

MISSISSIPPI SUPREME COURT DECISIONS – FEBRUARY 11, 2021**SUPREME COURT - CIVIL CASES****BATTISE V. AUCOIN****CIVIL - CUSTODY**

FAMILY LAW - VISITATION - GRANDPAENT VISITATION - Pursuant to Miss. Code Ann. § 93-16-3(4), a petition for visitation rights shall be filed in the county where an order of custody as to the child has previously been entered; if no custody order has been entered, then the grandparents' petition shall be filed in the county where the child resides or may be found

FAMILY LAW - ATTORNEY'S FEES - FINANCIAL HARDSHIP - Upon a showing of financial hardship for the parents, the court shall, on motion of the parent or parents, direct the grandparents to pay reasonable attorney's fees to the parent or parents at any time, including before a hearing, without regard to the outcome of the petition

PROFESSIONAL RESPONSIBILITY - RECUSAL - OBJECTIVE STANDARD - A judge is required to disqualify himself or herself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality

FACTS

Joseph and Sheila Aucoin were married and had two daughters. After Joseph's death, Sheila began restricting Linda Battise, Joseph's mother's, visitation with the children because Linda was not abiding by Sheila's parental decisions. Linda petitioned the Hancock County Chancery Court for grandparent visitation. The chancellor encouraged the parties to confer because Sheila made some statements showing that they could come to a visitation agreement without court involvement. Linda and Sheila reached an agreement, but the chancellor declined to sign the agreed order. The chancellor advised Sheila to retain an attorney because she did not believe that Sheila fully understood the implications of the agreement. Furthermore, the chancellor told Sheila that she was entitled to attorney's fees. Subsequently, Sheila hired an attorney and filed a motion to dismiss or stay proceedings until fees were paid in advance. Simultaneously, Linda filed a motion to recuse the chancellor. The chancellor denied Linda's motion to recuse and ordered Linda to pay \$3,500 to Sheila for attorney's fees within thirty days or else she could not proceed with her case. Linda appealed.

ISSUES

Whether the chancellor erred by (1) requiring Linda to prepay attorney's fees to Sheila before Linda's case could be heard; (2) not entering a final judgment; and (3) refusing to recuse.

HOLDING

(1) Because based on the plain language in Miss. Code Ann. § 93-16-3(4), the fee requirement only applies if the petition is filed under subsection (2), and because Linda sought visitation under subsection (1) of the statute, the fee requirement did not apply. (2) Because Linda did not cite any authority to support her position, she waived the issue of the chancery court's failure to enter a final judgment. (3) Because a reasonable person would not find the chancellor acted with bias, prejudice, or in an impartial manner, the chancellor did not err in refusing to recuse. Therefore, the Supreme Court affirmed in part and reversed and remanded in part the judgment of the Hancock County Chancery Court.

Affirmed in Part; Reversed & Remanded in Part - 2019-IA-01775-SCT (Feb. 11, 2021)

Opinion by Justice Beam

Hon. Jennifer T. Schloegel (Hancock County Chancery Court)

William W. Dreher, Jr. for Appellant - George Scanlan Blair for Appellee

Briefed by [Fatelia Avery](#)

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SUPREME COURT - ORDERS

PAYTON V. STATE

ORDER

ORDER

In 2009, Gary Payton was convicted of statutory rape. Since then, Payton has filed seven applications for leave to seek post-conviction relief (“PCR”) from the Supreme Court and two petitions for PCR in the trial court without first seeking leave from the Supreme Court. After failing, Payton filed his eighth application with the Supreme Court. Because Payton’s application was barred by the three-year statute of limitations and as a successive writ, and because Payton’s claim was insufficient to merit waiving the procedural bars, Payton’s request for leave to seek post-conviction relief was denied. Payton was also warned that any future filings deemed frivolous may result in monetary sanctions and restrictions on filing applications for post-conviction relief in forma pauperis.

OBJECTION IN PART

Presiding Justice King agreed that Payton’s application for PCR did not merit relief, but disagreed with the Supreme Court’s warning that future filings deemed frivolous may result in monetary sanctions or restrictions on filing applications for PCR in forma pauperis. Rather than imposing sanctions and threatening to restrict access to the courts, he would simply dismiss or deny motions that lack merit.

