

MISSISSIPPI SUPREME COURT DECISIONS – SEPTEMBER 23, 2021**SUPREME COURT - CIVIL CASES****DAVIS V. HENDERSON****CIVIL - DOMESTIC RELATIONS**

APPELLATE PROCEDURE - STANDARD OF REVIEW - ABUSE OF DISCRETION - The standard of review in domestic-relations matters is limited and, in order for an appellate court to reverse, the chancellor must be manifestly wrong, clearly erroneous, or apply an erroneous legal standard; a chancellor's findings of fact may not be set aside or disturbed on appeal if they are supported by substantial, credible evidence

FAMILY LAW - CHILD SUPPORT - CHANCELLOR'S DISCRETION - Pursuant to *Copeland*, the chancellor, being the only one to view the witnesses and observe their demeanor, is in the best position to determine if the actions and conduct of the minor child were convincingly clear and extreme to warrant a termination of child support

FAMILY LAW - CHILD SUPPORT - TERMINATION - When a child engages in clear and extreme actions exhibiting a desire to abandon the relationship with a non-custodial parent, the termination of the non-custodial parent's financial obligations with respect to the child is permitted

FACTS

James Henderson ("Jim") and Stacey Davis were divorced in 2004. At that time, the couple had two sons, C.R.H. and L.S.H. Stacey received sole custody of both sons while Jim received visitation rights. From 2005 to 2018, the parties engaged in numerous proceedings regarding custody, visitation, and contempt. In 2018, Jim filed his sixth petition for citation of contempt against Stacey and a petition to terminate his financial obligations to one of the minor sons, C.R.H. The chancery court found that the lack of visitation between C.R.H. and Jim was an ongoing, long-term occurrence attributable to C.R.H.'s desire not to see his father, aided by Stacey's contempt. The chancery court also found that the actions of C.R.H. were clear and extreme enough to warrant a temporary suspension of child support until such time as all parents and all children participated in co-parenting and reunification counseling. A year later, the chancery court issued a final judgment and granted Jim's request to terminate his financial obligation to C.R.H. until such time as C.R.H. resumed his regular visitation with his father on a consistent basis and a viable father-son relationship was established. Stacey appealed. The Court of Appeals reversed the chancellor's decision, disagreeing with the chancellor that C.R.H. and Stacey were responsible for the strained relationship. Rather, the Court of Appeals held that Jim's conduct constituted abuse and neglect and, therefore, was the proximate cause of the strained relationship. Further, the Court of Appeals found that C.R.H.'s conduct did not rise to the level of clear and extreme actions that would warrant termination of Jim's financial obligation. The Court of Appeals then reversed the chancery court's decision. Jim petitioned for writ of certiorari.

ISSUE

Whether C.R.H.'s actions and conduct were convincingly clear and extreme, warranting a termination of child support.

HOLDING

Because the chancery court found that the lack of visitation had been an ongoing, long-term occurrence, because the Court of Appeals did not apply the abuse-of-discretion standard of review applicable to the chancery court's decision, and because the Court of Appeals substituted its own findings of fact in place of those of the chancellor, the chancellor properly supported his findings with substantial evidence, and the Court of Appeals erred in not applying the applicable standard of review. Therefore, the Supreme Court reversed the judgment of the Court of Appeals and reinstated and affirmed the judgment of the Madison County Chancery Court.

DISSENTS

Presiding Justice Kitchens argued that the chancery court was manifestly wrong when it found that C.R.H.'s conduct in rejecting a relationship with his father was clear and extreme. He argued that child support stems from a parent's fundamental obligation rather than something a child must earn through love and affection for the parent, therefore, termination of child support should be reserved for rare cases demonstrating clear and extreme rejections of the parent-child relationship. Because C.R.H. was participating in parental reunification counseling and stated that he loved his father, this case did not rise to the level necessary to forfeit his right to child support.

Justice Coleman argued that the chancery court failed to consider the legal principle that it would be unjust to allow one obligated to pay child support to create a rift in his relationship with a child that, in turn, releases the obligor from paying child support. Because the chancellor did not consider this rule, and because issues of law are reviewed de novo, the chancery court's judgment should be reversed and remanded for further proceedings.

