

MISSISSIPPI SUPREME COURT DECISIONS – JANUARY 21, 2021**SUPREME COURT - CRIMINAL CASES****HAMPTON V. STATE****CRIMINAL - FELONY**

CRIMINAL PROCEDURE - ABSENCE - WAIVER - Pursuant to Miss. R. Crim. Pro. Rule 10.1(b)(1)(B), a criminal defendant's absence from his or her trial is considered waived "if the court finds that such absence was voluntary and constitutes a knowing or intelligent waiver of the right to be present"

CRIMINAL PROCEDURE - UNEXCUSED DEFENDANT - TRIAL COURT DISCRETION - Pursuant to Miss. R. Crim. P. 10.1(d), "the court, by order *may* direct law enforcement officers forthwith to bring the defendant before court"

EVIDENCE - CIRCUMSTANTIAL EVIDENCE - STEELE RULE - Pursuant to *Steele v. State*, the State's evidence is legally insufficient if it does nothing more than establish a "probability of guilt" and does not "invest mere circumstances with the force of truth"

FACTS

In March 2015, Kadedria Hampton moved in with her boyfriend, Rickey Taylor. Taylor's child from another relationship, LRJ, and Hampton's two children from another relationship also lived with them. Shortly after the move, Hampton gave birth to Taylor's child. A few months after the birth of the baby, LRJ was hospitalized because of a head injury and two swollen eyes. In examining LRJ's injuries, the nurse noticed that LRJ was very frail and looked malnourished. Because of the suspicious injuries and LRJ's frail appearance, law enforcement and Child Protective Services ("CPS") were contacted. Stephanie Smith, a CPS family-protection specialist, opened an investigation into LRJ's suspected abuse. Smith conducted several on-site visits to the home and monitored LRJ's health and behavior. In July 2015, Smith made another in-home visit and found LRJ asleep on the bed while the other children were playing. LRJ told Smith that his arms and legs hurt and that he was very hungry. Smith examined LRJ's legs and arms and found burn marks on his legs. LRJ was immediately admitted to the hospital and law enforcement was contacted. After the incident, Detective Turner interviewed both Hampton and Taylor separately about LRJ's injuries and, subsequently, charged both of them with child abuse and neglect. On the second day of Hampton's trial, Hampton was not present in the room when her trial was scheduled to resume. The trial judge inquired into Hampton's whereabouts and waited thirty minutes for Hampton before proceeding with the trial without Hampton. Some fifteen minutes after the trial resumed, Hampton entered the courtroom and explained that her tardiness was due to her child's sickness and oversleeping. During the trial, the State presented evidence showing that LRJ suffered from second-degree burns on his arm and legs, a compression fracture of the spine in the lumbar region, and brain atrophy from dehydration and malnourishment. The jury found Hampton guilty on both counts of felony abuse. Hampton appealed.

ISSUES

Whether (1) the trial court violated Hampton's Sixth Amendment right to be present at every stage of her trial and (2) the evidence presented was sufficient to support Hampton's convictions of felony child abuse.

HOLDING

(1) Because Hampton's absence was voluntary and done knowingly, and because the trial court was not required to send law enforcement officers to find and bring the missing defendant to court, Hampton waived her federal and state Sixth Amendment right to be present at her trial and the trial court did not abuse its discretion by resuming trial without Hampton's presence. (2) Because reasonable minds could conclude that LRJ's malnourishment continued and worsened while under Hampton's care, and because the State only presented evidence proving Hampton knew or should have

known of LRJ's burns rather than proving that Hampton aided or acted knowingly or recklessly to cause the burns, Hampton's conviction for felony starvation of a minor was supported by sufficient evidence, but the evidence was insufficient to establish the crime of felony child abuse for burning a child. Therefore, the Supreme Court affirmed in part and reversed and rendered in part the judgment of the Coahoma County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Chief Justice Randolph agreed with the majority that there was sufficient evidence to convict Hampton for felonious starvation of a minor, but argued that there was also sufficient and ample evidence to convict Hampton for the crime of felonious child abuse for burning the child and that the majority overstepped in reversing the jury's conviction.