Ordered - 2020-M-01287 (Feb. 11, 2021)

Order by Justice Griffis - Objection in Part by Presiding Justice King
Briefed by [William “Jack” Simpson](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 9, 2021

COURT OF APPEALS - CIVIL CASES

ESTATE OF ELLIS V. MMC MATERIALS, INC.

CIVIL - PERSONAL INJURY

TORTS - NEGLIGENCE - SUMMARY JUDGMENT - To survive summary judgment in a negligence action, the plaintiff bears the burden of providing evidence showing that the defendant breached a duty of care and that the breach proximately caused the injury

TORTS - NEGLIGENCE - CAUSATION - The cause in fact of an injury is that cause which, in natural and continuous sequence unbroken by any efficient intervening cause, produces the injury and without which the injury would not have occurred

TORTS - NEGLIGENCE - PROXIMATE CAUSE - Negligence which merely furnished the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof

TORTS - NEGLIGENCE - CIRCUMSTANTIAL EVIDENCE DOCTRINE - Circumstantial evidence of negligence can create a question of fact for the jury, and allows the jury to draw an inference of the defendant’s negligence beyond mere conjecture

FACTS

Roosevelt Buie hired Tommy Ellis to build a carport on his residence. Ellis ordered concrete for the project from MMC Materials (“MMC”), and Victor Baker, an MMC truck driver, delivered the concrete to Buie’s residence. Ellis asked Baker if he would be able to get the mixer truck next to the slab where Ellis wanted to pour the concrete. Baker smelled alcohol on Ellis, but still backed the mixer truck into the spot Ellis wanted. Baker placed the concrete chute onto the mixer truck, but the chute was locked. Ellis thought the concrete was too stiff, and wanted Baker to unlock the chute so he could dilute the concrete with water. Ellis pulled the chute towards him and had both hands on the chute. Baker turned his back to Ellis in order to turn the water on, but heard a noise that prompted him to turn around to find that Ellis has fallen. Baker alleged that Ellis fell by stumbling while he was trying to pull the chute toward himself. Baker locked the chute, picked Ellis up, and placed him in the driver’s side of the vehicle, where he saw Ellis grab a beer and continue to drink. Ellis then left the job site and later returned with his leg wrapped in a bandage. Although Buie had his own security camera footage of the incident, he stated that he could not make out what the actual cause of Ellis’s fall was, but he saw that Ellis had his hands on the chute the entire time. As a result of the fall, Ellis suffered a tibial plateau fracture in his right leg. He was fitted for a leg cast and was told to wear it for several weeks. However, MMC and Baker alleged that Ellis did not comply with the medical advice he was given and that he removed his cast early and continued to walk. As a result, Ellis suffered a displaced fracture of the injured bone and needed surgery. After surgery, Ellis allegedly continued to ignore medical advice to stay in the hospital and take antibiotics to prevent an infection. Subsequently, Ellis’s leg became infected and was amputated. Ellis again, allegedly, refused to listen to medical advice. This resulted in Ellis developing sepsis and his subsequent death. The Estate of Ellis (“the Estate”) filed a wrongful-death claim, alleging that Ellis’s wrongful death was a direct and proximate cause of MMC and Baker’s negligence. The Estate alleged that Baker failed to adhere to the duties he owed Ellis. MMC and Baker filed a motion for summary judgment, arguing that there was no evidence to show that they proximately caused Ellis to fall or that any duty owed to Ellis was breached. The Estate filed a response asserting that circumstantial evidence and reasonable inferences derived from that evidence created a factual basis for a jury to find negligence. Accordingly, Baker released too much cement or water from the chute causing the chute to become unstable, which caused Ellis’s fall. The Estate also asserted that MMC was negligent due to the cement truck’s lack of proper safety devices, including mirrors, that would alert the operator to any sudden emergencies. After a hearing, the trial court granted the motion for summary judgment, finding that the Estate failed to offer evidence which showed that MMC and Baker were negligent and proximately caused Ellis’s injury. The Estate appealed.

ISSUE

Whether the trial court erred by granting summary judgment.

HOLDING

Because the Estate failed to meet its burden of proving sufficient evidence in support of an essential element of its negligence claim—proximate cause—the circuit court did not err in granting summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Jefferson County Circuit Court.