The Judgment of the Court of Appeals is Reversed. The Judgment of the Madison County Chancery Court is Reinstated and Affirmed - 2018-CT-01184-SCT (Sept. 23, 2021)

En Banc Opinion by Justice Beam - Dissents by Presiding Justice Kitchens & Justice Coleman
Hon. Robert George Clark III (Madison County Chancery Court)
Paul E. Rogers & Mary Catherine Williams for Appellant - David Randall Wade for Appellee
Briefed by [Morgan A. Jones](#)

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OBERT L. GRP., P.A. V. HOLT

CIVIL - WILLS, TRUSTS, & ESTATES

WILLS & ESTATES - ATTORNEY'S FEES - COURT APPROVAL - A court must approve attorney's fees collected from an estate, and, if an attorney collects fees without obtaining approval, a chancellor may disapprove those fees later

PROFESSIONAL RESPONSIBILITY - ATTORNEY'S FEES - REASONABLENESS DETERMINATION - Miss. R. Prof'l Conduct 1.5(a) sets forth the factors a chancellor must consider to determine if attorney's fees are reasonable: (1) the time and labor required, the novelty and difficulty of questions involved, and the skill requisite to perform legal service properly; (2) the likelihood, if apparent to the client, that acceptance of particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in locality for similar legal services; (4) the amount involved and results obtained; (5) time limitations imposed by the client or by circumstances; (6) the nature and length of professional relationship with client; (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent

APPELLATE PROCEDURE - ATTORNEY'S FEES - STANDARD OF REVIEW - An appellate court will not disturb a chancellor's decision on attorney's fees unless it is manifestly wrong

EVIDENCE - ADMISSABILITY - POSTHEARING - An appellate court will not reverse an error involving the admission or exclusion of evidence unless it affects a substantial right of a party

FACTS

Before his death, Dr. Edwin Holt hired first-year attorney Joshua Stretch to represent him in having his dental license reinstated in Mississippi. Stretch was associated with more experienced attorneys at Obert Law Group, Keith Obert and William Brown. When Dr. Holt died, Stretch held \$73,000 as a yet-to-be-earned retainer on the licensure issue. After Dr. Holt's death, Stretch, Obert, and Brown handled the estate matters and dealt with allegations made by Dr. Holt's ex-wife. She claimed that because their divorce was never finalized, she was the rightful heir, rather than their five minor children. Obert Law Group collected more than \$180,000 in attorney's fees from Dr. Holt's estate for these matters without obtaining court approval or advising the executrix that the bills should be court-approved before being paid. The trustee of the revocable trust established by Dr. Holt petitioned the court for the return of all the collected fees. After a hearing, the chancellor determined the attorney's fees were unreasonable under the factors found in Miss. R.

Profl Conduct 1.5. The chancellor ordered the attorneys to return \$84,945 of the fees, finding only \$96,951 of the fees were reasonable. Obert Law Group petitioned for interlocutory appeal.

ISSUES

Whether the chancellor erred in (1) determining the reasonability of the attorney's fees; (2) allowing a predisposition about the attorneys drive his determinations; (3) deciding the reasonableness of attorney's fees by concluding Obert Law Group included Stretch and his estate work; (4) refusing to consider Obert Law Group's final invoice; and (5) failing to allow the Obert Law Group to supplement the trial record posthearing.

HOLDING

(1) Because, in light of the evidence, Obert Law Group did not meet the burden of proving the chancellor was manifestly wrong under Miss. R. Profl Conduct 1.5, the chancellor did not err in his reasonableness determination. (2) Because a single, off-hand remark made by the chancellor was insufficient to call the determination into question under a manifest-error standard of review, and because the almost \$100,000 in fees that were deemed reasonable by the chancellor cut against the argument, the chancellor did not allow a predisposition to drive his determinations. (3) Because the record supported the chancellor's conclusion that the estate work by Obert Law Group included the work of Stretch, and because Obert Law Group was the entity that billed and collected the attorney's fees without prior court approval, the chancellor properly included Stretch's work in the assessment. (4) Because the record clearly showed that the chancellor considered the final invoice in the assessment, the issue was without merit. (5) Because Obert Law Group never asked to add this evidence to the record during the hearing, and because Obert Law Group failed to demonstrate any right to add to the record posthearing, the chancellor did not err in failing to allow the supplement of the record posthearing. Therefore, the Supreme Court affirmed the judgment of the Madison County Chancery Court.

DISSENTS

Presiding Justice Kitchens joined Justice Griffis's dissent in part because he disagreed with Griffis's disapproval of the Court's decision in *Cascio*, finding it was factually different from this case.