Affirmed In Part; Reversed & Rendered In Part - 2019-KA-01304-SCT (Jan. 21, 2021)

Opinion by Justice Beam - Concurrence In Part & Dissent In Part by Chief Justice Randolph

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

W. Daniel Hinchcliff, George T. Holmes, & Richard Brooks Lewis Jr. (Pub. Def. Office) for Appellant - Brenda Fay Mitchell & Lisa L. Blount (Att'y Gen. Office) for Appellee

Briefed by [John Michael Sweatt](#)

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TERRY V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - CONSTRUCTIVE POSSESSION - INTENT - Constructive possession is established by showing that contraband was under the defendant's dominion and control; sufficient facts must warrant a finding that the defendant was aware of the presence and character of the contraband and was intentionally and consciously in possession of it

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

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - REVERSIBLE ERROR - If jury instructions fairly announce the law of the case and create no injustice, no reversible error will be found

FACTS

A search warrant was executed on Cephus Terry's residence in August 2017. Cocaine, methamphetamine, tramadol, and two firearms were found in the residence along with two small children. After reading Terry his rights, a deputy asked Terry how long he had been living in the residence, to which Terry responded, "about a year." Terry was charged with possession of cocaine with intent to sell, possession of methamphetamine, possession of Tramadol, and two counts of possession of a firearm by a felon. At trial, Terry testified that he did not live at the apartment and was only there to pick his children up. Additionally, the mother of his children, Kiara Baxstrum, testified that Terry did not live at the apartment and that the drugs and firearms belonged to her. Terry was convicted on all five counts, and the Neshoba County Circuit Court sentenced him as a habitual offender to serve forty-six years in the custody of the Mississippi Department of Corrections. The trial court denied his motion for a new trial, and the Court of Appeals affirmed. Terry appealed.

ISSUES

Whether (1) the State proved every element of constructive possession beyond a reasonable doubt and (2) the trial court erred in instructing the jury regarding the issue of constructive possession.

HOLDING

(1) Because the jury heard evidence that the drugs were in plain view, and because Terry lived in the apartment, sufficient evidence supported the jury's verdict, and the State proved every element of the crime beyond a reasonable doubt. (2) Because the jury instructions informed the jury that more than proximity was required for Terry to be convicted of

constructive possession, the trial court did not err in instructing the jury regarding the issue of constructive possession. Therefore, the Supreme Court affirmed the judgment of the Neshoba County Circuit Court.

DISSENTS

Presiding Justice Kitchens argued that the State did not prove that Terry exercised control over the premises or the contraband. He also disagreed that the jury instructions informed the jury that more than proximity was required for Terry to be convicted of constructive possession.

Presiding Justice King also dissented, arguing that the State failed to prove that Terry had knowledge of the presence and character of the drugs, and the State offered no competent evidence that Terry lived in the apartment.

Affirmed - 2019-CT-00623-SCT (Jan. 21, 2021)

En Banc Opinion by Justice Coleman - Dissents by Presiding Justice Kitchens & Presiding Justice King

Hon. Mark Sheldon Duncan (Neshoba County Circuit Court)

William B. Jacob & Joseph A. Kieronski Jr. for Appellant - Meta S. Copeland & Barbara Byrd (Att’y Gen. Office) for Appellee

Briefed by [Blake Tims](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – JANUARY 19, 2021

COURT OF APPEALS - CIVIL CASES

ESTATE OF TURNER V. TOWN PHARMACY AND GIFTS, LLC

CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

EMPLOYMENT LAW - EMPLOYMENT AT-WILL - TERMINATION - Absent an employment contract expressly providing to the contrary, an employee may be discharged at the employer’s will for good reason, bad reason, or no reason at all, excepting only reasons independently declared legally impermissible

EMPLOYMENT LAW - EMPLOYMENT AT-WILL - PUBLIC POLICY EXCEPTION - Pursuant to *McArn v. Allied Bruce-Terminix Co.*, an employee may sue her employer in tort for damages if she is fired for (1) refusing to participate in an illegal act or (2) reporting illegal acts of her employer to her employer or anyone else

