

MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 23, 2021**COURT OF APPEALS - CIVIL CASES****COOPER TIRE & RUBBER CO. V. LOVELESS****CIVIL - WORKERS' COMPENSATION**

CIVIL PROCEDURE - APPELLATE REVIEW - WORKERS' COMPENSATION - A court can only reverse workers' compensation decisions if the Commission's decision lacks the support of substantial evidence, is arbitrary or capricious, is beyond the Commission's scope or its power, or violates constitutional or statutory rights

CIVIL PROCEDURE - RES JUDICATA - APPLICABILITY - The doctrine of res judicata only applies in final judgments, not to interlocutory decisions

CIVIL PROCEDURE - APPELLATE REVIEW - WORKERS' COMPENSATION - An appeal originating from the Workers' Compensation Commission only serves as a review of law and will not reweigh evidence

FACTS

Rondie Loveless was diagnosed with a stress fracture in her right foot while she was employed by Cooper Tire & Rubber Company ("Cooper Tire"). Loveless believed that the pain was caused by her excessive walking, standing, and other work-related activities in Cooper Tire's lab. Cooper Tire denied that the injury was work-related and therefore denied workers' compensation benefits. Loveless's physician testified that his main diagnosis was a stress fracture potentially caused by her long hours of standing rather than caused by a traumatic event. An administrative judge found that the injury was work-related, that Loveless had sustained a 100% industrial loss of use of her right leg, and that she was entitled to temporary total and permanent partial disability benefits. The Workers' Compensation Commission affirmed the administrative judge's decision. Cooper Tire appealed.

ISSUES

Whether (1) substantial evidence supported the Commission's finding of a compensable injury and (2) the Commission erred in relying on the doctrine of res judicata.

HOLDING

(1) Because the Commission's finding of a compensable injury was supported by substantial evidence proving a causal connection between Loveless's work-related injury and her disability, Loveless established a compensable injury. (2) Because the Commission's 2017 order was interlocutory, the Commission erred by relying on the doctrine of res judicata; however, this error was harmless because the Commission also clearly stated that its decision would be the same even if res judicata did not apply. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers' Compensation Commission.

Affirmed - 2020-WC-00266-COA (Feb. 23, 2021)

Opinion by Presiding Judge Wilson

Mississippi Workers' Compensation Commission

M. Reed Martz for Appellant - Greg E. Beard for Appellee

Briefed by [Jack Hall](#)

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

LANCASTER V. MILLER

CIVIL - TORTS

CORPORATIONS - LIMITED LIABILITY COMPANY- INDIVIDUAL LIABILITY - Pursuant to Miss. Code Ann. § 79-29-311(1), in a limited liability company, no member, manager, or officer shall be obligated for a debt solely by reason of being a member, acting as a manager, or acting as an officer of the limited liability company

CORPORATIONS - LIMITED LIABILITY COMPANY - INDIVIDUAL LIABILITY - Generally, when a corporate officer directly participates in or authorizes the commission of a tort, even on behalf of the corporation, he may be held personally liable

TORTS - FRAUDULENT MISREPRESENTATION - ELEMENTS - (1) a misrepresentation or omission of a fact, (2) that the representation or omission is material or significant, (3) that the person/entity charged with the negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons/entities, (4) that the plaintiff reasonably relied upon the misrepresentation or omission, and (5) that the plaintiff suffered damages as a direct and proximate result of such reasonable reliance

FACTS

Jan Macko formed Magnolia, LLC (“LLC”) and served as the manager and a member of the company. Her daughter, Andrea Miller, was also a member of the LLC. Macko and Miller purchased a house from James Pickett and Kathy Pickett. The title to the home was in the name of Magnolia, LLC. When selling the home, James Pickett advised Miller and Macko that they should replace the roof and that they should replace the plumbing in the kitchen and utility room because of water leaks. Miller and Macko remodeled the house; however, they replaced only certain parts of the roof, some plumbing items, and some electrical sockets. To finance the renovations, Macko obtained two loans in the name of the LLC. Furthermore, Miller and Macko contributed some of their personal money to purchase and renovate the house. Miller used her personal Facebook account to advertise the house, stating in the post that the house was a “totally renovated home for sale by owner.” Jonathan Lancaster and Cassi Bickham came across Miller’s Facebook post and contacted Miller to view the house. Following the tour, Lancaster and Bickham made an offer to buy the house based upon the representations made by Miller and Macko. During negotiations to purchase the property, Lancaster and Bickham claimed that Miller and Macko represented that the entire house had been renovated and the renovations were covered by warranties. The alleged renovations included new plumbing, a new electrical system, and a new roof. Bickham and Lancaster signed a purchase contract, which only had Miller and Macko listed as the sellers. They also signed a “Property Condition Disclosure Statement” that Miller and Macko also signed as the sellers. “Magnolia Properties” was listed at the beginning of the disclosure, which stated that the house had been totally renovated. Lancaster gave Macko and Miller a check as earnest money on the purchase that same day made out to “Magnolia Properties.” Lancaster and Bickham hired ICOM, LLC to prepare an independent inspection of the house. ICOM indicated that for the items it inspected, the house was in good condition. Lancaster and Bickham signed closing documents, which listed Magnolia, LLC as the owner. That same day, the home was conveyed to Lancaster and Bickham from Magnolia, LLC by a deed signed by “Macko/Manager/Member” and “Miller/Member.” Shortly after purchasing the house, Lancaster and Bickham discovered severe and hazardous issues with the home, including but not limited to, electrical shortages, burst water pipes, and a leaking roof. They also claimed that none of the renovations were covered by warranties as promised. Lancaster and Bickham contacted the contractors who had previously worked on the house. The contractors said that Macko and Miller fired them before they finished their work because they recommended that the house needed additional work, including replacing the entire roof and replacing the entire electrical system. Moreover, because the contractors were fired and the work was not completed, none of the renovations were covered by warranty. Lancaster and Bickham filed suit against Magnolia LLC, ICOM LLC, and Miller and Macko individually. Miller and Macko filed a motion to dismiss, arguing that Lancaster and Bickham had no claims against them individually because they were not owners of the property. Lancaster and Bickham filed a response in opposition to the motion for summary judgment claiming there were genuine issues of material fact. The circuit court granted summary judgment for Miller and Macko. Lancaster and Bickham appealed.

ISSUE

Whether the trial court erred by granting Miller’s and Macko’s motion for summary judgment.

HOLDING

Because Lancaster and Bickham adequately pled fraud and misrepresentation by presenting specific facts of misrepresentation by Miller and Macko, and because they presented sufficient evidence in the record which created several genuine issues of material fact with respect to Miller’s and Macko’s individual liability, the circuit court erred in granting Miller’s and Macko’s motion for summary judgment. Therefore, the Court of Appeals reversed the judgment of the Lamar County Circuit Court.

DISSENT

Presiding Judge Carlton argued that because Lancaster and Bickham presented insufficient evidence to pierce the veil of a limited liability company there is insufficient evidence to hold Miller and Macko individually liable. Therefore, all individual claims against Miller and Macko should be dismissed.

Reversed & Remanded - 2019-CA-01715-COA (Feb. 23, 2021)

Opinion by Judge McDonald - Dissent by Presiding Judge Carlton

Hon. Claiborne McDonald (Lamar County Circuit Court)

Daniel Myers Waide for Appellants - Patrick H. Zachary & Vicki R. Leggett for Appellees

Briefed by [Rachel Fewell](#)

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

MCKAY V. CHOCTAW CTY.