Justice Griffis argued that because the chancellor's judgment did not explain how he arrived at the amounts, there was insufficient evidence to support the disallowance of attorney's fees. Accordingly, the chancellor should have utilized the lodestar method to calculate the number of hours reasonably expended multiplied by a reasonable hourly rate, making requisite findings of fact to support his decision. Further, he argued that the chancellor erred by not considering Dr. Holt's decision on who to hire as his attorneys and how much to pay them per hour.

Affirmed - 2019-IA-01265-SCT (Sept. 23, 2021)

En Banc Opinion by Justice Maxwell - Dissents by Presiding Justice Kitchens & Justice Griffis

Hon. James Christopher Walker (Madison County Chancery Court)

Keith D. Obert & William F. Brown for Appellants - James Matthew Tyrone & Clark Clifton Luke for Appellees

Briefed by [Carter Babaz](#)

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SUPREME COURT - ORDERS

MISS. BAR V. ANGEL

ORDER

BAR MATTERS - DISCIPLINE - JURISDICTION - Miss. R. Discipline 13(a) provides that when sanctions are imposed against an attorney by another jurisdiction, such sanctions are grounds for disciplinary action in this state

BAR MATTERS - DISCIPLINE - DISABILITY INACTIVE STATUS - Miss. R. Discipline 20(c) provides that a final adjudication in another jurisdiction that an attorney licensed to practice in Mississippi should be transferred to

disability inactive status shall establish the disability for purposes of a disability proceeding in the State of Mississippi; the burden is on the attorney to demonstrate that the reason for the original transfer to disability status no longer exists

FACTS

Kevin Angel has been a member of the Mississippi Bar since 2002. He was also licensed to practice law in Tennessee, where he lived. In 2020, the Tennessee Supreme Court filed an Order of Temporary Suspension against Angel and, based on documentation from Angel's medical provider, concluded that Angel was incapacitated from continuing the practice of law. The Tennessee Supreme Court transferred Angel to disability inactive status until further order from the court. In March 2021, the Mississippi Bar filed a formal complaint against Angel under Miss. R. of Discipline 13(a) and 20(c), requesting that the Supreme Court transfer Angel to disability inactive status in Mississippi and that he pay the costs and expenses incurred by the filing of the complaint.

ORDER

The Supreme Court granted the Mississippi Bar's request to transfer Angel's disability inactive status until further order and that Angel pay the costs and expenses incurred by the filing of the complaint. The Supreme Court ordered: (1) that Angel be placed on disability inactive status and not be permitted to practice law in the State of Mississippi until restatement of these privileges by the Court; (2) that Angel must comply with the requirements set forth in Miss. R. of Discipline 11; (3) that Angel be allowed to seek reinstatement to practice law in Mississippi; (4) that Angel shall reimburse the Mississippi Bar \$265 for costs and expenses incurred in the proceeding; and (5) that the Clerk of the Court send copies of the Court's final order to Angel and to the Mississippi Bar.

Granted - 2021-BD-00267-SCT (Sept. 21, 2021)

En Banc Order by Justice Griffis

Briefed by [J. Evan Thomas](#)

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MISS. BAR V. REYNOLDS

ORDER OF DISBARMENT

ETHICS - DISBARMENT - FELONY CONVICTION - Under Miss. R. Disc. 6(a), whenever an attorney licensed in Mississippi pleads guilty to a felony in any court of any state, the court shall consider the guilty plea conclusive evidence and enter an order of disbarment

ETHICS - DISBARMENT - RULES - The Court will not delay action to await another state's decisions, they will apply Mississippi rules to the breach of Mississippi rules, and the Court will impose the appropriate discipline according to Mississippi rules and procedure

FACTS

Richard L. Reynolds, a Mississippi licensed attorney, pled guilty to a felony in United States District Court for the Northern District of Texas. Following the plea, the Mississippi Bar filed a complaint seeking disbarment. Reynolds faced potential disciplinary action in Tennessee, Texas, and Louisiana in addition to Mississippi. Reynolds asked the Court to defer their decision on his disbarment until a final decision was made in Louisiana. Further, Reynolds requested that Mississippi's decision be dependent on the Louisiana decision.