FACTS

Tommy Turfitt opened Town Pharmacy and Gifts LLC (“Town Pharmacy”) with his mother, Laurie. Tommy hired Robyn Turner to be the pharmacist in charge. Turner had worked with the Turfitts in the past, had a difficult relationship with them, and claimed that Laurie insulted her. Several weeks after Turner sent Tommy a letter complaining to him about Laurie’s behavior, Laurie told Tommy that Turner was not what their business needed. Tommy agreed, but took no action regarding Turner’s employment at that time. Around 2017, Turner’s mother suffered a stroke. Turner offered to resign if her resulting absences were becoming a problem, but Tommy told her to take care of her mother and assured her that her job was safe. In September 2017, a customer called asking for Jerry Segura, the relief pharmacist. Laurie told the customer that the pharmacy was closed for the day, but Segura arrived and opened the pharmacy for a customer. When Turner arrived at work in the morning the next day that the pharmacy was open, she found a prescription for diazepam, a scheduled IV controlled substance, and a note to take four tablets out of the prescription. Turner thought the note was odd, and Tommy did not know anything about it. Turner was concerned that Segura had dispensed pills without a prescription in violation of state and federal law, but she did not express this concern to anyone and chose not to talk to Segura about it. Segura later told Tommy that the customer was an elderly woman suffering from alcohol withdrawals and that he dispensed diazepam to her pursuant to her doctor’s instructions. Turner later met with Tommy in his office to discuss certain Board of Pharmacy regulations, and Tommy inferred that Turner was accusing him of violating the regulations by circumventing her authority as the pharmacist-in-charge. Turner brought a *McArn* claim against Town Pharmacy. The conversation quickly developed into an argument. While Turner left the conversation believing that she was still employed, Tommy claimed that he told Turner that her resignation was acceptable. When

Turner returned to work two days later, Tommy informed her that he had accepted her resignation. Turner filed suit against Town Pharmacy in the Hancock County Circuit Court, alleging wrongful termination and that Tommy fired her for reporting and refusing to participate in the illegal distribution of controlled substances to a customer without a current prescription. Town Pharmacy asserted that Turner resigned and moved for summary judgment. The circuit court granted Town Pharmacy's motion after finding that Turner failed to produce any evidence that another pharmacist engaged in criminal conduct. Turner appealed.

ISSUE

Whether the circuit court properly granted summary judgment in favor of Town Pharmacy.

HOLDING

Because Turner failed to produce sufficient evidence for a reasonable juror to find that the alleged crime forming the basis of her *McArm* claim was committed, Town Pharmacy was entitled to summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Hancock County Circuit Court.

Affirmed - 2019-CA-01614-COA (Jan. 19, 2021)

Opinion by Presiding Judge Wilson

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

Mitchell Paul Hasenkampf & Karen Elizabeth Futch for Appellant - Russell Scott Manning for Appellee

Briefed by [Joshua L. Holmes](#)

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SMITH V. SMITH

CIVIL - CUSTODY

FAMILY LAW - CUSTODY - MODIFICATION - At trial, the parent seeking custody modification must show: (1) a material change in circumstances occurred since the issuance of the decree sought to be modified; (2) that the material change adversely affected the minor child; and (3) that it would be in the child's best interest for custody to change

FAMILY LAW - CUSTODY - VISITATION - Visitation is a matter within the chancellor's sound discretion, and the chancellor is charged with fashioning a visitation schedule that is in the best interests of the children

CIVIL PROCEDURE - CONTEMPT - DISCRETION - Contempt is an issue of fact to be decided on a case-by-case basis; the chancery court has substantial discretion in deciding whether a party is in contempt

FAMILY LAW - BEST INTEREST OF CHILD - ALBRIGHT ANALYSIS - When evaluating a child's best interest, the following factors must be considered: (1) the age, health, and sex of the child; (2) which parent has had continuity of care; (3) the parties' parenting skills; (4) the parties' willingness and capacity to provide primary child care; (5) the parties' employment responsibilities; (6) the parties' physical and mental health and age; (7) the emotional ties of parent and child; (8) the parties' moral fitness; (9) the home, school and community records of the child; (10) the child's preference, if the child is at least twelve years old; (11) the stability of the home environment and employment of each party; and (12) and other factors relevant to the parent-child relationship

FAMILY LAW - CHILD SUPPORT - BOARDING SCHOOL - Pursuant to *R.K. v. J.K.*, a noncustodial parent may not cease paying child support simply because the child is away at boarding school and not living with the custodial parent