CIVIL - PERSONAL INJURY

EVIDENCE - HEARSAY - POLICE REPORT - A police report may be admissible under the hearsay exception in Miss. R. Evid. 803(8) if the report is based on a factual investigation and it satisfies the Rule’s trustworthiness requirement; if the law enforcement officer who wrote the report was not present at the time and place of the crash, then evidence will only be admitted if he is a qualified expert in accident reconstruction

MISS. TORT CLAIMS ACT - POLICE PROTECTION IMMUNITY - RECKLESS DISREGARD - The MTCA’s police-protection immunity bars claims against police officers acting within “police protection” activities at the time of a tort unless the officer acts in reckless disregard of the safety and well-being of any person not engaged in criminal activity; reckless disregard is more than negligence and typically involves a conscious indifference to consequences and almost a willingness that harm should follow

APPELLATE REVIEW - FINDINGS OF FACT - SUBSTANTIAL EVIDENCE - The trial judge’s findings of fact following a non-jury trial are subject to a limited scope of review if the trial judge applied to appropriate legal standard; if there is substantial supporting evidence on the record, then the appellate court will not reverse a court’s findings even if the appellate court disagrees

FACTS

On a clear day in September of 2014, Deputy Barry Miller received a radio call indicating an emergency and responded. Miller claimed that he turned his lights and siren on, increased his speed to sixty-five miles per hour, and attempted to legally pass a large truck and a sedan in front of the truck. The lane of oncoming traffic had three cars. Per Miller, he was in the correct lane when he was hit by a pickup truck pulling onto the highway and was then pushed into oncoming traffic, where his car struck Robert McKay’s car. McKay suffered serious injuries from the wreck. The trial judge admitted a Uniform Crash Report into evidence over McKay’s objections and found that the Mississippi Tort Claims Act’s (“MTCA”) police-protection immunity barred McKay’s claim. McKay appealed.

ISSUES

Whether the trial judge (1) abused his discretion by admitting the Uniform Crash Report and the trained accident reconstructionist’s testimony and (2) erred by finding that the officer did not act in reckless disregard of the safety of others.

HOLDING

(1) Because the Uniform Crash Report and the trained accident reconstructionist's testimony were based on undisputed facts rather than expert opinions or credibility determinations, the judge did not abuse his discretion by admitting the Uniform Crash Report and the testimony of the officer who wrote the report into evidence. (2) Because the circuit court judge applied the correct legal standard, citing cases relevant to the "reckless disregard" standard, because, based on all the evidence, a reasonable fact finder could have found that the cause of the wreck was the result of another driver, and because Miller was not deliberately indifferent and exercised at least some care, the trial judge did not err in finding that McKay failed to prove that the officer acted with reckless disregard. Therefore, the Court of Appeals affirmed the judgment of the Choctaw County Circuit Court.

Affirmed - 2019-CA-01196-COA (Feb. 23, 2021)

Opinion by Presiding Judge Wilson

Hon. Robert William Elliot (Choctaw County Circuit Court)

Robert G. Germany, William Rufus Wheeler Jr., & James Roger Franks Jr. for Appellant - Daniel Judson Griffith & Arnulfo Ursua Luciano for Appellee

Briefed by [Kathleen Workman](#)

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

THORNTON V. THORNTON

CIVIL - DOMESTIC RELATIONS

FAMILY LAW - DIVORCE - GROUNDS - Under Miss. Code Ann. § 93-5-1, the twelve grounds for divorce include habitual cruel and inhuman treatment, which requires a showing by the preponderance of the evidence of conduct that either (1) endangers life, limb, or health, or creates a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief or (2) is so unnatural and infamous as to make the marriage revolting to the nonoffending spouse and render it impossible for that spouse to discharge the duties of marriage, thus destroying the basis for its continuance

FAMILY LAW - DIVORCE - CRUEL & INHUMAN TREATMENT - There are many kinds of acts such as willful failure to support, verbal abuse, neglect, and the like which, if taken alone will not constitute cruelty, but when taken together will manifest a course of conduct as a whole which may amount to cruelty for a showing of habitual cruel and inhuman treatment

FAMILY LAW - CRUEL & INHUMAN TREATMENT - CORROBORATION - A party claiming habitual cruel and inhuman treatment must present some corroborating evidence of the offensive conduct, and the corroborating evidence need not be sufficient in itself to establish the ground, but rather need only provide enough supporting facts for a court to conclude the plaintiff's testimony is true

FAMILY LAW - CRUEL & INHUMAN TREATMENT - EMOTIONAL ABUSE - Evidence of emotional abuse may be sufficient conduct supporting habitual cruel and inhuman treatment if it is more than mere unkindness, rudeness, or incompatibility

FACTS

Felicia Thornton ("Felicia") and Chester Thornton ("Chester") married in 1981 and had four children. Felicia filed a complaint for divorce in 2016 on the grounds of habitual cruel and inhuman treatment or, in the alternative, irreconcilable differences. Chester answered the complaint, denying that Felicia was entitled to a divorce. At trial, their daughter, Aria, and Felicia both testified that Chester was trying to force Felicia out of the home, that Chester regularly called Felicia the "devil," and that he said she was stupid. Felicia and Aria both testified that Chester was physically violent, and Aria witnessed one such incident. Felicia said that she lived in fear of Chester after he was physically violent with her and because of his controlling demeanor. Chester admitted that he called Felicia "devil," but claimed he was not calling her the devil, just naming the devil within her. Chester admitted that they fought frequently over the thermostat and that he objected to Felicia's efforts to obtain an education degree. The Walthall County Chancery Court granted Felicia a divorce on the grounds of habitual cruel and inhuman treatment. Chester filed a motion to set aside the judgment or for a new trial, which was denied. Chester appealed.

ISSUES

Whether (1) there was “corroborating testimony” to support a finding of habitual cruel and inhuman treatment; (2) there was a “manifestation of injury” to Felicia to support a finding of habitual cruel and inhuman treatment; and (3) Felicia was not entitled to a divorce because she had “unclean hands.”

HOLDING

(1) Because both Aria and Chester’s own testimony corroborated material aspects of Felicia’s allegations, and because there was ample evidence of physical and emotional abuse by Chester that was more than mere unkindness, rudeness, or incompatibility, the trial court did not err in finding habitual cruel and inhuman treatment. (2) Because Felicia testified that Chester had physically attacked her on multiple occasions and that she was afraid of him, and because conduct that “creates a reasonable apprehension of . . . danger” to “life, limb, or health” is sufficient to support a divorce on this ground, Felicia’s testimony was sufficient to support the trial court’s finding and the argument that there was “no manifestation of injury” was without merit. (3) Because Chester failed to raise the issue of “unclean hands” in the trial court, he waived the issue on appeal. Therefore, the Court of Appeals affirmed the judgment of the Walthall County Chancery Court.

Affirmed - 2019-CA-01073-COA (Feb. 23, 2021)

Opinion by Presiding Judge Wilson

Hon. Wayne Smith (Walthall County Chancery Court)

Dennis C. Sweet III & Eduardo Alberto Flechas for Appellant - Todd Brentley Ott for Appellee

Briefed by [Mckenzie Williamson](#)

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

WHELAN V. CITY OF GAUTIER

CIVIL - REAL PROPERTY

ADMINISTRATIVE LAW - APPELLATE REVIEW - AGENCY CONCLUSIONS - An agency’s conclusions must remain undisturbed unless the agency’s order: (1) is not supported by substantial evidence; (2) is arbitrary or capricious; (3) is beyond the scope or power granted to the agency; or (4) violates one’s constitutional rights

PROPERTY - PLAT ALTERATION - NOTICE - Persons adversely affected by or directly interested in a proposed plat alteration must be given notice and the right to appear, object, and give reasons why the plat should not be altered or vacated

CIVIL PROCEDURE - AWARDS - ATTORNEY’S FEES - When determining the reasonableness of an attorney’s fees, the court looks at the following factors: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent

TORTS - SLANDER OF TITLE - ELEMENTS - To succeed in an action for slander of title, a claimant must show that another was falsely and maliciously published statements that disparage or bring into question the claimant’s right of title to the property, thereby causing special damage to the claimant

