

MISSISSIPPI COURT OF APPEALS DECISIONS – JULY 27, 2021**COURT OF APPEALS - CIVIL CASES****McNAIR V. J.F.M., INC.****CIVIL - PERSONAL INJURY**

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - TOLLING - The filing of an action tolls the statute of limitations for a 120-day service period

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - SERVICE OF PROCESS - If a plaintiff fails to serve process on a defendant within the 120-day service period, the statute of limitations will automatically begin to run again once that period expires

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - TOLLING - In order to further toll the statute of limitations, the plaintiff must refile the complaint before the statute of limitations ends, or show good cause for failing to serve process on the defendant within the 120-day period; otherwise, dismissal is proper

CIVIL PROCEDURE - STATUTE OF LIMITATIONS - SERVICE OF PROCESS - The plaintiff's showing of good cause for failure to serve process within 120 days relates to the initial complaint and must be made in the initial action

FACTS

On November 6, 2014, Cynthia McNair experienced a slip and fall at a convenience store owned by J.F.M., Inc. McNair filed an initial complaint against J.F.M. on October 24, 2017, thirteen days before the statute of limitations expired. On August 15, 2019, the circuit court judge signed an order of dismissal without prejudice due to McNair's failure to serve process properly or show good cause why J.F.M. was not served properly within 120 days under Miss. R. Civ. P. 4(h). McNair's counsel stated that she did not receive the order until August 26, 2019. On September 5, 2019, McNair refiled her complaint, and on November 9, 2019, J.F.M. was properly served with process containing the second complaint. J.F.M. then filed a motion to dismiss the second complaint with prejudice and contended that the action was time-barred because McNair had not filed it within thirteen days of the circuit court's dismissal. McNair responded by arguing that the statute of limitations did not begin to run again until her counsel received the order setting aside the first complaint. The circuit court agreed with J.F.M., finding that the second complaint was not filed within the statute of limitations, and dismissed the complaint with prejudice. McNair appealed.

ISSUES

Whether (1) the statute of limitations had run before the filing of McNair's second complaint; (2) there was sufficient evidence for the first complaint to survive a motion to dismiss; (3) service of process of the first complaint was made on the proper agent; and (4) the second complaint was filed within the 120-day deadline for service of process.

HOLDING

(1) Because McNair failed to properly serve J.F.M. with her initial complaint, the statute of limitations automatically began to run again after the 120-day period, and therefore, the limitations period expired on March 6, 2018, before the filing of McNair's second complaint. (2) Because none of the facts in the record supported McNair's argument regarding the ability of the first complaint to survive a motion to dismiss, and because McNair made no appeal regarding it in the initial action, the issue was not properly before the court. (3) Because none of the facts in the record supported McNair's argument regarding service of the first complaint on an incorrect agent, and because McNair made no appeal regarding it in the initial action, the issue was not properly before the court. (4) Because none of the facts in the record supported McNair's argument regarding service of the first complaint on an incorrect agent, and because the initial complaint was

dismissed and McNair failed to appeal, the 120-day service-of-process deadline for the initial complaint was not at issue, and the circuit court's dismissal with prejudice was proper. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

Affirmed - 2020-CA-00342-COA (July 27, 2021)

Opinion by Chief Judge Barnes

Hon. Robert B. Helfrich (Forrest County Circuit Court)

Vanessa J. Jones for Appellant - William Harry Eckert, Roy A. Nowell Jr., & Michael J. Tarleton for Appellee

Briefed by [Marianna Nichols](#)

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PACE V. PACE

CIVIL - DOMESTIC RELATIONS

EVIDENCE - ATTORNEY-CLIENT PRIVILEGE - EXCEPTIONS - Exceptions to the attorney-client privilege are only acceptable when the reason for disclosure outweighs the potential chilling of essential communications
FAMILY LAW - DIVORCE - CHILD SUPPORT - An award of child support is a matter within the discretion of the chancellor and will not be reversed unless the chancellor was manifestly wrong in her finding of fact or manifestly abused her discretion

FAMILY LAW - DIVORCE - EQUITABLE DISTRIBUTION - Assets accumulated during marriage are subject to equitable division unless proven that such assets are attributable to one of the party's separate estates before the marriage or outside the marriage

FAMILY LAW - DIVORCE - EQUITABLE DISTRIBUTION - A chancellor's discretion in the area of equitable distribution is exceedingly broad; the chancellor has the flexibility to do what equity and justice requires