FACTS

In February 2014, Bradley ("Brad") and Laurie Smith were granted a divorce on the grounds of irreconcilable differences. They had two minor children: a son, "George," and a daughter, "Irene." The final judgment of divorce included the parties' Marital Dissolution Agreement ("MDA"), which stated that Laurie had sole physical custody of both children and that the parties shared joint legal custody. In 2016, Laurie and Irene moved to Memphis, Tennessee, and George was enrolled at a boarding school in Chattanooga, Tennessee the following year. In 2018, Laurie wanted to transfer Irene from Bodine, her current school, to Currey Ingram Academy ("Currey Ingram") in Nashville. Brad and

Laurie filed competing petitions for modification of custody and child support, as well as citations of contempt. Brad also requested sole physical custody of George. The chancery court awarded Laurie sole physical and legal custody of Irene and awarded Brad sole physical and legal custody of George. Further, the chancery court ordered Brad to pay one-half of the tuition for Irene's new school and to enroll George at a private school in Jackson. Brad appealed.

ISSUES

Whether (1) the chancery court erred by failing to consider if Laurie's school choice for Irene was reasonable, necessary, and in the child's best interest; (2) the Court of Appeals should overrule the "Mississippi Minority Rule" that the relocation of a custodial parent is not a material change in circumstances for the purposes of modification of custody; (3) the chancery court erred in modifying custody; (4) the chancery court erred in ordering Brad to enroll George in a specific private school; (5) the chancery court erred by not ordering Laurie to pay child support for George; (6) the chancery court erred in ordering Brad to pay back child support for George; (7) the chancery court erred in revising the MDA provision regarding the payment of the children's extracurricular activities; (8) the chancery court erred in awarding Brad limited visitation with Irene.

HOLDING

(1) Because the chancery court carefully considered all evidence and testimony regarding Brad's income, Laurie's income, the needs of the children, and support obligations, because the MDA did not specify a particular school and did not impose any limitation upon the costs of attendance, because Bodine would not allow Irene to progress past the sixth grade, because Irene's learning needs for language and auditory deficits could not be addressed at Bodine, and because the Director of Curriculum at Bodine testified that Irene required more than what they provided, the chancery court did not err in determining that Irene should be enrolled at Currey Ingram and that Brad should be responsible for one-half of the cost for tuition and expenses. (2) Because the chancery court lacked authority to overrule Supreme Court precedent, the Court of Appeals declined to find that a custodial parent's relocation, on its own, constitutes a material change in circumstances for the purposes of modification of custody. (3) Because the chancery court appropriately considered the *Albright* factors in making its determination, and because there was substantial evidence to support the modification of custody in the children's best interest, the chancery court did not err in modifying custody. (4) Because Brad failed to raise this assignment of error in his motion to reconsider the judgment, the Court of Appeals declined to address the validity of the chancery court's order for Brad to enroll George in a specific private school. (5) Because Laurie's support went directly to the children's schools, because the support Laurie received from her father was not considered income, and because Laurie had a lack of income at the time of trial, the chancery court did not err by not ordering Laurie to pay child support for George. (6) Because George had not been living with Brad full-time due to George attending boarding school during the months in which Brad was ordered to pay direct support, because Brad failed to present evidence at trial regarding any additional support paid directly to George or for his benefit while he was in boarding school except for the maintenance of a primary home for George, because Laurie continued to also maintain a home for George to visit, and because the Supreme Court held in *R.K. v. J.K.*, that a noncustodial parent may not cease paying child support because the child is away at boarding school and not living with the custodial parent, the chancery court did not err in ordering Brad to pay the eight months of back child support while George attended boarding school and was still under Laurie's physical custody under the MDA. (7) Because the MDA required both parents to mutually agree upon the children's extracurricular activities, and because there was substantial evidence that the provision was unworkable based on Brad and Laurie's inability to agree on the extracurricular activities, the chancery court did not err in revising the MDA provision regarding the payment of the children's extracurricular activities. (8) Because the chancery court has broad discretion when determining visitation and its limitations, because the chancery court spent hours crafting Brad's visitation which would give him as much visitation that distance would allow, and because the visitation provision allowed Brad to visit Irene any time he wants in Nashville, the chancery court did not err in awarding Brad limited visitation with Irene. Therefore, the Court of Appeals affirmed the Hinds County Chancery Court.