FACTS

David Vindich purchased a .76-acre tract of land in Gautier, Mississippi (“the City”). Vindich wanted to build an 1,800 square foot garage on the land. The City had an ordinance that required structures to be approved by the City’s planning director before they could be built. Before he began this project, Vindich met with Scott Ankerson, the City’s planning director, to discuss the project. Vindich claimed that Ankerson verbally approved Vindich to build a 1,410 square foot garage; however, Ankerson later denied this. After the meeting, Vindich moved forward and purchased plans to build

the garage. Later, Vindich submitted his application to the Building Department, which denied his application. Vindich appealed the Building Department's decision to the Planning Commission. Vindich's appeal was successful and his application was approved; however, this decision was not final. The Planning Commission's decision was merely a recommendation to the City Council, which then voted to approve the application. The City Council eventually approved Vindich's application and he proceeded to construct the building. One of Vindich's neighbors, Martin Wheelan, saw that Vindich had begun constructing the garage. Wheelan had an issue with the size of the structure and filed a lawsuit against Vindich, the City, and the individual members of the City Council. Wheelan argued that the City's approval of Vindich's application was unlawful because it violated the city ordinance. Vindich's building violated the City's ordinance, and thus required a public hearing and notice to neighbors and the public at large. Furthermore, Wheelan alleged that the building violated his right to due process and argued that Vindich's building completely overwhelmed the neighborhood and was a nuisance. In Vindich's answer to the complaint, he counterclaimed against Wheelan for slander of title. The trial court dismissed Wheelan's claims and held that the City's interpretation of the statute was not unreasonable. Further, the trial court held that Vindich's project was not a nuisance because the law does not grant someone the right to an unobstructed view across a neighbor's property. The trial court also dismissed Vindich's counterclaim against Wheeler for slander of title. Wheelan appealed, and Vindich cross-appealed.

ISSUES

Whether (1) the trial court had jurisdiction to consider Wheelan's challenge to the City Council's actions; (2) the City's decision to grant the permit was unlawful; (3) Wheelan was deprived of due process because he and other neighbors received no notice of the public hearing on Vindich's appeal or the City Council meeting on the Planning Commission's recommendation; (4) Vindich was entitled to damages, costs, and attorney's fees; and (5) the trial court erred in dismissing Vindich's counterclaim against Wheelan for slander of title.

HOLDING

(1) Because Wheelan's suit was equitable in nature, and because state courts have concurrent jurisdiction with federal courts to consider due process claims under 42 U.S.C. § 1983, the chancery court had jurisdiction to hear Wheelan's claims. (2) Because the interpretation of the City's ordinance was debatable, and because the City Council's actions were not arbitrary, capricious, or manifestly unreasonable, the chancery court did not abuse its discretion, apply an erroneous legal standard, or make a manifestly wrong finding. (3) Because Vindich applied for a building permit, not a variance, and the City processed and approved it as such, there was not a requirement for notice and thus there was no merit to Wheelan's due process claim. (4) Because Wheelan's chancery court filing was not without justification based on failure to exhaust administrative remedies, because Wheelan's case was not deemed "frivolous," because Vindich was a necessary party to the action, and because Wheelan cannot be sanctioned for an appeal he did not file, the trial court did not err in denying Vindich damages, costs, or attorney's fees. (5) Because Vindich presented no authority that Wheelan's statements questioning the validity of Vindich's building permit constituted slander of title, the trial did not err when it dismissed Vindich's slander-of-title claim against Wheelan. Therefore, the Court of Appeals affirmed the judgment of the Jackson County Chancery Court.

CONCURRENCE IN PART/DISSENT IN PART

Presiding Judge Wilson argued that the chancery court had jurisdiction to consider Wheelan's challenge to the City Council's order granting Vindich's building permit. He agreed with the majority affirming the chancery court's denial of Vindich's counterclaim for slander of title and holding that Vindich is not entitled to recover attorney's fees for the trial or appeal. However, he argued that the City's interpretation of its ordinance cannot be upheld. Although there are reasonable interpretations of the subject ordinance under which the City could have granted Vindich's application for a building permit, the City's interpretation is manifestly unreasonable. For that reason, he argued the chancery court's judgment should be reversed in part, and the City Council's order should be vacated.

Affirmed - 2019-CA-01062-COA (Feb. 23, 2021)

En Banc Opinion by Judge McDonald - Concurrence in Part/Dissent in Part by Presiding Judge Wilson

Hon. Michael H. Ward (Jackson County Chancery Court)

Robert E. O'Dell for Appellant - Edward C. Taylor, A. Kelly Sessoms III, Nathan Ryne Hand, & Nicole Wall Sullivan for Appellees

Briefed by [Bess Fisher](#) & [Morgan Hart](#)

COURT OF APPEALS – POST-CONVICTION RELIEF

COLLINS V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PROCEDURAL BAR - SUCCESSIVE MOTIONS - Under the Uniform Post-Conviction Collateral Relief Act, any order denying or dismissing a PCR motion is a bar to a second or successive post-conviction relief motion

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

POST-CONVICTION RELIEF - WEIGHT OF THE EVIDENCE - WAIVER - Under *Pegues*, challenges to the weight of the evidence are waived by pleading guilty

CRIMINAL PROCEDURE - GUILTY PLEA - FACTUAL BASIS - If sufficiently specific, an indictment or information can be used as the sole source of the factual basis for a guilty plea; a defendant’s admission alone may establish a factual basis for the guilty plea so long as the trial court can say with confidence the prosecution could prove the accused guilty

CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS - A guilty plea will only be binding upon a criminal defendant if it is voluntary and intelligently entered, which means a defendant must be advised about the nature of the crime charged against him and the consequences of the guilty plea

CRIMINAL PROCEDURE - INDICTMENT DEFECT - WAIVER - Under *Iyy*, a valid guilty plea waives all non-jurisdictional defects to an indictment

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under *Strickland*, a claimant of ineffective assistance of counsel bears the burden of proof to show that: (1) counsel’s performance was deficient and (2) the deficiency prejudiced his defense; allegations of ineffective assistance of counsel must be made with specificity and detail, and are assessed by the totality of the circumstances

FACTS

In 2014, Kevin Collins was indicted for murder, conspiracy to commit murder, aggravated assault, and possession of a firearm by a felon. In May 2015, Collins pled guilty to manslaughter and aggravated assault. Collins later filed a motion for post-conviction relief (“PCR”), which the circuit court subsequently dismissed. Collins then filed a motion to reinstate the appeal after the mandate issued, which was denied. In 2019, Collins filed a second PCR motion reasserting claims raised in his first PCR motion. The circuit court dismissed the motion as time-barred and barred as a successive motion, noting that the claims did not overcome the procedural bars. Collins appealed.

ISSUES

Whether (1) Collins’s convictions were against the overwhelming weight of the evidence; (2) an insufficient factual basis existed for Collins’s guilty plea; (3) the circuit court failed to advise Collins of certain constitutional rights; (4) Collins’s indictment was defective because it did not conclude with the words “against the peace and dignity;” and (5) Collins received ineffective assistance of counsel.

HOLDING

(1) Because Collins plead guilty and any challenges to the weight of evidence are waived by pleading guilty, the issue was waived. (2) Because both the record and the statements made during the plea hearing reflected that Collins heard the

factual statements that the State presented and admitted that enough evidence existed to support his convictions, a sufficient factual basis was established to support Collins's plea. (3) Because the transcript showed that Collins was advised as to both his right to counsel and that by entering a guilty plea he would waive his right to cross-examine witnesses and his right to self-incrimination, the issue was without merit. (4) Because there was no indication in the record that Collins objected to his indictment prior to pleading guilty, the issue was waived. (5) Because the record indicated that Collins was satisfied with his attorney's assistance, and because the only evidence provided to support Collins's claims that he was coerced were his own unsupported assertions, Collins did not receive ineffective assistance of counsel. Therefore, the Court of Appeals affirmed the judgment of the Lincoln County Circuit Court.