Affirmed - 2019-CA-01422-COA (Feb. 9, 2021)

Opinion by Presiding Judge Carlton

Hon. Tomika Harris Irving (Jefferson County Circuit Court)

John T. Ball & Stephanie Hughes Baird for Appellant - Michael Wayne Baxter & Michael Madison Taylor Jr. for Appellees

Briefed by [Madison Reightler](#)

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ESTATE OF YOAKUM V. SMITH

CIVIL - WILLS, TRUSTS, & ESTATES

CIVIL PROCEDURE - MOTION PRACTICE - SUMMARY JUDGMENT - Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show

that there is no genuine issue as to any material fact, and the evidence must be viewed in the light most favorable to the non-moving party

CIVIL PROCEDURE - SUMMARY JUDGMENT - NONMOVANT'S BURDEN - In opposition to the motion, the nonmoving party must show there is significant probative evidence that such an issue of fact exists; mere allegations unsupported by detailed and precise facts are not sufficient

FACTS

Mary Edna Yoakum (“Mary”) died and left three surviving children: Mary Smith, Henry Yoakum, and Louie Barnes. Smith filed a petition to establish and probate a will dated October 25, 1999. Henry filed an answer denying that the 1999 will was Yoakum’s last will and testament. Henry referenced a holographic will dated November 21, 2004. Henry also attached a typed will dated November 22, 2004, which contained nearly identical language as the holographic will and was signed “Mary Edna Yoakum”. Smith challenged the holographic will and filed a motion for summary judgment for the dismissal of Henry’s counterclaim. In response, Henry argued that Jenny Yoakum, a witness to the November 22 will, signed an “Affidavit of Subscribing Witness” and “Affidavit Proving Holographic Will,” which created a genuine issue of material fact. The chancery court granted summary judgment in favor of Smith and held that Henry did not make an adequate showing that Yoakum had signed and executed the 2004 wills. Henry appealed.

ISSUE

Whether the chancery court erred by granting summary judgment.

HOLDING

Because Miss. Code Ann. § 91-5-9 does not prohibit the spouse of a beneficiary from being a subscribing witness, Jenny’s affidavit created a genuine issue of material fact. Therefore, the Court of Appeals reversed and remanded the judgment of the Simpson County Chancery Court.

Reversed and Remanded - 2019-CA-01806-COA (Feb. 9, 2021)

Opinion by Judge Greenlee

Hon. Gerald Marion Martin (Simpson County Chancery Court)

Daniel Dewayne Ware for Appellant - James Burvon Sykes III for Appellee

Briefed by [Joshua L. Holmes](#)

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FOSTER V. SUNFLOWER CTY. CONSOL. SCH. DIST.

CIVIL - OTHER

CIVIL PROCEDURE - APPEALS - MUNICIPAL AUTHORITIES - Pursuant to Miss. Code Ann. § 11-51-75, “[a]ny person aggrieved by a judgment or decision of the board of supervisors of a county, or the governing authority of a municipality, may appeal . . .” to the circuit court within ten days of the decision

CIVIL PROCEDURE - APPEALS - MUNICIPAL AUTHORITIES - Miss. Code Ann. § 11-51-75, by its plain language, does not apply to appeals from school board decisions and the Legislature has not otherwise provided for a general judicial review of school board decisions

CIVIL PROCEDURE - JURISDICTION - STANDING - Standing is a jurisdictional issue that may be raised at any time; parties have standing to sue when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law

CIVIL PROCEDURE - APPEALS - RESULT - An appellate court may affirm a trial court’s decision if the correct result is reached, even if the trial court reached the result for a different reason

FACTS

Sunflower County Consolidated School District School Board (“the Board”) decided to rename “Ruleville Central High School” to “Thomas Edwards, Sr. High School” at the request of Thomas Edwards Sr.’s son. After the Board made the

decision at a regular board meeting, some alumni of the high school who opposed the change asked the Board to reconsider its decision. When the Board did not reconsider the name change, Tom Foster, an alumnus of the high school, individually and on behalf of alumni against the name change, filed a complaint for a declaratory judgment and injunctive relief against the Sunflower County Consolidated School District (“the District”) as well as a motion for a temporary restraining order and a temporary injunction in the Sunflower County Chancery Court. Foster and the other alumni (collectively “Plaintiffs”) contended the District violated existing policies about community involvement in board decisions and provided inadequate notice of the name change. The chancery court denied Plaintiffs’ motion for relief and dismissed their complaint, finding not only that Plaintiffs failed to seek relief properly under Miss. Code Ann. § 11-51-75, but also because there was no merit to their arguments. Plaintiffs appealed.