Affirmed - 2019-CA-01230-COA (Jan. 19, 2021)

Opinion by Chief Judge Barnes

Hon. J. Dewayne Thomas (Hinds County Chancery Court, First Judicial Dist.)

W. Thomas McCraney III for Appellant - Richard C. Roberts III for Appellee

Briefed by [Madison Reightler](#)

T.M.T., LLC v. MIDTOWN MKT. WINE & SPIRITS, LLC

CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

INTELLECTUAL PROPERTY - TRADEMARKS - SECONDARY MEANING- The general rule is that generic or geographical terms can acquire no proprietary rights unless the term can acquire secondary meaning through (1) a steady growth attributable to “substantial investment” into the business and considerable advertisement or (2) if the mark has become “broadly known throughout the public”

INTELLECTUAL PROPERTY - TRADEMARKS - INTENT - If a mark was adopted with the intent of deriving a benefit from the reputation of another business, that fact alone may be sufficient to justify the inference that there is confusing similarity

INTELLECTUAL PROPERTY - TRADEMARKS - LIKELIHOOD OF CONFUSION - The likelihood of confusion factors include: (1) the type of trademark at issue; (2) the similarity of design; (3) similarity of service; (4) the identity of service facilities and customers; (5) similarity of advertising media used; (6) the defendant’s intent; and (7) actual confusion

EVIDENCE - INJUNCTIVE RELIEF - FACTORS - When considering a request for injunctive relief, the court must consider whether (1) a substantial likelihood [exists] that the plaintiff will prevail on the merits; (2) the injunction is necessary to prevent irreparable harm; (3) the threatened injury to the plaintiff outweighs the harm an injunction might do to the defendants; and (4) granting a preliminary injunction is consistent with the public interest

FACTS

T.M.T., LLC (“T.M.T”), a Mississippi limited liability company doing business as Midtown Wine & Spirits, brought this case against Midtown Market Wine & Spirits, LLC (“Midtown Market”) over the use of a trade name and service mark. Both T.M.T. and Midtown Market are liquor stores in the Midtown area of Hattiesburg, Mississippi. In June 2016, Michael Harrington filed a “Certificate of Formation” for a business with the Mississippi Secretary of State, creating T.M.T., LLC. In February 2017, T.M.T. opened its liquor store under the name “Midtown Wine & Spirits” and made its first sale. Although the name “Midtown Wine & Spirits” does not appear on the Certification of Formation or any of the company’s annual reports. T.M.T. used the service mark “Midtown Wine and Spirits” in late February 2017. In September 2018, T.M.T. registered its service mark of Midtown Wine & Spirits with the Mississippi Secretary of State. In May 2018, four months before T.M.T. registered its mark, Dr. Ted Harden Jr. filed a Certificate of Formation with the Mississippi Secretary of State forming “Midtown Market Wine & Spirits LLC.” Harrington contacted Dr. Harden in August 2018 and requested that Dr. Harden change his business’s name, but Dr. Harden refused. After Midtown Market opened, there were several instances of customer and online confusion, such as alcohol delivery mistakes between T.M.T. and Midtown Market, phone number confusion, and even customer reviews meant for the opposite store. Thus, this case arose in regard to the use of a trade name (“Midtown”) and service mark. The chancery court found that T.M.T. had the right to use the service mark “Midtown Wine & Spirits” because it was not so similar as to deceive the public, Midtown Market did not infringe on T.M.T.’s service mark, and no likelihood of confusion existed concerning the identity or association between the two businesses. The chancery court denied T.M.T.’s requests for sanctions, preliminary and permanent injunctions, and attorney’s fees. T.M.T. appealed.

ISSUES

Whether the chancery court erred by (1) finding that Midtown Market had not violated Mississippi’s Trademark Laws and (2) denying an injunction.