Affirmed - 2019-CP-01760-COA (Feb. 23, 2021)

Opinion by Judge Greenlee

Hon. Michael M. Taylor (Lincoln County Circuit Court)

Pro se for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Schyler Burney](#)

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

WHITE V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - POST-RELEASE SUPERVISION - PROCEDURES - Procedures for termination of post-release supervision and recommitment shall be conducted in the same manner as procedures for the revocation of probation and imposition of a suspended sentence as required pursuant to Miss. Code Ann. § 47-7-37

CONSTITUTIONAL LAW - DUE PROCESS - POST-RELEASE SUPERVISION OR PROBATION - A court cannot revoke an offender's PRS or probation simply because, through no fault of his own, the offender is unable to report

FACTS

In December 2017, Steven White pled guilty to possession of less than ten grams of methamphetamine with intent to sell. The Desoto County Circuit Court sentenced him to time served of sixty-seven days and seven years of post-release supervision ("PRS"), with five years of reporting and two years non-reporting. In January 2018, White's probation officer filed a petition to revoke White's PRS, alleging that White had never reported for intake. The circuit court entered an order, finding that White violated the terms of his PRS by failing to report for intake as scheduled. The court then revoked 180 days of White's PRS, ordered him to complete a drug rehabilitation program while incarcerated at a technical violation center ("TVC"), and directed that he would be released from the TVC upon completion of the program or after 180 days, whichever occurred first. In February 2019, the Mississippi Department of Corrections ("MDOC") filed a notice that White would be released due to completion of the TVC. In March 2019, White's probation officer filed a petition to revoke White's PRS, alleging that White failed to report upon being released from the TVC. Officer Johnson mistakenly informed the court that it was White's third revocation, rather than his second, and the court accepted Johnson's representation, entering an order to revoke five years of White's PRS based on his failure to report within twenty-four hours of being released. White filed a motion for post-conviction relief, alleging that the court erred by sentencing him to 180 days in a TVC for his first violation and by revoking five years of his PRS sentence for his second violation. The circuit court denied White's motion without holding a hearing or directing the State to respond. The order acknowledged that White's PRS had only been revoked twice, however the circuit court ruled that it properly revoked five years of White's PRS. White appealed.

ISSUE

Whether the circuit court erred in revoking five years of White's PRS.

HOLDING

Because White's PRS had only been revoked twice, the circuit court erred when it revoked White's PRS on the ground that it was his third revocation. Therefore, the Court of Appeals reversed and rendered the judgment of the Desoto County Circuit Court.

Reversed & Rendered - 2020-CP-00537-COA (Feb. 23, 2021)

Opinion by Presiding Judge Wilson

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

Pro se for Appellant - Michael Dewayne Wilson Sr. (Att'y Gen. Office) for Appellee

Briefed by [Gabrielle Beech](#)

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

COURT OF APPEALS - CRIMINAL CASES

DOTSON V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - SENTENCING - JUVENILE OFFENDER - Sentencing a juvenile offender to life without parole is not constitutionally prohibited, but requires the sentencing authority to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison

CONSTITUTIONAL LAW - SENTENCING - MILLER FACTORS - Before sentencing a juvenile offender to life without parole, the sentencing authority must consider the following factors: (1) chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences; (2) family and home environment that surrounds the defendant; (3) circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him; (4) that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth; and (5) the possibility of rehabilitation

CONSTITUTIONAL LAW - MILLER FACTORS - BURDEN OF PROOF - The burden rests with the juvenile offender to convince the sentencing authority that *Miller* considerations are sufficient to prohibit a sentence of life without parole; if the offender persuades the judge that the *Miller* factors preponderate in favor of parole eligibility, then the judge must declare the offender parole eligible

FACTS

When Dunta Dotson was fifteen years old, he, along with his thirteen-year-old brother, Robert Dotson, and friend Eugene Ealy, drove to Madison County, Mississippi to steal a four-wheeler. Upon finding a four-wheeler at Robert Jeanes's residence, Dunta and Ealy approached the door while Robert remained in the car. Dunta was armed with a gun. The pair knocked and asked Jeanes to use his phone. After Jeanes obliged, Dunta shot and killed Jeanes while Ealy pretended to use the phone. Dunta admitted the shooting was unprovoked, but claimed he did not intend to kill Jeanes. Dunta admitted that earlier that day, Ealy said that they would need to kill Jeanes after robbing him "because [a] dead man don't talk." The three stole several vehicles, firearms, and other property from the house. Dunta turned himself in three days later, originally telling police it was Ealy who shot Jeanes because he was scared. Dunta was indicted for capital murder and pled guilty to the lesser-included offense of murder, as opposed to capital murder. The trial court sentenced Dunta to life without parole, as this was the only possible sentence that could be imposed by statute at the time. After the U.S. Supreme Court's decision in *Miller v. Alabama*, which rendered mandatory life-without-parole sentences for juveniles unconstitutional, Dunta applied for post-conviction relief. The trial court granted the motion, vacated Dunta's sentence, and ordered a hearing for resentencing. Dr. Criss Lott, a forensic and clinical psychologist, testified as an expert witness on Dunta's behalf, and Jeanes's brothers, Kenneth and Mike Jeanes, provided victim impact statements for the State. Dr. Lott testified that, in his opinion, the factors present in *Miller* were also present in Dunta's case. Dr. Lott emphasized Dunta's immature brain development at the time of the murder, who was then fifteen years and three months old, and that in his opinion, the act was transient in nature. On cross-examination, Dr.

Lott acknowledged that Dunta was charged with aggravated assault as a thirteen-year-old after shooting a shotgun at a boy who stole his bike. That charge was later dropped. Dr. Lott also addressed Dunta’s capacity for rehabilitation, noting his family support system, receiving his GED in prison, and general good behavior. Dunta also testified, explaining that he and Ealy had been stealing vehicles for several months before the time of the murder. He stated that he carried a gun “on and off” during the thefts because it was a social norm. Dunta confirmed the account regarding the aggravated assault charge, and also admitted to several nonviolent rule violations in prison. He also mentioned his rehabilitative efforts, such as taking classes and working as a barber. Lieutenant Don Hicks, testifying for the State, relayed that Dunta did not seem upset when he turned himself in for murder. He also put little weight on the fact that Dunta turned himself in, since police were already looking for him and he took three days to do so. Hicks mentioned the fact that Dunta initially blamed Ealy before taking responsibility for the shooting. The trial court, upon review of the evidence under the applicable law, resentenced Dunta to life without the possibility of parole. Dunta filed his notice of appeal. Several months later, Dunta filed a motion to stay the appeal until the U.S. Supreme Court’s decision in *Jones v. Mississippi*, which would address the issue of whether the Eighth Amendment requires a finding that a juvenile offender is “permanently incorrigible” before being sentenced to life without parole. The Court of Appeals held Dunta’s motion in abeyance for the purposes of oral argument. The Court then denied Dunta’s motion to stay without prejudice. Dunta appealed.

ISSUES

Whether (1) the trial court applied the incorrect legal standard in sentencing Dunta to life without parole and (2) his life-without-parole sentence was disproportionate as a matter of law.