ISSUES

Whether (1) the chancery court erred in dismissing Plaintiffs’ complaint for failure to exercise the exclusive remedy provided by Miss. Code Ann. § 11-51-75 and (2) Plaintiffs lacked standing to sue the District.

HOLDING

(1) Because Miss. Code Ann. § 11-51-75 does not apply to Plaintiffs’ action, the chancery court erred in dismissing the complaint for failure to exercise the statute’s exclusive remedy. (2) Because Plaintiffs presented neither a legal right grounded in statutory or common law to challenge the Board’s renaming of the school, nor the adverse effects that would impact them individually, Plaintiffs lacked standing to sue the District, and the chancery court reached the proper result in dismissing the complaint. Therefore, the Court of Appeals affirmed the judgment of the Sunflower County Chancery Court.

Affirmed - 2019-CA-01640-COA (Feb. 9, 2021)

Opinion by Chief Judge Barnes

Hon. Debra Michelle Giles (Sunflower County Chancery Court)

Alsee McDaniel for Appellants - Carlos D. Palmer & Tangala L. Hollis-Palmer for Appellee

Briefed by [Cecelia Hurt](#)

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KNIGHT V. R.S.

CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

TORTS - DEFAMATION - NON-TESTIMONIAL STATEMENTS - Statements made by a witness outside of court containing the exact same substance as their testimony given under oath are privileged and cannot be the basis of a defamation lawsuit

TORTS - DEFAMATION - GOOD FAITH PRIVILEGE - Communications which would otherwise be defamatory are protected as privileged if they are made in good faith in the prosecution of any inquiry regarding a crime that has been committed

TORTS - DEFAMATION - UNPRIVILEGED PUBLICATION - A successful claim of defamation must prove, among other elements, an unprivileged publication to a third party

FACTS

John Knight was convicted of the sexual battery of his twelve-year-old stepdaughter, Jane Smith. While the appeal of his criminal conviction was pending, Knight filed a civil suit against Jane and her mother, Rebecca Smith. Rebecca and Knight were briefly married prior to the allegations of sexual battery. Knight claimed that Jane and Rebecca had “defamed” him by conspiring to make false allegations and ruin his reputation. Throughout his pleadings, Knight repeatedly attacked the substance of his criminal conviction, arguing that it was not he, but another person, who sexually assaulted his stepdaughter. Knight also insisted that the suit was solely focused on his ruined “good reputation.” Rebecca responded to the lawsuit, denying Knight’s allegations. Jane could not be found and was not served. Therefore, the Lowndes County Circuit Court denied Knight’s motion for a default judgment against her. The circuit court held that

Knight could not sue witnesses from his criminal trial, including Rebecca for her immunized testimony, in which Rebecca claimed Knight sexually assaulted Jane. Subsequently, Knight argued that he was not suing Rebecca for her testimony during the trial but instead for analogous statements she had made outside of court. The circuit court did not find Knight's argument to be a meaningful distinction and dismissed the case with prejudice. Knight appealed.

ISSUE

Whether the trial court erred in dismissing Knight's claims of defamation.

HOLDING

Because the testimony of a witness in a criminal or civil trial cannot be the basis of a civil lawsuit, and because Rebecca's analogous statements outside of court were brought within the safe harbor of a judicial proceeding and sworn to under oath, the trial court did not err in dismissing the case for failure to state a claim. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

Affirmed - 2020-CP-00128-COA (Feb. 9, 2021)

Opinion by Judge McCarty

Hon. Lee Sorrels Coleman (Lowndes County Circuit Court)

Pro se for Appellant

Briefed by [Greyson Young](#)

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LOGAN V. STATE

CIVIL - OTHER

APPELLATE PROCEDURE - CLAIMS - MOOTNESS - An appeal is considered moot and dismissed when no useful purpose could be accomplished by entertaining it, when so far as concerns any practical ends to be served the decision upon the legal questions involved would be merely academic, unless a matter is capable of repetition yet evading review

CONSTITUTIONAL LAW - RIGHT TO SPEEDY TRIAL - EXTRADITION - In a situation where the accused is already detained in another jurisdiction, the date of extradition is used to determine the time that the constitutional right to a speedy trial attached