HOLDING

(1) Because the term “Midtown” was commonly used to describe a general area of Hattiesburg, because T.M.T. presented no evidence that Midtown Market had ever attempted to pass off its products or services as those of T.M.T., and because the two liquor stores’ names were not so similar that the public would be deceived, “Midtown” was classified as a generic or geographical term and T.M.T. could not acquire any proprietary rights in the name as they

failed to establish secondary meaning in the term, there was no intent to confuse, mislead, or deceive the public, and there was no likelihood of confusion between the parties' marks. (2) Because T.M.T. was not entitled to legal protection for trademark infringement, T.M.T. was not entitled to injunctive relief. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Chancery Court.

Affirmed - 2019-CA-01199-COA (Jan. 19, 2021)

Opinion by Judge Greenlee

Hon. Sheila Havard Smallwood (Forrest County Chancery Court)

Anna Kathleen Rush for Appellant - Matthew D. Miller & Nicholas Kane Thompson for Appellee

Briefed by [Muriel Collins](#)

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WHITE V. CMTY. BANCSHARES OF MISS. INC.

CIVIL - CONTRACT

CONTRACTS - ARBITRATION - TERMINATION - Under Rule 57 in the Commercial Arbitration Rules, if a party does not make payments owed, after notice and request for payment, the arbitration may be suspended, and the proceedings may be terminated if the payment is not made within the time provided in the notice of suspension

CONTRACTS - ARBITRATION - VACATION OF AWARD - Under Miss. Code Ann. § 11-15-23, a court may vacate an arbitration award upon any of the following grounds: (1) that such award was procured by corruption, fraud, or undue means; (2) that there was evident partiality or corruption on the part of the arbitrators, or any one of the them; (3) that the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy, or other misbehavior by which the rights of the party shall have been prejudiced; (4) that the arbitrators exceeded their powers, or that they so imperfectly executed them that a mutual, final, and definite award on the subject matter was not made

FACTS

In 2007, Robert White filed suit against Community Bancshares of Mississippi Inc., David M. Hughes, and Community Bank Coast (collectively "Community") over matters relating to a promissory note executed to fund a commercial real estate transaction. In 2011 and 2014, multiple promissory notes were signed that modified the terms of the original loan. Arbitration agreements were executed in 2007 and again in 2011, both of which were separate from the promissory notes executed at approximately the same time. No separate arbitration agreement was executed, nor did anything in the 2014 promissory note disavow or modify the terms of the 2011 arbitration agreement. On January 11, 2017, White filed suit against Community, alleging that Community knew about false financial representations made in relation to the real estate transaction and demanding almost \$10 million in damages and an additional \$5 million in punitive damages. In February 2017, Community filed a motion to dismiss or to compel arbitration. White filed a request to withdraw and to compel arbitration and paid \$1,650 to the American Arbitration Association ("AAA") to demand arbitration. In March 2018, the circuit court entered its order to stay proceedings sua sponte, finding that parties had submitted the case to binding arbitration. Preparations for arbitration proceeded, and after numerous notices to White requesting payment of arbitration fees, the AAA entered its order of dismissal, terminating the arbitration proceeding. In November 2018, White filed a motion to return the case to the active docket and establish venue in Harrison County Circuit Court. In addition, he argued that the 2011 arbitration agreement was invalid or otherwise not binding on him; that he could not afford arbitration, so he should be able to proceed in circuit court; and that the preliminary injunction was needed to stop foreclosure proceedings on the property purchased via loan that is the subject of this case. The circuit court denied the request for injunctive relief. In August 2019, the circuit court heard the remaining motions in which White sought to reinstate his first amended complaint, despite the fact that AAA had terminated his case. On October 3, 2019, the circuit court denied White's motion and dismissed his case with prejudice. White appealed.

ISSUES

Whether the circuit court erred in (1) affirming the AAA's dismissal; (2) finding that the 2011 arbitration agreement was not discharged by the 2014 promissory note; and (3) dismissing White's claims with prejudice.

HOLDING

(1) Because White petitioned the circuit court to send the case to arbitration, because White did not alert anyone of his alleged inability to pay, much less provide proof of inability pay, and because White failed to establish any statutory ground to vacate the AAA's award, the circuit court properly affirmed the AAA's dismissal. (2) Because the arbitration agreement was not discharged by the 2014 promissory note, because the two documents did not conflict, and because the trial court had only limited jurisdiction to oversee compliance with the order compelling arbitration and to enforce the final judgment at the conclusion of the case, the circuit court properly found that the 2011 arbitration agreement was not discharged by the 2014 promissory note. (3) Because the Seventh Amendment has no application to actions arising under state law, the circuit court did not err in its dismissal of White's claims with prejudice. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2019-CP-01666-COA (Jan. 19, 2021)

Opinion by Judge Westbrook

Hon. Christopher Louis Schmidt (Harrison County Circuit Court, First Judicial Dist.)