HOLDING

(1) Because Dunta was provided a full and fair evidentiary hearing, and because the trial court recognized that he bore the burden of proving that the *Miller* factors preponderate in favor of parole eligibility and the circuit court judge took into account each of the *Miller* factors in light of all the evidence presented in making its ruling, the trial court applied the correct legal standard in sentencing Dunta to life without parole. (2) Because the trial court found that on the day of the murder, Dunta had time to think and plan with a number of opportunities for him to stop, because the circuit court acknowledged that Dunta “had a somewhat less than a perfect or ideal upbringing” but determined this was not a significant factor, because the murder was jointly planned and executed rather than the product of influence, because there was no evidence that Dunta lacked the capacity to deal with police officers or prosecutors or assist in his own defense, and because there were instances following the crime that were both favorable and unfavorable to the possibility of rehabilitation; the murder was not the product of impulsivity or lack of self-control but a planned, premeditated event, Dunta’s upbringing weighed only slightly in his favor, the circumstances of the homicide weighed heavily against parole, there was nothing in the incompetencies of youth factor that weighed in favor of parole, and Dunta failed to show that the *Miller* factors required that he receive a sentence of life with eligibility for parole and his life-without-parole sentence was therefore not disproportionate as a matter of law. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

Affirmed - 2019-KA-01086-COA (Feb. 23, 2021)

Opinion by Presiding Judge Carlton

Hon. John Huey Emfinger (Madison County Circuit Court)

Stacy Ferraro & Thomas M. Fortner (Pub. Def. Office) for Appellant - Scott Stuart & Krissy Casey Nobile (Att’y Gen. Office) for Appellee

Briefed by [Cameron Johnson](#)

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

MISSISSIPPI COURT OF APPEALS DECISIONS – FEBRUARY 22, 2021

COURT OF APPEALS - CIVIL CASES

BECKWORTH V. BECKWORTH

CIVIL - REAL PROPERTY

CONTRACTS - LIMITATIONS - STATUTE OF FRAUDS - Under Miss. Code Ann. §15-3-1(c), Mississippi's statute of frauds requires a contract for the sale of land to be in writing and "signed by the person to be charged therewith"

CONTRACTS - STATUTE OF FRAUDS - EXCEPTIONS - The doctrine of equitable estoppel may be used to enforce an oral contract which would otherwise be unenforceable under the statute of frauds

PROPERTY - EQUITABLE DEFENSES - ESTOPPEL - In order to assert a claim of equitable estoppel, one must show: (1) belief and reliance on some representation; (2) change of position as a result of the representation; and (3) detriment or prejudice caused by the change of position

APPELLATE PROCEDURE - REQUESTS PENDING APPEAL - SUPERSEDEAS BOND - In a case without monetary judgment, Miss. R. App. P. 8(b)(1) provides that "application for a stay of the judgment or the order of a trial court pending appeal or for approval or disapproval of a contested supersedeas bond . . . during the pendency of an appeal must ordinarily be made in the first instance in the trial court"

APPELLATE PROCEDURE - REQUESTS PENDING APPEAL - DISCRETION - Whether a supersedeas bond shall be allowed is within the sound discretion of the court

FACTS

Ann Beckworth ("Ann") bought residential property on February 2, 2011 and was the sole record owner. Ann's brother, Archie Beckworth ("Archie") was living in Chicago at the time Ann purchased the property and began making monthly payments of \$325 to Ann. Three years later, Archie moved into the residence in Mississippi with Ann and continued making monthly payments to her. In May 2019, Ann notified Archie by mail to remove his personal belongings from the property. In July 2019, Ann filed an eviction action in the Justice Court of Sunflower County against Archie, alleging that he was a tenant, renting a room in the residence. The justice court ruled in Ann's favor, giving Archie thirty days to remove any personal property from the subject property. Archie appealed to the Sunflower County Circuit Court. He also filed a motion to stay the judgment pending the appeal, claiming that Ann did not have legal authority to remove his personal property because Archie was not a tenant on the premises but had an ownership interest in the property. At trial, Archie insisted that he and Ann had an oral agreement to be co-owners of the property and that the monthly payments were toward purchasing the home, not rent. Citing the statute of frauds, the circuit court refused to allow Archie to submit any evidence to support his claim of equitable estoppel. The circuit court upheld the justice court's ruling, ordering Archie to vacate the premises. The circuit court further denied Archie's motion to stay the judgment pending appeal. The following day, Archie filed a motion to establish a supersedeas bond for appeal pursuant to Miss. R. App. P. 8, which the circuit court denied because the cause did not involve a money judgment. Archie appealed.

ISSUES

Whether the trial court erred in (1) excluding evidence of equitable estoppel based upon the statute of frauds and (2) denying Archie's motion to establish a supersedeas bond.

HOLDING

(1) Because the doctrine of equitable estoppel may be used to enforce an oral contract which would otherwise be unenforceable under the statute of frauds, the trial court, citing the statute of frauds, erroneously denied Archie any opportunity to demonstrate the elements of equitable estoppel. (2) Because the trial court was well within its discretion to deny Archie's request for the supersedeas bond, as the court had already denied his motion for a stay pending appeal, the trial court's denial of a supersedeas bond did not constitute reversible error. Therefore, the Court of Appeals affirmed in part, and reversed and remanded in part the judgment of the Sunflower County Circuit Court.

Affirmed In Part; Reversed & Remanded In Part - 2019-CA-01762-COA - (Feb. 22, 2021)

Opinion by Chief Judge Barnes

Hon. W. Ashley Hines (Sunflower County Circuit Court)

Alsee McDaniel for Appellant - Jane E. Tucker for Appellee

Briefed by [Cecelia Hurt](#)

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

COOK V. TAYLOR

CIVIL - PERSONAL INJURY

CIVIL PROCEDURE - ANSWER - AFFIRMATIVE DEFENSE - Miss. R. Civ. P. 8 states that a party shall affirmatively set forth “any other matter constituting an avoidance or affirmative defense”

CIVIL PROCEDURE - WAIVER - AFFIRMATIVE DEFENSE - Absent extreme and unusual circumstances, an eight-month unjustified delay in the assertion of any affirmative defense coupled with active participation in the litigation process constitutes waiver, as a matter of law

FACTS

Brenda Cook filed a negligence action against Amos Taylor, individually, seeking damages for injuries she incurred when their vehicles collided. Taylor was traveling in his capacity as a volunteer firefighter. Taylor filed an answer to Cook’s suit, raising eight affirmative defenses, none of which was qualified immunity. For the next fourteen months, Taylor extensively participated in litigation before filing a motion for summary judgment asserting that he was entitled to qualified immunity. Two months after filing his motion for summary judgment, Taylor filed a motion to amend his answer to assert a qualified immunity defense. Without ruling on his motion to amend his answer, the trial court granted Taylor’s motion for summary judgment. Cook appealed.

ISSUE

Whether the trial court erred in granting Taylor’s motion for summary judgment.

HOLDING

Because Taylor’s unjustifiable fourteen-month delay in asserting his affirmative defense, while participating in the litigation, constituted a waiver of the qualified immunity defense, the trial court erred in granting Taylor’s motion for summary judgment. Therefore, the Court of Appeals reversed the judgment of the Quitman County Circuit Court.

Reversed & Remanded - 2019-CA-01406-COA (Feb. 22, 2021)

Opinion by Presiding Judge Carlton

Hon. Linda F. Coleman (Quitman County Circuit Court)

Thomas Alan Womble & Bethany Ann Tarpley for Appellant - Lawrence John Tucker Jr. for Appellee

Briefed by [Ashley Pruitt](#)

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

DAVIS V. DAVIS

CIVIL - CUSTODY

FAMILY LAW - JURISDICTION - ABUSE ALLEGATIONS - Miss. Code Ann. § 43-21-151(1)(c) provides that when a charge of abuse arises during a custody action in chancery court, the chancery court may proceed with the investigation, hearing, and determination of such abuse charges as part of its hearing and determination of the custody action

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 - ABUSE ALLEGATIONS - ATTORNEY’S FEES - Miss. Code Ann. § 93-5-24(9)(c) provides that the chancery court shall only award attorney’s fees if the court finds that the allegations of domestic violence are completely unfounded