FACTS

Courtney Logan was serving a thirty-one-year sentence in the custody of the Tennessee Department of Corrections for the attempted murder of a Nashville, Tennessee police officer when Mississippi sought his extradition to face prosecution for crimes he had committed in Mississippi. Logan was convicted in Leflore County, Mississippi, of five counts of kidnapping, one count of aiding an escape, and one count of being a felon in possession of a firearm. The trial court sentenced him as a habitual offender to serve seven consecutive life terms without eligibility for parole or probation. Logan's convictions and sentences were affirmed on appeal. Following his convictions, Logan filed claims in Mississippi, Tennessee, and the federal courts. Logan alleged that his constitutional right to due process was violated when he was extradited from Mississippi to Tennessee without a hearing. The circuit court dismissed his motion. Logan appealed.

ISSUE

Whether Logan had a valid claim challenging his extradition.

HOLDING

Because Logan had been returned to the demanding state at the time his claims were filed, Logan's claims were "extinguished" or "moot", and the legality of his extradition was no longer subject to legal attack. Therefore, the Court of Appeals affirmed the judgment of the Leflore County Circuit Court.

Affirmed - 2019-CP-01386-COA (Feb. 9, 2021)
Opinion by Judge McCarty
Hon. Carol L. White-Richard (Leflore County Circuit Court)
Pro se for Appellant - Scott Stuart (Att’y Gen. Office) for Appellee
Briefed by [Bess Fisher](#)

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SMITH V. PIKE CTY.

CIVIL - PERSONAL INJURY

MISS. TORT CLAIMS ACT - SOVEREIGN IMMUNITY - WEATHER EXCEPTION - Pursuant to Miss. Code Ann. § 11-46-9(1)(q), a governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways

MISS. TORT CLAIMS ACT - SOVEREIGN IMMUNITY - REASONABLE WARNINGS - Miss. Code Ann. § 11-46(1)(w) shields a governmental entity from liability in instances arising out of the removal by third parties of any sign, signal, warning device, illumination device, guardrail or medial barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for maintenance within a reasonable time after actual or constructive notice

FACTS

On March 12, 2016, Melissa Smith drove her vehicle across a washout on a Pike County (“the County”) road and sustained injuries. The washout was a result of a significant rain event that occurred on the evening of March 10 and early morning of March 11. As a result, Smith brought a negligence action against the County, claiming failure to place proper warnings in advance of the washout and allowing an unreasonably dangerous and hazardous condition to exist in the road, amongst other claims. The County filed a motion for summary judgment, arguing Smith’s claims were barred under Miss. Code Ann. § 11-46-9(1)(q), which granted the County immunity. The Pike County Circuit Court granted the County’s motion for summary judgment. Smith appealed.

ISSUES

Whether the circuit court erred in finding that (1) the dangerous conditions were solely caused by the weather conditions rather than in conjunction with the County’s failure to warn and (2) the accident occurred simultaneously with the weather that caused the washout.

HOLDING

(1) Because there was no proof that anything other than the weather was the sole cause of the accident, the County was immune to any breach of duty. (2) Because the Mississippi Legislature has not specified any time requirements in Miss. Code Ann. § 11-46-9(1)(q), the circuit court did not err in finding the County immune from liability under Miss. Code Ann. § 11-46-9(1)(q). Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit Court.

CONCURRENCE

Judge Westbrook argued that exceptions listed in Miss. Code Ann. § 11-46-9 cannot be used as affirmative sources of liability. She argued that there was testimony that there had been previous washouts in the area and that once Smith learned that information, Smith would have been able to determine whether the road was properly maintained, and, if not, whether a maintenance failure on the part of the County caused or contributed to the washout; or, whether rain was the sole cause of the washout and the accident.

DISSENT

Presiding Judge Wilson argued that there was a genuine issue of material fact as to whether the County’s alleged failure to warn of a dangerous washout was a contributing cause of Smith’s injuries, which occurred approximately thirty-six hours after the County became aware of the washout and recognized the need to provide warnings. He also argued that

Smith presented sufficient evidence to create a genuine issue of fact as to whether the County's alleged negligence was a contributing cause to her wreck. Accordingly, he argued that there is also a genuine issue of material fact as to whether rain was the sole cause of Smith's injuries.