ORDER

The Supreme Court rejected Reynolds's argument, reasoning that since Reynolds pled guilty to a felony, Mississippi rules required disbarment. Since only Mississippi law applies to the breach of Mississippi rules, delaying action to wait on another state's decision would have done nothing except delayed the inevitable. Therefore, the Court ordered the disbarment of Reynolds from practicing law in Mississippi and assessed him the cost of the disciplinary proceeding. Further, the Court ordered the forwarding of an immediate copy of the Order of Disbarment to the attorneys of record for each party, Reynolds, the executive director of the Mississippi Bar, the judges of the circuit, chancery, and county

courts of the districts where Reynolds lived and practiced law, and the clerks of the United State District Courts for the Northern and Southern Districts of Mississippi, the U.S. Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States. The Court order enjoined Reynolds from practicing law in Mississippi, performing any legal service for others, or holding himself out as an attorney in any way shape or form. The Court order required Reynolds to send notice of his disbarment and inability to act as an attorney to each of his clients, every attorney or adverse party in any Mississippi proceeding, and all affected courts and agencies within ten days of receiving the order. Lastly, the Court ordered that Reynolds return all files, papers, monies, and other properties of his clients back to any clients that request them after receiving notice of his disbarment and required that within thirty days of receiving the Order of Disbarment Reynolds file an affidavit with the Supreme Court stating his clients have received notice and all such files, papers, monies, and properties returned to those clients.

Ordered - 2021-BD-00435-SCT (Sept. 21, 2021)

Order by Chief Justice Randolph

Briefed by [Samuel Taylor Rayburn](#)

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MISSISSIPPI COURT OF APPEALS DECISIONS – SEPTEMBER 21, 2021

COURT OF APPEALS - CIVIL CASES

BERRY V. HOLBROOK

CIVIL - MEDICAL MALPRACTICE

CIVIL PROCEDURE - CONTINUANCE - DISCOVERY - The trial court can use its discretion to determine if a continuance to produce discovery is necessary based on a party's diligence

CIVIL PROCEDURE - SUMMARY JUDGMENT - STANDARD OF REVIEW - Summary judgment is appropriate when the non-moving party has failed to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial

TORTS - MEDICAL MALPRACTICE - EXPERT TESTIMONY - Production of expert testimony is necessary to support a claim of medical negligence

FACTS

On May 10, 2016, James Albert Berry was taken to the emergency room at Simpson General Hospital ("Simpson General") after his wife found him unresponsive at home. Dr. Dennis Adams admitted Berry for observation. Following admission, Dr. Chip Holbrook assumed Berry's care, treated him, and then discharged him two days later. On May 19, 2016, Berry was admitted to the University of Mississippi Medical Center, where a CT scan revealed a large aneurysm. After undergoing rehabilitation at the Mississippi Methodist Rehabilitation Center, Berry claimed that he still was unable to work and suffered sensory, cognitive, and motor problems. On May 8, 2018, Berry sued Holbrook, Adams, and Simpson General for medical negligence. In September 2018, Holbrook answered the complaint and filed notice of discovery requests. Adams answered the complaint and filed notice of discovery requests in November 2018. In October 2019, Simpson General filed a motion for summary judgment, citing Berry's failure to identify expert witnesses to testify. On December 10, 2019, Berry filed a motion to continue the summary judgment hearing set on December 13, 2019. In this motion, Berry identified his expert witnesses for the first time, however, Berry represented that he had been unable to obtain their affidavits due to scheduling conflicts. Therefore, Berry requested an additional forty-five days to obtain the witnesses' affidavits. The court granted the motion, giving Berry until February 1, 2020 to provide the affidavits. On February 3, 2020, Berry filed a motion for an additional thirty days to produce the affidavits. On February 4, 2020, Simpson General submitted a written request for summary judgment to the court, which mentioned Berry's second motion for additional time. The court granted Simpson General's motion. Berry subsequently filed a motion to alter the judgment, and, after notice and hearing, the trial court denied. Berry appealed.

ISSUES

Whether the trial court erred in (1) denying Berry's second request for continuance and (2) granting Simpson General's motion for summary judgment.

HOLDING

(1) Because Berry's second motion for continuance did not sufficiently explain why he could not have produced the required affidavits sooner, and because Berry failed to identify any need for discovery to be conducted on his part or point to information in Simpson General's possession that would help him oppose their summary judgment, the trial court did not abuse its discretion in implicitly denying the continuance for a second time. (2) Because Berry failed to provide the necessary affidavits from his expert witnesses to establish a prima facie negligence case, the trial court did not err in granting Simpson General's motion for summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Simpson County Circuit Court.