Pro se for Appellant - Robert Alan Byrd, Russell Scott Manning, & Andrea Jacey Boyles for Appellees

Briefed by [Betsy Lee Montague](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

BELL V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - VOLUNTARINESS - A voluntary guilty plea waives claims of ineffective assistance of counsel except in instances where the alleged ineffectiveness relates to the voluntariness of a guilty plea

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - PERFORMANCE - For a claim of ineffective assistance of counsel to succeed, the defendant must demonstrate that the counsel's performance was deficient and, but for the deficient performance, a different result would likely have occurred

FACTS

In 2016, a shooting occurred at a Jackson gas station. Officers dispatched to the scene gathered suspect information from witnesses, including the individual who drove Kendrick Bell to the gas station prior to the shooting. Based on this information, officers were able to locate and arrest Bell. Surveillance video recorded at the scene showed Bell shooting and killing Teletha Banks. Bell pled guilty to second-degree murder, being a felon in possession of a firearm, and shooting into an occupied vehicle. Following his sentencing, Bell filed a Motion for Post-Conviction Collateral Relief, arguing that he received ineffective assistance of counsel. The Hinds County Circuit Court denied the motion. Bell appealed.

ISSUES

Whether (1) the trial court erred by denying Bell's PCR motion for ineffective assistance of counsel and (2) Bell's due process rights were violated by his counsel's decision to forgo a preliminary hearing.

HOLDING

(1) Because Bell presented no evidence that his plea was entered into unknowingly, unintelligently, or involuntarily, and because he did not demonstrate a deficiency in his attorney's performance that would have resulted in a different outcome, the circuit court did not err in denying Bell's PCR motion. (2) Because a preliminary hearing was not necessary

due to Bell's indictment by the grand jury on the charges, Bell's due process rights were not violated. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2019-CP-01034-COA (Jan. 19, 2021)

Opinion by Judge Westbrook

Hon. Winston L. Kidd (Hinds County Circuit Court, First Judicial Dist.)

Pro se for Appellant - Abbie Eason Koonce (Att'y Gen. Office) for Appellee

Briefed by [Greyson Young](#)

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WINGO V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - EXCEPTIONS - Errors affecting fundamental rights may be excepted from the time-bar for filing a PCR motion, but mere assertions of constitutional-rights violations do not suffice to overcome the procedural bar

POST-CONVICTION RELIEF - PROCEDURAL BARS - SUCCESSIVE-WRIT BAR - Any order denying or dismissing a PCR motion is a bar to a second or successive PCR motion

CRIMINAL PROCEDURE - HABITUAL OFFENDER - INDICTMENT - Where the dates of prior judgment are omitted from a habitual offender indictment, there may still be enough information to be able to determine the dates of judgment

CRIMINAL PROCEDURE - DISCOVERY - WITNESS LIST - During discovery, the State is required to provide names of all "witnesses in chief" to be offered at trial

EVIDENCE - WITNESSES - SUBPOENAS - Although failure to subpoena a witness may be detrimental to a party, no statute, case law, or rules of court requires a party to subpoena a witness to testify

FACTS

In 1999, Curtis Wingo was indicted as a habitual offender for felony driving under the influence. Wingo initially pled guilty, but he subsequently backed out of the plea agreement. Wingo was convicted and sentenced to life in prison without eligibility for parole. At Wingo's sentencing hearing, Tammy Thigpen, an assistant chief-of-records for the Mississippi Department of Corrections, served as an authenticating witness of Wingo's habitual offender status. In 2019, Wingo filed his sixth motion for post-conviction relief ("PCR"). The Winston County Circuit Court held that the claims in Wingo's PCR motion were procedurally barred by the statute of limitations and the successive-writ bar. The circuit court also found that Wingo's claims failed on the merits. Wingo appealed.