FAMILY LAW - DIVORCE - ALIMONY - Alimony is considered only after the marital property has been equitably divided and the chancellor determines one spouse has suffered a deficit

FACTS

Julie and Michael Pace were married in 2005. In 2018, Julie filed for divorce after she discovered Michael was having an affair. Michael, a doctor, owned and operated a medical clinic. In 2018, Julie informed the Mississippi Physicians' Health Program ("MPHP") that Michael had recently started using drugs again. The MPHP required Michael to complete a treatment program and then participate in a monitoring program to maintain his medical license. Michael completed the treatment program but opted out of the monitoring program, thus retiring his medical license. In 2018, Michael filed an emergency ex parte motion to direct Julie to return cash that she had allegedly taken from a jointly owned safe deposit box. At the hearing, both parties testified regarding the disputed cash; however, the record had little evidence to support either party's claims. Following the hearing, Michael asked the court to order Julie to produce emails between her and her attorney regarding the safe deposit box. In 2019, the case proceeded to trial. Michael admitted that he had committed adultery. Accordingly, the chancellor granted Julie a divorce based on uncondoned adultery. The court granted Julie custody of the parties' son, ordered Michael to pay child support of \$1,200 a month, ordered the parties to sell the marital home and medical clinic and divide the proceeds equally, and awarded Julie the remaining cash from the safe deposit box. Michael appealed, and Julie cross-appealed.

ISSUES

Whether the trial court erred in (1) denying Michael's motion compelling Julie to produce emails between her and her attorney; (2) its child support order; (3) failing to distinguish marital property from separate property; (4) dividing the marital estate; and (5) not awarding alimony.

HOLDING

(1) Because the contents of the email referenced in Julie's testimony were not integral to the outcome of any legal issue in the case, and because Julie did not rely on the email to support any claim or defense, the trial court did not abuse its

discretion by denying Michael’s motion to compel. (2) Because the trial court found that Michael could earn a substantial income of more than \$100,000 annually, and because the finding was supported by substantial evidence, the trial court did not abuse its discretion in its child support order based on earning capacity rather than actual income. (3) Because Michael failed to provide any proof that any asset was his separate property, his claim was without merit. (4) Because Julie was unemployed and needed the cash to support herself and their son, because the parties agreed to sell the marital home and medical clinic building, and because the order directed Julie to make preparations for the sale, not control over the assets, the trial court did not abuse its discretion by awarding the funds and assigning the responsibility to Julie. (5) Because the division of property awarded Julie \$120,000 immediately and evenly divided the proceeds from the sale of assets, the trial court did not abuse its discretion by not awarding Julie alimony. Therefore, on direct appeal, the Court of Appeals affirmed the judgment of the Forrest County Chancery Court. On cross-appeal, the Court of Appeals affirmed the judgment of the Forrest County Chancery Court.

On Direct Appeal: Affirmed. On Cross-Appeal: Affirmed - 2019-CA-01377-COA (July 27, 2021)

Opinion by Presiding Judge Wilson

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

Mary Lee Holmes for Appellant - S. Christopher Farris for Appellee

Briefed by [Chandler Coleman](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

ALEXANDER V. STATE

CIVIL - POST-CONVICTION RELIEF

CIVIL PROCEDURE - POST-CONVICTION RELIEF - PERMISSION TO FILE - An appellant must request leave from the Supreme Court before proceeding with a post-conviction relief motion

CIVIL PROCEDURE - JURISDICTION - FINAL JUDGMENTS - The content of a document, rather than its title, makes the document a final judgment and ends litigation in a case

CIVIL PROCEDURE - POST-CONVICTION RELIEF - HABEAS CORPUS - Any pleading cognizable under the Uniform Post-Conviction Collateral Relief Act, even one labeled a petition for habeas corpus, is treated as a motion for post-conviction relief

CIVIL PROCEDURE - RECUSAL - ABUSE OF DISCRETION - Under Miss. Const. art. 6, § 165, Miss. Code Ann. § 9-1-11, and the Mississippi Code of Judicial Conduct, a judge does not have to recuse herself because she served as district attorney in the county where the case originated at the time the case began