Affirmed - 2020-CA-00445-COA (Sept. 21, 2021)

Opinion by Judge Emfinger

Hon. Stanley Alex Sorey (Simpson County Circuit Court)

James Michael Priest Jr. for Appellant - Mark P. Caraway for Appellees

Briefed by [Marlee Russell](#)

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JEFFERSON V. JEFFERSON

CIVIL - DOMESTIC RELATIONS

DOMESTIC RELATIONS - CHILD SUPPORT - ADJUSTED GROSS INCOME - Pursuant to Miss. Code Ann. § 43-19-101(3)(a), when determining an individual's adjusted gross income for reasons pertaining to child support, a court may take into account all possible sources of income that are likely to be accessible to the absent parent

DOMESTIC RELATIONS - CHILD SUPPORT - NON-SALARY EMPLOYMENT BENEFITS - Pursuant to *Pittman*, gross income includes non-salary employment benefits that replace what otherwise would be personal expenditures; in *Price*, a father serving in the Navy was obligated to impute his basic allowable substance and basic allowable housing entitlements to his gross income when assessing child support obligations

DOMESTIC RELATIONS - CHILD SUPPORT - TRANSPORTATION COSTS - Under *Branch*, the non-custodial parent is not entitled to receive financial support from the custodial parent for transportation costs associated with visitation

FACTS

Andreekous and Charlise Jefferson, a married couple with one child, had been living in Japan due to Andreekous's enlistment in the United States Air Force. However, after separating, Charlise moved back to the United States with the couple's son, and the two soon filed a joint complaint for divorce. Attached to their complaint was a property settlement agreement which outlined the problems that had been resolved amongst themselves, including a provision that specified that if one parent were to live outside of the United States, that parent would maintain visitation rights with their child for the entire summer. The pair then requested that the trial court rule on the unresolved issues pertaining to child support and transportation costs connected with visitation, such as airfare and rental vehicles. The trial court accepted the settlement agreement and granted the couple a divorce. When calculating the amount owed in child support, the trial court analyzed Andreekous's financial records and discovered that, on top of his salary, Andreekous received nontaxable military stipends for basic subsistence, housing, cost of living, and clothing. The trial court determined that Andreekous's adjusted gross income totaled \$6,396.32 per month and subsequently ordered him to pay fourteen percent of that figure to Charlise in child support payments. Additionally, the trial court found that Andreekous was responsible for all travel expenses related to visitation. Andreekous filed a motion to reconsider, and a hearing was conducted. At the hearing, Andreekous contended that his adjusted gross income was only \$3,500.00 per month. Andreekous further testified that his base salary was likely to be decreased in the future, and that once he retired from the Air Force, he

intended to remain in Japan indefinitely as he had already found another job, but he had no way of knowing what his future gross income would be. Concerning the transportation costs, Andreekous remarked that it would be great if Charlise could help contribute financially, but ultimately admitted that he would be able to pay for the visitation fees if she was unable to do so. In her testimony, Charlise stated that she did not have the means to help pay for the expenses. Ultimately, the trial court preserved its original judgment, and ordered Andreekous to pay Charlise fourteen percent of his adjusted gross income, or \$895.48 per month in child support. Furthermore, the trial court held that Andreekous would be solely responsible for transportation costs unless he lived within 150 miles of Charlise and their son. Andreekous appealed.

ISSUES

Whether the trial court erred when it (1) determined that Andreekous’s military benefits were available sources of funds that could be factored into his adjusted gross income for child support payments and (2) ruled that Andreekous alone was responsible for all transportation costs related to visitation.

HOLDING

(1) Because military entitlements are considered a source of income pursuant to Miss. Code Ann. § 43-19-101(3)(a), the trial court did not err when it determined that Andreekous’s military benefits were a form of earned income. (2) Because there was no evidence that Andreekous’s obligation to pay transportation costs hindered his ability to continue the visitation agreement, and because Andreekous testified that he would be able to cover the costs of transportation with or without Charlise’s contributions, the trial court did not err when it ruled that Andreekous alone was responsible for all transportation costs related to visitation. Therefore, the Court of Appeals affirmed the judgment of the Oktibbeha County Chancery Court.

Affirmed - 2020-CA-00642-COA (Sept. 21, 2021)

Opinion by Judge McCarty

Hon. Rodney Purvis Faver (Oktibbeha County Chancery Court)

Robert J. Dambrino III for Appellant - *Pro se* for Appellee

Briefed by [John McDonald](#)

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M.A.S. v. LAMAR CNTY. DEP’T OF CHILD PROT. SERVS.