ISSUES

Whether (1) Wingo's PCR motion was procedurally barred; (2) Wingo's sentence was illegal due to the defect in the habitual offender portion of the indictment; (3) allowing Thigpen to testify at Wingo's sentencing hearing was improper; and (4) Wingo received ineffective assistance of counsel.

HOLDING

(1) Because Wingo's sixth PCR motion was filed eighteen years after the expiration of the limitations period, and because none of the allegations that Wingo raised involved fundamental rights that would give rise to an exception from the time-bar or the successive-writ bar, Wingo's PCR motion was procedurally barred. (2) Because the indictment contained enough information for Wingo to be able to ascertain the dates of judgment, and because Wingo acknowledged his habitual offender status and admitted to the prior felonies during his plea colloquy, Wingo's sentence was not illegal due to the defect in the habitual offender portion of the indictment. (3) Because Thigpen was not a witness in chief at Wingo's trial, and because the State was not required to subpoena Thigpen to testify, allowing Thigpen to testify at Wingo's sentencing hearing was not improper. (4) Because Wingo did not raise the issue of ineffective assistance of counsel in the PCR motion before the circuit court, the Court of Appeals declined to rule on the issue of whether Wingo

received ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Winston County Circuit Court.

Affirmed - 2020-CP-00117-COA (Jan. 19, 2021)

Opinion by Judge Westbrook

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

Pro se for Appellant - Lauren Gabrielle Cantrell (Att’y Gen. Office) for Appellee

Briefed by [Cody Austin](#)

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COURT OF APPEALS - CRIMINAL CASES

SELLERS V. STATE

CRIMINAL - MISDEMEANOR

CRIMINAL LAW - DRIVING UNDER THE INFLUENCE - TESTIMONY OR TESTING - A defendant can be charged and convicted for driving under the influence by the testimony of a witness who observed the defendant exhibiting signs of intoxication, or by the results of a breathalyzer test

CRIMINAL PROCEDURE - DIRECTED VERDICT - REASONABLE DOUBT - The relevant question in determining whether a directed verdict should be granted is 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

CRIMINAL PROCEDURE - ARRESTS - PROBABLE CAUSE - In order to arrest an individual suspected of a felony, either with or without a warrant, a police officer must have (1) probable cause to believe that a felony has been committed and (2) probable cause to believe that the person proposed to be arrested is the one who committed it

FACTS

Officer William Hall responded to a report from the Madison Police Department, and began following Antionne Sellers, who matched the descriptions that the caller gave. Officer Hall observed that Sellers was driving twenty miles per hour below the speed limit, swerving in his lane, and his car had a tag cover that obscured the license plate’s expiration date. After initiating the traffic stop for improper display of the tag cover, Officer Hall noticed an odor of alcohol coming off Sellers’s breath and that his eyes were dilated. After consenting to three different field sobriety tests and providing a sample for a portable breath test, Sellers was charged with driving under the influence and an improper-equipment violation. The Madison Municipal Court convicted Sellers of driving under the influence (first offense) and an improper-equipment violation. Sellers appealed to the county court, and the county court found Sellers guilty of driving under the influence but not guilty of the improper-equipment charge. Sellers appealed to the Madison County Circuit Court, and the circuit court affirmed the county court’s judgment. Sellers appealed.

ISSUES

Whether the county court (1) erred by denying Sellers’s motion for a directed verdict and (2) properly viewed the evidence before it.

HOLDING

(1) Because Officer Hall had probable cause to initiate the traffic stop, because Sellers’s acquittal on the improper-equipment charge did not mean that Officer Hall lacked probable cause for the traffic stop, and because the exclusionary rule did not apply, the evidence was sufficient to find Sellers guilty of driving under the influence and the county court did not err in denying Sellers’s motion. (2) Because the probable cause inquiry looks to the totality of the circumstances, the judge did not err in looking at all evidence present, including video evidence, in order to gain a clear picture of the totality of the circumstances. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2020-KM-00087-COA (Jan. 19, 2021)

Opinion by Judge McCarty

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

Kevil Dale Camp for Appellant - Barbara Wakeland Byrd & John Hedglin (Att'y Gen. Office) for Appellee

Briefed by [Bess Fisher](#)

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