FACTS

Kate (“Kate”) and Max (“Max”) Davis married in 2014 and had one child, Danielle. In 2017, Max and Kate separated, and Kate filed for divorce based on irreconcilable differences. In July 2018, the chancellor awarded joint legal and physical custody of Danielle. In September 2018, Kate noticed some bruises on Danielle’s arms, and Danielle told Kate that Max had “jerked her around.” In October 2018, Danielle returned to Kate with bruising around her eye after she stayed with Max. When Kate asked Danielle about her eye, Danielle said that Max had struck her. Kate met with the Lamar County Sherriff’s Department and filed a request for charges of felonious child abuse, claiming that Max had abused Danielle. In October 2018, Max was arrested on one charge of misdemeanor child abuse and one charge of felony child abuse. Kate filed affidavits with the Lamar County Justice Court alleging the abuse. The Lamar County Justice Court entered a protection order prohibiting Max from having custody of Danielle. Following the initial appearance, the misdemeanor charge was not pursued, and the felony charge was dismissed for lack of evidence. On October 25, 2018, Max filed for modification of custody, alleging that Kate had denied him custody and falsely accused him of abuse, and asked the chancellor to award attorney’s fees for his defense of the abuse allegations. Kate also filed modification of custody, alleging that Max had abused Danielle, that a material change of circumstances had occurred, and that Danielle needed protection from irreparable harm. Kate sought a temporary restraining order against Max and an emergency order granting her custody. The chancellor appointed a guardian ad litem (“GAL”) to investigate the abuse allegations and make a recommendation as to the best interests of the child. The chancellor also entered a temporary order reinstating the joint custody decree. Following a May 2019 status hearing, the chancellor entered an order prohibiting any contact between Danielle and a man named Ted Greene and any discussion concerning the identity of Danielle’s biological father with Danielle. The chancellor also modified custody to give Max sole physical custody and Kate visitation. At trial, Max explained that Danielle got the black eye while jumping on a trampoline with other children. He also testified that he had spent little time with Danielle on the day that her arm was bruised and that when he returned Danielle to Kate that evening, Kate did not mention the bruise. He also testified that the Department of Children Protection Services (“DCPS”) did not investigate him for child abuse. The local child advocacy center was referred the abuse case and Robin Bixler conducted a forensic interview with Danielle, during which Bixler determined in her professional opinion that there was no abuse despite that Danielle’s responses to questions were consistent with a child who may have been abused. Bixler gave her report, which consisted of a summary of Danielle’s statements, to DCPS. Torjia Ashford, a child-family protection specialist for DCPS, investigated the case and closed the investigation without taking further steps because she felt that Kate was taking the necessary steps to keep Danielle safe. At trial, Kate testified that she believed that Danielle had been abused because she had no reason to doubt what her daughter told her. The GAL testified that he did not think that Danielle had been abused. In August 2019, the chancellor entered a final order finding that Kate’s criminal charges and custody modification were to the detriment of the child, without care, nor in the best interest of her child, which amounted to a material change in circumstances for the court to modify custody. The chancellor then applied the *Albright* factors and determined that Max should have sole legal and physical custody of Danielle and Kate visitation. The chancellor also awarded Max attorney’s fees, including the amount remaining for his criminal defense of the abuse allegations. Kate filed a motion for new trial or to amend the judgment, which was denied. Kate appealed.

ISSUES

Whether (1) the chancery court had jurisdiction to hear allegations of abuse that were the subject of a DCPS investigation; (2) the chancellor erred by modifying custody; and (3) the chancellor erred by awarding attorney’s fees.

HOLDING

(1) Because the abuse charges arose during the custody action in chancery court, and because the abuse investigation was never turned over to youth court, the chancery court had jurisdiction over the custody action, and the chancellor did not err by addressing the alleged abuse in the course of adjudicating the custody action. (2) Because Max failed to prove a material change in circumstances that adversely affected the child, the chancellor erred by ordering a modification of custody, and the Court of Appeals reversed and rendered the modification of custody. (3) Because the allegations of abuse were not completely unfounded, the chancellor erred by awarding attorney’s fees, and the Court of Appeals reversed and rendered the award. Therefore, the Court of Appeals affirmed in part and reversed and rendered in part the judgment of the Lamar County Chancery Court.

Affirmed in Part; Reversed & Rendered in Part - 2019-CA-01683-COA (Feb. 22, 2021)

Opinion by Presiding Judge Wilson

Hon. Deborah J. Gambrell (Lamar County Chancery Court)

Mary Holly Hammett for Appellant - Shawn M. Lowrey for Appellee

Briefed by [Caroline Heavey](#)

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

KANZA CONSTR., INC. V. KANSAS CITY S. RYS. CO.

CIVIL - CONTRACT

CONTRACTS - ORAL MODIFICATION - PATTERN OF CONDUCT - Parties may orally modify a contract that expressly forbids oral modification if the parties engage in a pattern of conduct that waives the stipulation that all modifications be in writing

CONTRACTS - BREACH - BARRED CLAIMS - A party who has breached a contract may not maintain a suit for breach of contract against the other party

CONTRACTS - MATERIAL BREACH - EXCUSED PERFORMANCE - A party's material breach of a bilateral contract excuses further performance by the other party

CONTRACTS - MATERIAL BREACH - DEFINITION - A breach is material when there is failure to perform a substantial part of the contract or one or more of its essential terms or conditions

FACTS

In 2009, the City of Vicksburg contracted with Kansas City Southern Railways Co. ("KCS") to demolish a bridge and construct a new one in its place. KCS began accepting bids from contractors to complete both the demolition and construction. KCS accepted Kanza Construction's bid of \$6,796,000, which was the total amount KCS received from the City. KCS and Kanza entered into a contract, wherein Kanza agreed to finish the project by June 10, 2011. The contract included a provision stating that, should Kanza fall behind schedule, it would be required to increase its manpower and equipment allocations to the project immediately, without any cost to KCS. Kanza was given notice to proceed with the project on June 10, 2010; however, due to design changes made by Kanza, construction did not begin until April 2011, three months before the deadline. Kanza's deadline was extended to September 30, 2011, then again to December 3, 2011. In September of the same year, KCS's senior vice president and chief engineer, John Jacobsen, and Kanza's president, Steve Hutchinson, began corresponding by mail. Jacobsen requested that Hutchinson increase its manpower and equipment allocation immediately, referencing the provision described above. Hutchinson responded by denying Kanza was behind schedule and that Kanza was entitled to additional time for delays beyond its control. Hutchinson agreed to add manpower and equipment to meet the December deadline but stated this would be an "Acceleration of the Project," entitling Kanza to additional compensation. Subsequently, Jacobsen and Hutchinson met in person, along with KCS's general counsel, David Reeves, where the deadline was again extended to February 28, 2012. Hutchinson stated in an affidavit that Reeves "took [him] aside and requested that Kanza proceed with the acceleration without a prior change order." Hutchinson believed this to mean that Kanza would cover the additional costs for the acceleration. Kanza completed the bridge by the February deadline, but defects required KCS to hire additional engineers and a new contractor to repair and finish the project. Consequently, KCS refused to pay Kanza the remainder of the amount owed, along with any acceleration costs. Kanza sued KCS for breach of contract and damages, including the remainder of the lump sum specified in the contract and acceleration costs. In its answer, KCS denied breaching the contract and filed a counterclaim for breach of contract against Kanza, seeking damages for the costs incurred to repair and finish the contract. The Warren County Circuit Court granted KCS partial summary judgment for Kanza's accelerated damages claim, and during a bench trial, KCS was awarded damages of \$3,476,544.83 for its additional costs. Kanza appealed only the partial summary judgment on its claim for acceleration damages.

ISSUE

Whether the trial court erred in granting KCS partial summary judgment on Kanza's claim for acceleration damages.

HOLDING

Because Kanza failed to challenge the trial judge's finding that it materially breached the contract, Kanza's claim for acceleration damages was barred. Therefore, the Court of Appeals affirmed the judgment of the Warren County Circuit Court.

