thames did not claim punitive damages. In July 2017, Rogers responded to the motion in limine, arguing that the evidence was relevant to the issue of punitive damages. Rogers did not amend his complaint to include punitive damages. In September 2018, the case proceeded to trial. Prior to trial, the judge heard arguments on the motion in limine and excluded the evidence regarding the brakes. The parties then proceeded to jury selection. At the conclusion of jury selection, Rogers moved to amend his complaint to include a claim for punitive damages. The judge denied the motion, noting that Rogers failed to do so in the eighteen months since Thames's deposition. Rogers showed that he incurred \$7,388.25 in medical expenses and did not provide any proof of lost wages. The jury instruction included the direction to consider the stipulation and only to determine the amount of damages to award. The jury found in favor of Rogers and awarded \$13,000. Rogers appealed.

ISSUES

Whether the trial judge erred by (1) denying Rogers's motion to amend the complaint; (2) excluding evidence regarding Thames's brakes; (3) denying challenges for cause during jury selection; and (4) denying Rogers's motion for a new trial

HOLDING

(1) Because Rogers raised the issue that the trial judge erred by denying his motion to amend the complaint for the first time in his reply brief, and because Rogers did not explain why he waited over two years to amend his complaint, Rogers waived the issue on appeal and it was without merit. (2) Because the jury instructions stated the Thames's negligence was the sole proximate cause of the accident and charged the jury with determining compensatory damages, because the \$13,000 jury verdict exceeded Rogers's total medical bills, and because the excluded evidence would not have proven any additional compensatory damages, the exclusion of the evidence was harmless. (3) Because a juror's views alone do not constitute grounds for a challenge, and because there was no evidence that any of the challenged jurors were partial, prejudiced, or unwilling or unable to follow the law, the trial judge did not abuse his discretion in denying Rogers's challenges during jury selection. (4) Because the jury award exceeded Rogers's medical expenses by \$5,611.75, the jury award was not contrary to the overwhelming weight of the evidence and the trial judge did not abuse his discretion in denying the motion for new trial. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

DISSENT

Judge McDonald argued the majority disregarded the fact that the stipulation of negligence amounted to a unilateral filing because Rogers never signed or accepted the stipulation as required by law, which created a domino effect of erroneous rulings. She also asserted that because the trial court relied on the stipulation of negligence, the trial court abused its discretion by excluding evidence of Thames's knowledge of the breaks and committed plain error by denying Rogers's motion to amend his complaint. Finally, she stated that the trial court unduly restricted Rogers's presentation of his case.

Affirmed - 2019-CA-00583-COA (Jan. 5, 2021)

En Banc Opinion by Presiding Judge Wilson - Dissent by Judge McDonald

Hon. Jon Mark Weathers (Forrest County Circuit Court)

Graham Patrick Carner, Raju Aundre' Branson, & Jessica Elizabeth Murray for Appellant - Trace D. McRaney for Appellee

Briefed by [Caroline Heavey](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

ALLEN V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL PROCEDURE - CRIMINAL INFORMATION - ESSENTIAL ELEMENTS - Under *Spearman*, omissions of phrases from relevant statutes for charges does not render a criminal information defective if the

information contained the essential elements of the charge and the defendant was given adequate notice of the charges against him

CRIMINAL PROCEDURE - PRELIMINARY HEARING - PROCEDURAL BAR - Under *Jones*, where the defendant fails to raise the issue at his revocation hearing, the issue is procedurally barred from review

CRIMINAL PROCEDURE - PRELIMINARY HEARING - DENIAL - Under *Jones*, if a defendant is denied a preliminary hearing, he must show that prejudice resulted from that denial

CRIMINAL PROCEDURE - PROBATION REVOCATION - DUE PROCESS - Probation revocation hearings only require minimum due process standards, which include (1) written notice of the claimed violations; (2) disclosure to the probationer of the evidence against him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless a hearing officer finds good cause for not allowing such confrontation); (5) a neutral and detached hearing body or officer; and (6) a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation

FACTS

Jeremy Allen stole two cars in 2010. Following his arrest, he waived an indictment for two counts of auto theft and plead guilty to the charges. The trial court sentenced Allen to a total of twenty years in custody on both counts combined. However, the trial court suspended twelve of those years and placed him on post-release supervision (“PRS”) so long as he complied with the conditions set forth, such as reporting to his probation officer, paying his supervision fees, abstaining from drug use, and not committing an offense against the laws of any state. Allen served his sentence and was released from prison to start his five-year PRS. In 2016, the State petitioned to revoke both his suspended sentence and PRS. The petition alleged Allen violated several PRS terms, and he was indicted on a fondling charge in 2015. Following this petition, Allen signed a form waiving his rights to a post-release revocation hearing. Allen was given a revocation hearing on the charges. The claims listed in the petition were read, and Allen responded that he understood the allegations against him. After being instructed that Allen had the right to require the State to prove he violated his probation, the trial court further assured him that no action would be taken against him unless he admitted to such or unless the State proved he had. When asked, Allen elected not to question the State’s witness. During the hearing, Allen admitted he violated the terms of his probation, but denied fondling a minor or attempting to escape custody. Despite such denial, Allen chose not to testify. The trial court found that Allen violated the terms of his probation and thus revoked his PRS and restored his previously suspended twelve-year sentence. The trial court did not include its specific reasons for revoking Allen’s PRS in its final written order. Allen filed a post-conviction relief petition. The trial court denied the petition, finding after considering the relief requested, it plainly appeared on the face of the petitions, exhibits, and prior proceedings that he was not entitled to any relief on either the conviction claim or the revocation claim. Allen appealed.

ISSUES

Whether (1) Allen’s criminal information was defective; (2) the issue of the denial a preliminary hearing was barred; and (3) Allen’s due process rights were violated.

HOLDING

(1) Because the criminal information contained the essential elements of auto theft, and because Allen was given adequate notice of the charges against him, this issue was without merit. (2) Because Allen failed to raise the issue of the trial court’s denial of his preliminary hearing at his revocation hearing, and because the denial did not result in any prejudice against Allen, this issue was waived, procedurally barred, and without merit. (3) Because Allen was afforded adequate procedural protections during his revocation hearing and was fully informed of the charges against him, the trial court did not deny Allen due process by omitting reasons for his revocation in its final order. Therefore, the Court of Appeals affirmed the judgment of the Union County Circuit Court.

Affirmed - 2019-CP-01607-COA (Jan. 5, 2021)

Opinion by Judge McCarty

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

Pro se for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Claire Scott](#)

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COURT OF APPEALS - CRIMINAL CASES

FRANKLIN V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - CONSTRUCTIVE POSSESSION - EVIDENCE - There must be evidence, in addition to physical proximity, showing the defendant consciously exercised control over the contraband, and absent this evidence, a finding of constructive possession cannot be sustained

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - NARROWER INSTRUCTION - A defendant's request for a narrower instruction is not mandated if the court's instruction is a correct statement of the law and sufficiently instructed the jury of the elements of the offense

EVIDENCE - ADMISSABILITY - PREJUDICIAL EVIDENCE - Introduction of relevant evidence should only be barred when its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"

FACTS

Mario Franklin was found guilty of possessing a Schedule II drug with intent to sell and distribute. A federal agent flagged a package that was headed to Canton, Mississippi from California and a drug dog alerted on the package. The agent and sheriff's office planned a controlled delivery where the agent disguised himself as a postal carrier and delivered the package to Franklin. Franklin informed the agent that the recipient, fictitious name, was not there. The agent met Shanteka Morris at the door and Morris informed the agent that the package wasn't for her. Franklin and Morris were subsequently arrested in the living room for drug possession. After performing a pat-down, police confiscated three phones from Franklin's pockets. The police searched the phones and discovered "selfies" of Franklin, pictures of large bags of marijuana on a digital scale, and text messages referencing slang discussions of drug-dealing transactions. As police were arresting Morris, Franklin stated, "she had nothing to do with this. It's all mine." During a pre-trial conference, Franklin moved for exclusion of the incriminating cell phone photographs, arguing they were more prejudicial than probative because he resided in California where marijuana was legal. The trial court denied Franklin's motion to suppress and allowed admission of the photographs. The trial court instructed the jury that they were to ensure sufficient evidence existed to find Franklin was aware of the presence and character of the controlled substance and was intentionally and consciously in possession of the substance. The instruction also explained that constructive possession need not be physical possession, but may be shown by establishing the substance involved was subject to the defendant's control. Franklin requested a jury instruction to explain that mere proximity to the contraband was not enough to convict of constructive possession, but the instruction was refused. Franklin was sentenced to forty years in custody, with twenty to serve in prison, followed by five of post-release supervision. Franklin appealed.