Affirmed - 2019-CA-01446-COA (Feb. 9, 2021)

En Banc Opinion by Judge Lawrence - Concurrence by Judge Westbrook - Dissent by Presiding Judge Wilson

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

Edwin L. Bean Jr. for Appellant - William Robert Allen for Appellee

Briefed by [Allison Payne](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

MURPHY V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - FAILURE TO FILE - A motion for post-conviction relief must be filed within three years following the entry of judgment of conviction, and failure to file within the three-year period procedurally bars appeal of the dismissal of the motion

POST-CONVICTION RELIEF - STATUTE OF LIMITATIONS - EXCEPTIONS - Miss. Code Ann. § 99-39-5(2) includes the following exceptions to the three-year statute of limitations on motions for post-conviction relief: cases where (1) the Mississippi Supreme Court or the United States has rendered an intervening decision that would adversely affect the outcome of the conviction or sentence; (2) the defendant presents evidence not reasonably discoverable at trial that would have been practically conclusive at that time to cause a different result in conviction or sentencing; and (3) the defendant's sentence has expired or his probation, parole, or conditional release has been unlawfully revoked

POST-CONVICTION RELIEF - PROCEDURAL BAR - EXCEPTIONS - The denial of a post-conviction relief motion is a final judgment and bars subsequent requests for post-conviction relief unless (1) there are issues with the defendant's supervening insanity prior to the execution of a death sentence; (2) there has been an intervening decision of the United States Supreme Court or of the Mississippi Supreme Court, which would require a different outcome or sentence; (3) there is newly discovered evidence, which was not previously discoverable, that would have been practically conclusive if it were available at trial; or (4) the defendant claims that his sentence has expired, or his probation, parole, or conditional release has been unlawfully revoked

FACTS

In 2011, John Murphy was indicted for one count of possession of morphine and one count of possession of hydrocodone with the intent to distribute. He pled guilty to the hydrocodone charge. The circuit court sentenced Murphy to serve a term of twenty years with sixteen years suspended and four years to serve, followed by five years of post-release supervision ("PRS"). The circuit court warned Murphy that any violation of the law or failure to pay his fine and court costs while on PRS might result in the suspended term being revoked. In 2018, during Murphy's period of PRS, Murphy was indicted for one count of possession of methamphetamine in an amount greater than 0.1 gram but less than 2 grams and one count of tampering with evidence. Murphy pled guilty to the charge of tampering with evidence, and the circuit court sentenced him to ten years, with two years suspended and eight years to serve. The State filed a petition seeking to revoke Murphy's sixteen-year suspended sentence due to Murphy's violating his PRS terms. After a hearing, the circuit court found that Murphy violated the terms and conditions of his PRS. The circuit court entered an order revoking Murphy's suspended sentence and sentenced Murphy to serve a term of sixteen years in MDOC custody. In 2019, more than six years after his conviction, Murphy filed his PCR motion requesting that the circuit court correct his sentence. In his PCR motion, Murphy claimed that he was given "too much time" for his possession of hydrocodone sentence. The circuit court entered an order denying Murphy's PCR motion because Murphy's PCR motion was filed outside the statute of limitations was therefore time-barred. The circuit court held that

even if Murphy's PCR motion was not time barred, his motion lacked merit because he had waived the right to have the State present the evidence against him when he pled guilty. Murphy appealed.

ISSUE

Whether the circuit court erred in denying Murphy's PCR motion.

HOLDING

(1) Because Murphy filed his PCR motion over six years after the judgment of conviction for his crimes, and because he voluntarily signed his guilty-plea petition, the trial court did not err in denying his PCR motion. Therefore, the Court of Appeals affirmed the judgment of the Lowndes County Circuit Court.

Affirmed - 2020-CP-00064-COA (Feb. 9, 2021)

Opinion by Presiding Judge Carlton

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

Pro se for Appellant - Brittney Sharae Eakins (Att'y Gen. Office) for Appellee

Briefed by [Blake Tims](#)

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COURT OF APPEALS - CRIMINAL CASES

BARNES V. STATE

CRIMINAL - FELONY

APPELLATE PROCEDURE - APPEALABLE ISSUES - LINDSEY REQUIREMENTS - *Lindsey v. State* provides the procedure that governs cases where appellate counsel represents an indigent defendant and does not believe his or her client's case presents any arguable issues on appeal