Affirmed - 2019-CA-00904-COA (Feb. 22, 2021)

Opinion by Presiding Judge Wilson

Hon. Isadore W. Patrick Jr. & Hon. Toni Demetresse Terrett (Warren County Circuit Court)

Steven Craig Panter for Appellant - Charles Edwin Ross, James Earl Graves III, & Linda Faye Cooper for Appellee

Briefed by [Brie Mansoor](#)

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

COURT OF APPEALS - CRIMINAL CASES

ALEXANDER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - SENTENCING - MILLER FACTORS - In *Miller v. Alabama*, the U.S. Supreme Court identified five factors that should be considered before sentencing a juvenile to life without parole: (1) age and immaturity; (2) family home environment; (3) circumstances of the offense, including the juvenile's role and influence of peer pressure; (4) incompetencies of youth that may have disadvantaged the juvenile against the justice system; and (5) potential for rehabilitation

CONSTITUTIONAL LAW - DUE PROCESS - AKE FACTORS - In determining whether an expert is a basic tool for an adequate defense for indigent defendants, courts consider three factors: (1) the private interest that will be affected by the action of the State; (2) the governmental interest that will be affected if the safeguard is to be provided; (3) the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided

FACTS

In 1998, seventeen-year-old Norris Alexander stabbed his mother-in-law to death, was convicted of capital murder, and was sentenced to life imprisonment without eligibility for parole by a Panola County Circuit Court jury. In 2012, the U.S. Supreme Court held in *Miller v. Alabama* that sentencing a juvenile to a life sentence without the possibility of parole is unconstitutional and provided factors that must be considered before such a sentencing. Because of *Miller*, Alexander filed a post-conviction relief motion to set his sentence aside so that the *Miller* factors could be argued and considered by the sentencing court. Alexander, being an indigent defendant, could not afford to retain experts and did not have access to psychiatric records, so Alexander's counsel filed two motions requesting funds for expert testimony that would be presented at the *Miller* resentencing hearing. The Panola County Circuit Court denied both motions because defense counsel failed to establish a substantial need for experts, did not interview potential witnesses, and did not independently investigate the facts and circumstances of the case. At the *Miller* hearing, the State presented two witnesses who testified about Alexander in relation to the *Miller* factors. Alexander's counsel presented no witnesses, claiming in the record that a lack of funding for experts was the cause. After considering the *Miller* factors, the circuit court sentenced Alexander to life imprisonment without parole. Alexander appealed.

ISSUE

Whether the circuit court erred in denying Alexander's motions for funds to retain necessary expert assistance in the fields of mitigation investigation and adolescent development psychology.

HOLDING

Because the lack of expert assistance denied Alexander due process such that the trial was rendered fundamentally unfair, the circuit court abused its discretion in denying Alexander's requests for expert funds. Therefore, the Court of Appeals vacated Alexander's sentence and reversed and remanded the judgment of the Panola County Circuit Court.

DISSENT

Presiding Judge Carlton argued that, after review of the record, Alexander's counsel failed to identify a substantial need for expert assistance. Therefore, she argued that the circuit court did not abuse its discretion by denying Alexander's motions for funds to hire experts.

Vacated, Reversed, & Remanded - 2019-KA-01612-COA (Feb. 22, 2021)

Opinion by Judge Lawrence - Dissent by Presiding Judge Carlton

Hon. James McClure III (Panola County Circuit Court, Second Judicial Dist.)

Erin Elizabeth Briggs (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Rod Bridges](#)

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

BLISS V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - JURY INSTRUCTIONS - SUFFICIENCY - Where the given jury instructions fairly announce the law of the case and create no injustice, no reversible error will be found

CRIMINAL PROCEDURE - FAILURE TO OBJECT - PLAIN ERROR - Failure to object at trial waives any assignment of error on appeal absent plain error; further, the plain-error rule is applied only when a defendant's substantive or fundamental rights are affected

CRIMINAL PROCEDURE - EVIDENCE - EXCLUSION - A court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the jury, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence

FACTS

One evening, Fredrick Bliss followed J.R. home from the Beau Rivage Resort and Casino in Biloxi, Mississippi. He turned off his headlights as they entered her apartment complex, and he followed her until she parked in a poorly lit section of the parking lot. According to J.R., when she exited her vehicle to go inside, Bliss grabbed her from behind in a chokehold, shoved an object that J.R. feared was a knife behind her ear, told her to shut up, and dragged her to the ground. Bliss pulled J.R.'s underwear down, digitally penetrated her, and touched her breasts. He then stood up, threatened to kill J.R. if she turned around to look at him, and fled the scene. J.R. ran into her apartment and told her husband what had transpired. They contacted the police, but officers were unable to find the offender. Investigators later identified the object that J.R. feared was a knife to be a military pen. They were able to identify Bliss using the pen, his fingerprints found at the crime scene, video footage of him leaving the Beau Rivage at the same time as J.R., and video footage of him following J.R. into her apartment complex with his lights off. Bliss testified that he did follow J.R. to her apartment, but that he did so after she signaled for him to follow her home. He claimed that he always dimmed his lights so as not to blind the guards when entering a parking lot. He testified that he approached J.R., wrapped his hands around her waist, and caressed her until she told him that she was married with children. He then left and she went inside. A medical expert performed a sexual assault examination and found that there was a pinpoint bruise behind J.R.'s left ear, bruising on her left leg, and redness/bruising on her vagina and cervix. A Harrison County jury indicted Bliss for one count each of kidnapping, robbery, and sexual battery. At trial, the medical expert testified regarding the sexual assault examination, and the State introduced into evidence photographs of J.R.'s cervical injuries. The State also presented into evidence the videos of Bliss leaving the Beau Rivage at the same time as J.R., Bliss following J.R. into her apartment complex with his lights off, and a video of J.R. running into her apartment building with her underwear still around her ankles. The jury found Bliss not guilty of kidnaping or robbery, but convicted him of sexual battery. The Harrison County Circuit Court sentenced Bliss to serve twenty-five years in MDOC's custody without parole or early

release. Bliss moved for judgment notwithstanding the verdict, or a new trial in the alternative, and the trial court denied his motion. Bliss appealed.

ISSUES

Whether the trial court erred in (1) instructing the jury that uncorroborated testimony of a sex-crime victim is sufficient to support a conviction if accepted as true by the finder of fact and (2) by admitting into evidence the photograph of J.R.'s cervical injuries.

HOLDING

(1) Because the Supreme Court has held that an identical jury instruction stated the applicable caselaw and provided no improper comment on the weight of the evidence, and because, when read as a whole, the jury instructions fairly announced the law and created no injustice, the trial court did not abuse its discretion in instructing the jury. (2) Because the photograph assisted in the explanation of J.R.'s cervical injuries, aided the jury in understanding the nature and extent of the injuries, and aided the State in proving sexual penetration, the photograph possessed probative value that outweighed any potential prejudice to Bliss; accordingly, the admission of the photograph did not result in an abuse of discretion or a manifest miscarriage of justice. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

CONCURRENCE

Judge Westbrook agreed with the majority's decision regarding the photograph and she agreed that existing Supreme Court precedent bound them to uphold the contested jury instruction. However, she argued that such a jury instruction is problematic because it highlights a victim's testimony, potentially confuses or misleads jurors, and pertains to a concept that is irrelevant to a jury's function as fact-finder. Therefore, she would urge the State to join the jurisdictions that recognize the fallacy behind such instructions.