CIVIL - STATE BOARDS & AGENCIES

FAMILY LAW - PARENTAL RIGHTS - TERMINATION - To terminate the parental rights of natural parents, a petitioner must establish by clear and convincing evidence (1) that the parent has deserted the child or is unfit and (2) that termination is in the best interest of the child

FAMILY LAW - PARENTAL RIGHTS - TERMINATION - Miss. Code Ann. § 93-15-121(c) states that termination of parental rights is appropriate if it can be proved by clear and convincing evidence that the parent is suffering from habitual alcoholism or other drug addiction and has failed to successfully complete alcohol or drug treatment

FAMILY LAW - RIGHTS OF PARTIES - HARMLESS ERROR - Although practice counsels that the youth court follow the statutory procedure concerning notification of parties’ rights, without a specific showing of what prejudice occurred as a result of the court’s timing, the error is considered harmless

FACTS

In May 2018, the Mississippi Department of Child Protection Services (“CPS”) received a report that M.A.S.’s children were consistently absent from school and initiated an investigation. Upon entering the home, a CPS investigator found that the children were living in very poor conditions and placed the children in emergency CPS custody. At a review hearing, the court agreed to a trial home placement if M.A.S. provided a negative drug screen. M.A.S. did not comply with the request to submit to a drug screen, so the children were adjudicated educationally neglected in July 2018. CPS

took custody of the children with a plan of reunification with the natural parents. As part of the plan, M.A.S. was required to submit to random drug screening. Throughout the adjudication process, M.A.S. continuously tested positive for multiple substances, provided a fake drug test result, and otherwise refused to comply with testing altogether. As a result, in December 2019, the youth court entered a judgment terminating M.A.S.'s parental rights. M.A.S. appealed.

ISSUES

Whether (1) M.A.S.'s due process rights were violated as a result of faulty service of process and non-compliance with the Youth Court Act; (2) the petition to adjudicate the minor children as neglected was insufficient to place M.A.S. on notice of the issues to be argued at the adjudication hearing; (3) the youth court failed to conduct the disposition hearing separately and apart from the adjudication hearing in accordance with provisions of the Youth Court Act; (4) the youth court failed to consider reasonable alternatives to custody; (5) the youth court lacked jurisdiction over the termination of parental rights action because M.A.S. was not properly served with process or informed of rights prior to the hearing; (6) the GAL failed to conduct an independent, zealous investigation; and (7) the evidence presented at the TPR hearing was sufficient to terminate parental rights.

HOLDING

(1) Because M.A.S. was personally served for the adjudication hearing, and because she was present at the hearing and made no objections concerning service issues or failure to comply with Miss. Code Ann. § 43-21-557, M.A.S.'s rights were not violated, and the issue was without merit. (2) Because the facts of the petition sufficiently described the alleged acts of neglect to bring the case within youth court jurisdiction, because M.A.S.'s extensive history with the youth court should have made her aware of potential inquiries into her drug use, and because she did not appeal the adjudication order, M.A.S. waived her sufficiency argument, and the issue was without merit. (3) Because M.A.S. failed to timely appeal from the adjudication order, and because she failed to object to the failure to have a separate disposition hearing, M.A.S. waived her argument regarding failure to comply with Miss. Code Ann. § 43-21-601(1). (4) Because M.A.S. failed to appeal from the initial adjudication order or the disposition order despite her representation by counsel throughout the process, M.A.S. waived her claim. (5) Because M.A.S. was personally served with process, because she was present and an active participant at the TPR hearing, because she did not raise any objections, and because she did not specify what prejudice occurred, if any, due to the timing of the court's explanation of rights, the youth court had jurisdiction, and the issue was without merit. (6) Because M.A.S. failed to object or file post-trial motions regarding the GAL's investigation, the issue was waived on appeal. (7) Because M.A.S. was given multiple opportunities to prove her sobriety to the court and failed to do so, and because the record was otherwise substantially supported by CPS and GAL investigations, the youth court did not err by finding clear and convincing evidence for termination. Therefore, the Court of Appeals affirmed the judgment of the Lamar County Youth Court.

DISSENT

Judge McCarty argued that because M.A.S. was without legal counsel and was advised of her rights only after the State had already questioned the first witness, the youth court's decision violated her constitutional and state rights. He noted that, although the parents here did have an appointed lawyer, the trial court refused to continue the case so that their court-appointed lawyer could be present. In his view, the trial court forcing the parents to proceed with the hearing when they were not properly informed of the risks or provided their legal rights was clear error. Given the proof in the record, it seems apparent that the termination of rights was appropriate, however, he argued that the youth court's decision should be reversed and remanded to protect the parents' due process and fundamental liberties.