FACTS

After a grand jury indicted Barry Alexander on three counts of murder, a trial was held in December 1994. The State failed to disclose evidence, which led to a mistrial. The second trial was set for February 1995. Alexander entered a “Plea of Former Jeopardy” and attempted to file an interlocutory appeal, neither of which succeeded. The jury found Alexander guilty and sentenced him to three consecutive life sentences. In March 1995, Alexander filed a motion notwithstanding the verdict and a motion for a new trial. After Alexander’s counsel repeatedly canceled and failed to appear at hearings, the trial court denied the motion for new trial. The trial court did not enter an order on the motion for judgment notwithstanding the verdict. In December 1995, the trial court held a hearing, and Alexander’s counsel failed to appear. In January 1996, Alexander appealed to the Supreme Court on the denial of his motion for new trial. In April 1996, the appeal was dismissed for failure to prosecute. In December 2019, Alexander asked for leave to amend his motion for judgment notwithstanding the verdict to include a petition for writ of habeas corpus. The trial court viewed the motion as post-conviction relief (“PCR”) and denied it. Further, Alexander filed a motion for Judge Faye Peterson to recuse herself, which the trial court denied. Alexander appealed.

ISSUES

Whether the trial court (1) had jurisdiction to rule on Alexander's PCR motion; (2) erred in viewing Alexander's habeas corpus petition as a PCR motion; and (3) erred in failing to require Judge Peterson to recuse herself from the PCR motion.

HOLDING

(1) Because Alexander failed to obtain permission from the Supreme Court to file the motion, and because the trial court entered a final judgment and sentence in the case, the trial court did not have jurisdiction to rule on the PCR motion. (2) Because the Uniform Post-Conviction Collateral Relief Act ("UPCCRA") implemented a framework for post-conviction collateral review, and because any pleading cognizable under UPCCRA is treated as a PCR motion, the trial court did not err in viewing the habeas corpus petition as a PCR motion. (3) Because no statutory or constitutional grounds for recusal were raised, and because no action was taken on the case during Judge Peterson's time as district attorney, the trial court did not err in failing to require Judge Peterson to recuse herself from the PCR motion. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2020-CA-00177-COA (July 27, 2021)

Opinion by Judge Westbrook

Hon. Eleanor Johnson Peterson (Hinds County Circuit Court, First Judicial Dist.)

Chester Ray Jones for Appellant - Lauren Gabrielle Cantrell (Att'y Gen. Office) for Appellee

Briefed by [Ansley McLellan](#)

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BELK V. STATE

CIVIL - POST-CONVICTION RELIEF

CRIMINAL LAW - INEFFECTIVE ASSISTANCE OF COUNSEL - BURDEN OF PROOF - Under the *Strickland* test, a defendant must prove that his counsel was objectively deficient and that he suffered prejudice as a result

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - INVOLUNTARY PLEA - Under *Thomas*, a petitioner seeking post-conviction relief must prove that his counsel's ineffective assistance caused him to enter the plea, and that he would not have entered the plea but for his counsel's errors

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - FACTUAL SUPPORT - Pursuant to *Ingram*, a post-conviction relief motion must contain more than mere conclusory allegations of ineffectiveness of counsel in order for the claimant to prevail

CRIMINAL LAW - PLEA OF GUILTY - WAIVER OF PRELIMINARY HEARING - When a defendant enters a valid guilty plea, he waives all non-jurisdictional rights for matters relevant to trial, including a preliminary hearing

FACTS

In July 2015, a grand jury indicted Kentrial Belk on nine separate drug-related charges. Three counts were for the sale or transfer of marijuana, five counts were for the sale or transfer of cocaine, and one count was for possession of marijuana. As part of a plea agreement in July 2017, Belk, who had previously served three years in the Mississippi Department of Corrections ("MDOC") for possession of cocaine, pled guilty to one count of possession of marijuana with intent to distribute. In exchange, the other eight counts were retired to the files. Because he was a habitual offender, the Oktibbeha County Circuit Court sentenced Belk to serve ten years in the custody of MDOC with no possibility of parole or early release. In December 2017, Belk filed a motion for post-conviction relief ("PCR"), contending that his ten-year sentence was illegal. Additionally, Belk argued that he was subjected to a harsher sentence due to ineffective assistance of counsel. Specifically, Belk claimed that he involuntarily entered the guilty plea, that the eight retired charges should have been dismissed for lack of jurisdiction, and that the count for possession of marijuana should have been dismissed because he was never arrested, arraigned, or received a preliminary hearing. In July 2018, the circuit court acknowledged that the ten-year sentence exceeded the law's maximum penalty and granted Belk's PCR motion in part,