APPELLATE PROCEDURE - APPEALABLE ISSUES - LINDSEY BRIEF - Pursuant to *Lindsey v. State*, counsel must file a brief in compliance with Miss. R. App. P. 28(a)(1) certifying that there are no arguable issues after scouring the record thoroughly, send a copy of the appellate brief to the defendant, inform the defendant that counsel could find no arguable issues in the record, and advise the defendant of his or her right to file a pro se brief

FACTS

A parent reported that forty-nine-year-old Jeffery Barnes sexually abused her fourteen-year-old son at a cookout. During a forensic interview, the child informed investigators that Barnes had asked him to lick his "peens" (penis) three times on the day in question. The child also stated that while he was playing in his bedroom, Barnes entered, pulled his pants down, and instructed the child to lick Barnes's "peens" which the child subsequently did. During the trial, a tender-years hearing was held, and it was determined that the child's hearsay testimony would be admissible. Multiple witnesses were present at the cookout and testified that they saw Barnes enter the house and return a short while after. Barnes was found guilty for sexual battery of a child less than fourteen years of age, and serve thirty years in the custody of the Mississippi Department of Corrections, with twenty-five years to serve, followed by five years of post-release supervision. He was also ordered to pay a \$2,500 fine, all court costs, and register as a sex offender. Barnes appealed.

ISSUE

Whether were any arguable issues to support a reversal of Barnes's conviction.

HOLDING

Because Barnes did not file a pro se brief raising any arguable issues, and because his counsel met the *Lindsey* requirements by serving a brief in compliance with Miss. R. App. P. 28(a)(1)-(5),(8), there were no arguable issues to support a reversal. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Circuit Court.

Affirmed - 2019-KA-01809-COA (Feb. 9, 2021)

Opinion by Judge Westbrook

Hon. Prentiss Greene Harrell (Lamar County Circuit Court)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Lauren Gabrielle Cantrell (Att’y Gen. Office) for Appellee

Briefed by [Muriel Collins](#)

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BENTHALL V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - RIGHT TO BE PRESENT AT TRIAL - WAIVER - The defendant’s constitutional right to be present at trial is subject to waiver if there is an intentional relinquishment of a known right or privilege; a defendant’s willful, voluntary, and deliberate actions in avoiding trial constitutes a waiver

CRIMINAL PROCEDURE - ABSENCE - NONAPPEARANCE - Under Miss. Code Ann. § 99-17-9, a circuit court has the discretion to proceed in absentia if the criminal defendant is in any way in default for nonappearance

CRIMINAL LAW - BURGLARY - ELEMENTS - To convict a defendant of burglary under Miss. Code Ann. § 97-17-23, the prosecution must prove that the defendant committed (1) the unlawful breaking and entering of the dwelling house or inner door of such dwelling house of another (2) with the intent to commit a crime once entry has been gained

FACTS

Emily Benthall and Sonya Fulton were childhood friends. In 2014, Fulton permitted Benthall to live with her in a studio apartment above Fulton’s parent’s garage. Benthall was never given a key to either the studio or Fulton’s main house, and she was not permitted to be there when Fulton or her parents were not home. On October 10, 2015, Fulton and her parents went to Madison, Mississippi, for a family wedding. While Fulton and her parents were away, they had no contact with Benthall and did not give her permission to be in the house while they were gone. Two days later, upon returning home, Fulton and her parents quickly realized that jewelry belonging to Fulton’s mother, Linda Gale Wedgeworth, was missing and that the air conditioning unit attached to Wedgeworth’s bedroom window had been moved. A few days later, Investigator John Lilly obtained Benthall’s written confession that she took the jewelry from the house. After giving her statement, Benthall returned most of the missing jewelry to the police. On the morning of trial, Benthall failed to appear in court. Benthall’s counsel moved for a continuance, which was denied. The court ordered a recess to discuss Benthall’s whereabouts, however, neither law enforcement nor Benthall’s father had seen her since the Friday before her trial. The defense counsel admitted that Benthall was aware of the trial court date. Benthall’s counsel renewed his motion to continue. The court subsequently denied the motion for continuance, finding that Benthall was willfully, deliberately, and voluntarily not before the court. The trial proceeded without Benthall, but during the fourth witness’s testimony, Benthall suddenly arrived in court. Neither Benthall or her attorney gave any explanation as to why she had been late for court and not initially present. The jury ultimately found Benthall guilty of burglary of a dwelling. Benthall’s attorney did not file any post-trial motions or a timely notice of appeal. On September 11, 2019, the circuit court granted Benthall’s motion for an out-of-time appeal. Benthall appealed.