Affirmed - 2020-CA-00070-COA (Sept. 21, 2021)

Opinion by Judge Emfinger - Dissent by Judge McCarty

Hon. Brad Ashley Touchstone (Lamar County Youth Court)

Kelly Gunter Williams & Chad Kenneth King for Appellant - Steven Patrick Wansley (Att'y Gen. Office) for Appellee

Briefed by [Rachel Gholson](#)

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CIVIL - LEGAL MALPRACTICE

CONTRACTS - SETTLEMENT AGREEMENT - BURDEN OF PROOF - For there to be a settlement agreement, there must be a meeting of the minds, and the party seeking to enforce the agreement has the burden of proving by a preponderance of the evidence that there was a meeting of the minds

CONTRACTS - FORMATION - MEETING OF THE MINDS - A meeting of the minds occurs when in the context of written negotiations, one party makes a proposition, and the other party accepts the same as made; the minds of the parties must meet upon a definite proposition

CONTRACTS - FORMATION - COUNTER-OFFER - When a reply to an offer purports to accept but is conditional on the offeror's assent to terms additional to or different from those offered, it is a counter-offer, which serves as a rejection

CIVIL PROCEDURE - DEFAULT JUDGMENT - MOTION TO SET ASIDE - A motion to set aside a default judgment under Miss. R. Civ. P. 60(b) must be made within a reasonable time after entry of the judgment; the court determines reasonableness on a case-by-case basis

FACTS

In April 2008, Anita White filed a complaint against Winston Thompson III for legal malpractice. Thompson was served seven days later but failed to answer or defend against the claim. Almost three years later in April 2011, White filed an amended complaint asserting additional claims. Once again, Thompson was served and failed to answer or appear. In March 2012, the circuit court granted a default judgment against Thompson. Over a year later, a hearing was held to determine damages. Thompson did not appear at that hearing, and, in November 2013, the circuit court granted a final default judgment against Thompson. Almost three years later in October 2016, Thompson filed a motion under Miss. R. Civ. P. 60(b) to set aside the default judgment. Thompson did not take any further action for two years. After a series of responsive motions, Thompson filed a notice of hearing to set aside the default judgment in May 2019. In its September 2019 order, the circuit court denied Thompson's motion to set aside the default judgment. Thompson's attorney initiated settlement-agreement negotiations with White's attorney over email in February 2020. The negotiations and discussions continued until April 2, 2020 and ended in disagreement as to whether there was an enforceable, agreed-upon settlement. On April 13, 2021, Thompson moved to enforce the agreement against White. The circuit court denied Thompson's motion to enforce a settlement agreement, concluding there was no meeting of the minds between the parties. Thompson appealed.

ISSUES

Whether the circuit court erred in denying Thompson's motion to (1) enforce a settlement agreement and (2) set aside the default judgment.

HOLDING

(1) Because Thompson provided insufficient evidence to prove the existence of a valid offer, acceptance, and mutual assent, and because the evidence rather showed that Thompson had presented a counteroffer, which acted as a rejection of White's offer, the circuit court did not err in denying Thompson's motion to enforce a settlement agreement. (2) Because sufficient evidence supported the circuit court's determination that Thompson's almost three-year delay in filing his motion to set aside the default judgment was unreasonable, the circuit court did not err in denying Thompson's motion to set aside the default judgment. Therefore, the Court of Appeals affirmed the judgment of the Madison County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge McDonald concurred that the circuit court did not abuse its discretion by denying Thompson's Miss. R. Civ. P. 60(b) motion to set aside the default judgment. However, she argued there was sufficient evidence to prove the existence of a valid offer, acceptance, and mutual mistake during settlement negotiations. Therefore, the circuit court abused its discretion in denying Thompson's motion to enforce the settlement agreement.