re-sentencing him to serve eight years in MDOC. However, in April 2020, the circuit court denied the rest of the claims outlined in Belk's PCR motion. The court found Belk's counsel had been effective, noting the eight counts Belk had faced had been retired in exchange for his guilty plea. Furthermore, Belk's contention that his counsel should have been aware of the excessive punishment was dismissed as the court found he had suffered no prejudice once he was re-sentenced to serve the true maximum length of time allowed by law. Finally, the court stated that Belk had competently and voluntarily entered his guilty plea, and dismissed Belk's additional claims, concluding they were without merit. Belk appealed.

ISSUES

Whether the trial court erred when it (1) ruled that Belk had received effective counsel; (2) concluded that Belk had voluntarily entered the guilty plea; (3) dismissed Belk's claims concerning counts one through eight for lack of merit; and (4) dismissed Belk's claim pertaining to count nine for lack of merit.

HOLDING

(1) Because Belk's original sentence of ten years, which fell outside of the maximum amount of time allowed by law, was reduced to eight years, which was within the legal parameters for a habitual offender, and because Belk had not suffered any prejudice as a result, the trial court did not err in ruling that Belk had received effective counsel. (2) Because Belk did not prove that he would not have entered the guilty plea but for his counsel, the trial court did not err when it concluded that Belk had knowingly and voluntarily entered his guilty plea. (3) Because Belk offered nothing more than conclusory statements in regard to his claim that counts one through eight lacked jurisdiction, and because the counts were ultimately retired to the files, the trial court did not err when it dismissed Belk's claim for lack of merit. (4) Because Belk had waived his arraignment by entering his guilty plea after he had been separately indicted on count nine, and because there was no transcript of the plea proceedings, the trial court did not err when it dismissed Belk's claim for lack of merit. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Circuit Court.

Affirmed - 2020-CP-00465-COA (July 27, 2021)

Opinion by Chief Judge Barnes

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

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

Briefed by [John McDonald](#)

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MASSEY V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - PETITION - RECANTING TESTIMONY - Whether a new trial is warranted based on recanting testimony is in the sound discretion of the circuit judge and should not be disturbed unless is clearly erroneous; however, recanting testimony should be regarded with suspicion

EVIDENCE - WITNESS QUESTIONING - BENCH TRIAL - Miss. R. Evid. 614 allows a circuit judge to either call a witness on his own or examine a witness already testifying; a circuit judge presiding over a bench trial is given the same deference as a chancellor with regard to his findings

FACTS

In 2007, George Lee Massey was convicted for the lustful touching of a child and sentenced to a term of ten years, with five years suspended. Brooke, a fourteen-year-old minor at the time of the alleged events, was Massey's great-niece. In the 2007 trial, Brooke testified that in 2006 she visited her grandparents' home and Massey inappropriately touched her vaginal area and tried to expose himself to her. Following the trial, Massey was ordered to register as a sex offender as required by law. Massey's conviction was affirmed on appeal. However, Massey then sought leave to file a petition for post-conviction relief ("PCR"), which the Supreme Court granted in May 2020. In July 2020, an evidentiary hearing was held with Brooke as Massey's sole witness. Brooke recanted the testimony given during the trial, claiming that an adult

told her to falsify the sexual assault story. Due to the length of time between the trial and the recantation and emotional displays while on the stand, the trial court did not find Brooke to be a convincing or credible witness. The PCR petition was denied. Massey appealed.

ISSUES

Whether the trial court erred in (1) denying Massey’s petition for a new trial post-conviction relief and (2) allowing the trial judge to use his authority in his examination of Brooke.

HOLDING

(1) Because recanting testimony should be regarded with suspicion, and because the trial court did not find Brooke to be a convincing and credible witness, the trial court did not err in denying Massey’s petition. (2) Because Massey did not object to any questions from the court during trial, and because the trial court’s examination of Brooke was to determine the credibility of the witness, the trial court did not err or abuse its authority in its questioning of the witness. Therefore, the Court of Appeals affirmed the judgment of the Lauderdale County Circuit Court.

Affirmed - 2020-CA-00963-COA (July 27, 2021)

Opinion by Judge Emfinger

Hon. Charles W. Wright Jr. (Lauderdale County Circuit Court)

Kathryn Rae McNair for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Marlee Russell](#)

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