Affirmed - 2019-KA-01617-COA (Feb. 22, 2021)

En Banc Opinion by Judge Greenlee - Concurrence by Judge Westbrook

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

W. Daniel Hinchcliff & George T. Holmes (Pub. Def. Office) for Appellant - Allison Elizabeth Horne (Att'y Gen. Office) for Appellee

Briefed by [Jacob D. Hamm](#)

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

CARPENTER V. STATE

CRIMINAL - FELONY

CRIMINAL PROCEDURE - EVIDENCE - SUFFICIENCY ERROR - The sufficiency of the evidence is challenged with a motion for a directed verdict, a request for a peremptory instruction, or a motion for judgment notwithstanding the verdict

APPELLATE PROCEDURE - SUFFICIENCY ERROR - WAIVER - In the absence of a renewal of the directed verdict, a request for a peremptory instruction, or a motion for a judgment notwithstanding the verdict, the defendant has waived the sufficiency error on appeal

APPELLATE PROCEDURE - SUFFICIENCY ERROR - STANDARD OF REVIEW - When reviewing the sufficiency of the evidence, the relevant question 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

FACTS

Sharon Johnson, a sixty-six-year-old disabled woman, hired Jimmy Dean Carpenter as her live-in caretaker. Johnson updated her will to leave her house, land, and furniture to Carpenter if he could take care of her until her death. After

returning from a doctor visit, Johnson's friend left her on her recliner while Carpenter was in the kitchen making tea. Later that evening, after receiving an alert from Johnson's Safe Home Security alarm system, the security company called 911. Officers arrived at Johnson's home and found her stabbed to death in her recliner in the living room. Officers searched Johnson's house and the area around the house. The officers heard a male voice coming from the woods. The officers were unable to find anyone until their K9 dog located Carpenter in the woods about twenty to thirty feet from Johnson's house. Carpenter attempted to refuse arrest and, while yelling during his arrest, the officers believed it was the same voice they previously heard in the woods. Carpenter was arrested and transported to the Itawamba County jail. During an interview, Carpenter denied knowing Johnson. Several items were recovered from the scene and sent to the Mississippi Forensics Laboratory. A knife recovered from the kitchen tested positive for Johnson's DNA and Carpenter's right palm print was found on the knife's handle. Carpenter's DNA was found on a bloody ice cream package lid and on a spoon in the kitchen sink. Blood found on Carpenter's blue jeans and boots at the time of his arrest tested positive for Johnson's DNA. The officers also recovered Johnson's personal security device that hung around her neck to activate in an emergency. The device captured an audio recording of the events. Carpenter's voice was on the recording, repeatedly saying that "everything is okay." After the State rested its case-in-chief at trial, Carpenter moved for a directed verdict stating the State failed to make a prima facie case against him, which the court denied. The jury found Carpenter guilty of first-degree murder. Carpenter did not renew his motion for a directed verdict, nor did he make any post-trial motions challenging the sufficiency of the evidence. Carpenter appealed.

ISSUE

Whether the State presented sufficient evidence to support Carpenter's murder conviction.

HOLDING

Because Carpenter failed to renew his motion for a directed verdict, request a peremptory instruction, or move for judgment notwithstanding the verdict, Carpenter waived his sufficiency-of-the-evidence issue on appeal; furthermore, notwithstanding the waiver, because a rational trier of fact in this case could have found the essential elements of the crime beyond a reasonable doubt, the State presented sufficient evidence at trial. Therefore, the Court of Appeals affirmed the judgment of the Itawamba County Circuit Court.

Affirmed - 2019-KA-01849-COA (Feb. 22, 2021)

Opinion by Judge McDonald

Hon. Kelly Lee Mims (Itawamba County Circuit Court)

Justin Taylor Cook (Pub. Def. Office) for Appellant - Meta S. Copeland (Att'y Gen. Office) for Appellee

Briefed by [Lynette Potter](#)

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

MCDOWELL V. STATE

CRIMINAL - FELONY

CRIMINAL LAW - MURDER - FIRST-DEGREE MURDER - Miss. Code Ann. § 97-3-19(1)(a) states that first-degree murder is the killing of a human being without authority of law when done with deliberate design to effect the death of the person killed

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

EVIDENCE - WITNESS - FALSE TESTIMONY - To prove a party knowingly presented false testimony, the claimant must show that a witness testified falsely, that such testimony was material, and that the prosecution knew that the testimony was false

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - In order to prevail on a claim of ineffective assistance, a claimant must demonstrate that trial attorney's performance was deficient and that the deficiency was prejudicial to the defense

FACTS

James Wilson McDowell came to Biloxi, Mississippi on February 21, 2017 and was picked up by his adopted sister, Charity Roxanne McDowell, and Michael Taylor. McDowell hid a gun under the passenger seat in Charity's car. McDowell could not find his gun and Charity informed him that Deverick Johnson was the only person who had sat in the backseat of her car that day. They went to the home of Johnson's cousin to question Johnson about the missing gun. Johnson and his girlfriend were sitting in her car. McDowell got into the backseat of Johnson's girlfriend's car. Johnson stated that he did not have the gun. Next, McDowell claimed that when he opened the door to leave the vehicle, Johnson admitted that he was the type of person to rob people and McDowell claimed he saw Johnson reach under his seat. Thinking that Johnson was going to shoot him, McDowell shot Johnson first. Johnson's girlfriend disputed this, claiming that, without provocation, McDowell shot Johnson multiple times before fleeing. McDowell ran back to Charity's car, firing gunshots at other people in the area as he was running, and they drove off. The police found McDowell's gun under Johnson's seat and Johnson dead at the scene. When the police went to the house where McDowell was staying, he gave the police a false name. The police found the gun used to shoot Johnson underneath the steps of the back porch. McDowell was indicted for one count of first-degree murder and one count of unlawful possession of a firearm by a felon. Later, the State moved to amend his indictment to add a habitual offender charge. The circuit court granted the amendment. After the State rested its case-in-chief, McDowell's counsel moved for a directed verdict on first-degree murder and possession of a firearm by a felon because the State failed to meet its burden to prove the elements for each count. The circuit court denied his motion. The jury found McDowell guilty of first-degree murder and unlawful possession of a firearm by a felon and he was sentenced to life imprisonment for both counts, to run concurrently, without eligibility for parole or early release. McDowell appealed.

ISSUES

Whether (1) the trial court erred in failing to sustain McDowell's motion for a directed verdict based on the insufficiency of the evidence to support the State's case regarding first-degree murder; (2) the trial court erred in refusing a jury instruction of self-defense; (3) the trial court erred in refusing to limit the jury instructions to only manslaughter and justifiable homicide; (4) the State knowingly presented false evidence or failed to correct the false impression of witness testimony; and (5) McDowell's counsel provided ineffective assistance of counsel.

HOLDING

(1) Because the evidence was sufficient for a jury to find that McDowell killed Johnson with deliberate design without authority of law and that he was not acting in self-defense, the trial court did not err in denying McDowell's JNOV motion. (2) Because the jury was given a self-defense instruction and an instruction on manslaughter that incorporated the element of his imperfect self-defense claim, and because the imperfect self-defense jury instruction was an improper statement of the law, the trial court did not err in refusing a jury instruction of self-defense. (3) Because there is no crime of justifiable homicide and because the court correctly instructed the jury on the other instructions, the trial court did not err in refusing to limit the jury instructions. (4) Because McDowell did not meet the burden of proving that the State knowingly produced false testimony through Johnson's girlfriend, the State did not improperly present any false evidence. (5) Because the parties did not stipulate that the record was adequate to allow this Court to make the finding without consideration of the further findings of fact of the trial judge, and because the court did not find the record was sufficient to affirmatively show an ineffective assistance of counsel, the court declined to address the ineffective assistance of counsel issue. Therefore, the Court of Appeals affirmed the judgment of the Harrison County Circuit Court.

Affirmed - 2019-KA-01260-COA (Feb. 22, 2021)

Opinion by Judge McDonald

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

W. Daniel Hinchcliff (Pub. Def. Office) for Appellant - Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee

Briefed by [MaryScott Polk](#)

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

MISSISSIPPI CASES EDITOR

ANNA MCLEMORE

ASSOCIATE CASES EDITORS

MELISSA FENWICK

JOHN FORREST KELLY

MATTHEW RHEA

MATTHEW RUSS

LUKE SEYMOUR

FRANK WOOD

Thank you for supporting the Mississippi Law Journal.

Questions or comments: Anna McLemore, newsletter@mississippilawjournal.org

All BriefServ subscribers traditionally receive access to our website with archived case briefs since January 2007. Our BriefServ Archive is available to subscribers at <https://mississippilawjournal.org/briefserv/>. Currently, our digital database is still being updated with previous editions of the Newsletter. Requests for previous editions of the Newsletter not yet available in the BriefServ Archive can be made to Anna McLemore, newsletter@mississippilawjournal.org. If you have questions about accessing or using the BriefServ website, please contact us at support@mississippilawjournal.org