ISSUES

Whether the trial court erred in (1) denying the motion for a continuance and proceeding in absentia and (2) finding that evidence was sufficient to prove Benthall committed a “breaking” as required for a burglary conviction.

HOLDING

(1) Because the record was clear that Benthall was aware of her trial date, made preparations for her trial, and failed to explain her absence to her attorney or the trial court, the trial court properly found that Benthall’s absence was willful, deliberate, and voluntary, and the trial court did not abuse its discretion in denying Benthall’s motion for a continuance and proceeding in her absence. (2) Because Benthall admitted in a signed statement to reaching in the window and taking the jewelry, because the stolen items were within reach of the window where the air conditioner was, because Officer Lilly and the Fultons testified that the air conditioner had been moved, and because in viewing evidence in the

light most favorable to the State, rational jurors could have found that the State proved each element needed to convict Benthall, the trial court did not err in finding that there was sufficient evidence to prove Benthall committed a “breaking” as required for a burglary conviction. Therefore, the Court of Appeals affirmed the judgment of the Neshoba County Circuit Court.

CONCURRENCE IN PART & IN RESULT

Judge McCarty agreed that the circumstantial evidence in the case was sufficient to support a finding that Benthall burglarized the Fulton’s home. However, he argued that there was no evidence that Benthall was willfully trying to avoid trial. Therefore, he would have inquired into the reason of her absence before confirming her temporary absence and proceeding to try her in absentia.

Affirmed - 2019-KA-01438-COA (Feb. 9, 2021)

Opinion by Chief Judge Barnes - Concurrence In Part & In Result by Judge McCarty

Hon. Christopher A. Collins (Neshoba County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Alicia Marie Ainsworth & Ashley Lauren Sulser (Att’y Gen. Office) for Appellee

Briefed by [Betsy Lee Montague](#)

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JENNINGS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - INADEQUATE INSTRUCTION - The failure to instruct the jury on the essential elements of a crime is plain error

CRIMINAL PROCEDURE - SENTENCING - HABITUAL OFFENDER - While the habitual-offender-enhancement statute requires circuit judges to impose the maximum sentence for habitual offenders under Miss. Code Ann. § 99-19-81, Mississippi law recognizes limited circumstances in which a circuit judge may impose upon a habitual offender a reduced sentence

EVIDENCE - WITNESSES - CREDIBILITY - It is within the province of the jury to determine the credibility of witnesses; the jury may believe or disbelieve, accept or reject the utterances of any witness

FACTS

In 2017, the Mississippi Bureau of Narcotics arrested Gary Lynn Jennings for selling methamphetamines to a confidential informant. Jennings was subsequently indicted and, upon the State’s motion, the circuit court amended Jennings’s indictment to reflect his status as a habitual offender. At trial the jury ultimately returned a verdict finding Jennings guilty. Before sentencing, the State sought to have the circuit court sentence Jennings as a habitual offender. The trial judge made his reservation known that he disagreed with the trial court’s legal obligation to impose the statutory maximum in the case, but the trial judge asserted that he did not have the discretion to impose a lesser sentence. In response, Jennings filed a motion for a new trial and an amended motion for a new trial or to vacate the judgment. Both post-trial motions were denied. Jennings appealed.

ISSUES

Whether (1) the jury was not instructed on an essential element of the charged crime and (2) there was insufficient evidence presented on an essential element of the charged crime or, alternatively, that the verdict was against the overwhelming weight of the evidence.

HOLDING

(1) Because the mens rea requirement for the crime was omitted in the jury instructions, Jennings was denied the right to have a jury decide his guilt as to each element of the crime. (2) Because it is the jury’s duty to weigh the credibility of the witnesses, the State presented sufficient proof to show beyond a reasonable doubt that Jennings knowingly sold a

controlled substance. Therefore, the Court of Appeals reversed and remanded the judgment of the Calhoun County Circuit Court.

Reversed & Remanded - 2019-KA-01709-COA (Feb. 9, 2021)

Opinion by Presiding Judge Carlton

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

John Samuel Grant IV for Appellant - Scott Stuart (Att'y Gen. Office) for Appellee

Briefed by [John Michael Sweatt](#)

[Click here to view the full opinion](#)

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