ISSUES

Whether (1) there was sufficient evidence to support Franklin's constructive possession conviction; (2) the trial court erred in refusing his jury instruction on the charge; and (3) the trial court erred in allowing the admission of incriminating photos from his cell phone.

HOLDING

(1) Because Franklin stayed at the apartment from time to time, occasionally paid rent, and had his own key, and because Franklin lived at the apartment complex listed on the package's sender's address and testified that Morris "had nothing to do with this. It's all mine," there was sufficient evidence to support Franklin's constructive possession conviction. (2) Because the trial court's jury instruction stated the law of the case and created no injustice, the trial court did not err in refusing Franklin's jury instruction. (3) Because the pictures introduced at trial showed a massive quantity of bagged marijuana being weighed on a scale and supported the State's notion that Franklin possessed an intent to sell marijuana, the trial court did not err in allowing the admission of the photos from Franklin's cell phone. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2019-KA-01133-COA (Jan. 5, 2021)

Opinion by Judge McCarty

Hon. Steve S. Ratcliff III (Madison County Circuit Court)

Kevin Dale Camp for Appellant - Alicia Marie Ainsworth, Meta S. Copeland, & Ashley Lauren Sulser (Att’y Gen. Office) for Appellee

Briefed by [William “Jack” Simpson](#)

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TUBWELL V. STATE

CRIMINAL - MISDEMEANOR

APPELLATE PROCEDURE - COURT RECORDS - NOTICE - After the record has been completed, the trial court clerk should give notice to the parties that the record is ready to be reviewed before transferring it to the appellate court

APPELLATE PROCEDURE - BRIEF FILING - DEADLINE - The time for filing an appellate brief begins whether or not there is notice to the appellant

FACTS

In December 2016, Joe Tubwell was issued a uniform summons for improper vehicle parking at his Southaven residence. Tubwell had received numerous prior warnings beginning in October 2016. The Southaven Municipal Court ruled he was in violation of city parking ordinances. Tubwell appeared to the county court and was found guilty, representing himself. He then appealed to the Desoto County Circuit Court and again represented himself. The county court transcripts were sent to the circuit court, but there was no indication that the county court notified Tubwell or the city prosecutor that the record was ready to be reviewed. Tubwell reviewed the record once it arrived at the circuit court and filed an acknowledgement that he had reviewed the record and that it was accurate in April 2019. In June 2019, the circuit court entered an order notifying Tubwell that his appeal was deficient because he had not filed his appellate brief. The circuit court explained that the deadline was May 18, 2019, and he was given a fourteen-day period to rectify this. Instead of filing his brief, Tubwell filed a motion for a briefing schedule under Miss. R. App. P. 31. Tubwell asserted that after he acknowledged the appellate record on April 10, the circuit court did not issue a briefing schedule, and that he had no way of knowing when his brief was due as a result. Tubwell also argued he had “a right to be informed of the briefing schedule, in writing, before the court imposed a fourteen-day deadline to cure [the] deficiency.” In July 2019, the circuit court dismissed Tubwell’s appeal with prejudice, finding that the Mississippi Rules of Appellate Procedure provide for notice of a briefing schedule, but the clerk’s failure to give notice does not excuse a defendant’s delay in filing his brief. Tubwell appealed.

ISSUE

Whether the circuit court erred in dismissing Tubwell’s appeal with prejudice for failure to file a brief because it did not issue a briefing schedule under Miss. R. App. P. 31(a).

HOLDING

Because the time for filing the appellate brief begins whether or not there is notice to the appellant, and because the circuit court gave Tubwell fourteen days to file his brief but he failed to do so, the circuit court did not err in dismissing Tubwell’s appeal with prejudice. Therefore, the Court of Appeals affirmed the judgment of the Desoto County Circuit Court.

Affirmed - 2019-KM-01177-COA (Jan. 5, 2021)

Opinion by Chief Judge Barnes

Hon. Celeste Embrey Wilson (Desoto County Circuit Court)

Pro se for Appellant - Barabara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Brie Mansoor](#)

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