Affirmed - 2019-CA-01625-COA (Sept. 21, 2021)

En Banc Opinion by Judge Smith - Concurrence in Part & Dissent in Part by Judge McDonald
Hon. John H. Emfinger (Madison County Circuit Court)

Graham Patrick Carner for Appellants - Gregory Moreau Johnston & Price Wilson Donahoo for Appellees

Consolidated with:

Affirmed - 2020-CA-00565-COA (Sept. 21, 2021)

Hon. John H. Emfinger (Madison County Circuit Court)

Graham Patrick Carner for Appellant - Gregory Moreau Johnston for Appellees

Briefed by [Regan Monk](#)

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COURT OF APPEALS - POST-CONVICTION RELIEF

MAGEE V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - EVIDENTIARY HEARINGS - ATTORNEY RESPONSES - A circuit court is not required to order a petitioner's attorney to respond to PCR motions or to appear at evidentiary hearings

POST-CONVICTION RELIEF - EVIDENTIARY HEARINGS - SUBPOENAS - Miss. Code Ann. § 99-39-23(3) states that when an evidentiary hearing is required, the parties shall be entitled to subpoena witnesses and compel their attendance, including, but not limited to, subpoenas duces tecum

CRIMINAL PROCEDURE - GUILTY PLEA - VALIDITY - A guilty plea is valid if it is entered into voluntarily, knowingly, and intelligently; to determine whether the plea is voluntarily and intelligently given, the court must advise the defendant of his rights, the nature of the charge against him, as well as the consequences of the plea

CRIMINAL PROCEDURE - GUILTY PLEA - VOLUNTARINESS - A guilty plea is voluntary despite erroneous advice by counsel if the defendant's misconception is corrected by the circuit court during the plea colloquy

POST-CONVICTION RELIEF - EVIDENTIARY HEARINGS - APPOINTED COUNSEL - The circuit court has discretion to appoint counsel in PCR proceedings where the circuit court determines that the petitioner qualifies and displays a need for counsel; a criminal defendant has neither a state nor federal constitutional right to appointed counsel in post-conviction proceedings

FACTS

In 2014, Kendall Magee fatally shot Tyriunce Lewis and was subsequently indicted for second-degree murder and possession of a firearm by a felon. At his plea hearing, Magee informed the circuit court that he wanted another attorney, to which the circuit court responded that, regardless of Magee's desire for a new attorney, his trial would be scheduled to begin the following Thursday. Magee then stated that he instead wished to plead guilty to both counts, and the circuit court proceeded to advise him of the minimum and maximum sentences for each count. Magee then indicated that he understood that he could be sentenced up to the maximum sentence, stated that nobody had threatened him or promised him anything to plead guilty, and stated that he was pleading guilty for no other reason than the fact that he was guilty. Magee then pled guilty to both counts and received a sentence totaling forty-five years in custody, with twenty years suspended and five years of post-release supervision. In 2018, Magee filed a motion for post-conviction relief ("PCR"), in which he claimed that his plea was involuntary because his attorney failed to investigate the case, his attorney misinformed him of the possible sentence, and the judge coerced him into pleading guilty by denying a continuance to seek new counsel. Magee also suggested that he had received ineffective assistance of counsel, claiming that his attorney seemed confused and unknowledgeable about his defense and told Magee that he would only serve six or seven years in prison if he pled guilty. Subsequently, the circuit court ordered an evidentiary hearing, and, prior to that hearing, Magee filed motions for appointment of counsel, for continuance of the evidentiary hearing pending appointment of counsel, and to permit a special visit with evidentiary witnesses. Magee's motion for appointment of counsel was denied, and he represented himself pro se at the evidentiary hearing. The circuit court denied Magee's motion for PCR because (1) there was nothing in the record to substantiate Magee's claim that his attorney did not

properly investigate the case, (2) Magee was properly advised by the circuit court of the minimum and maximum sentences, and (3) Magee had not been coerced into pleading guilty. Magee appealed.

ISSUES

Whether the circuit court erred by (1) not allowing Magee to present the testimony of his former attorney or three witnesses at the evidentiary hearing; (2) failing to address Magee's claim that he pled guilty in reliance on incorrect advice regarding his sentence; and (3) denying Magee's motion to continue the evidentiary hearing.

HOLDING

(1) Because the circuit court was not required to order Magee's attorney to respond to Magee's PCR motion or to appear at the evidentiary hearing, and because there was no evidence that Magee's witnesses were present at the evidentiary hearing or that Magee attempted to exercise his right to subpoena those witnesses and compel their attendance, the circuit court did not err by not allowing Magee to present the testimony of his former attorney or three witnesses at the evidentiary hearing. (2) Because any misconceptions Magee had prior to the plea hearing were corrected at the plea hearing when the judge informed him of the minimum and maximum sentences for each count and advised Magee that he could sentence him to the maximum penalty for each offense, the circuit court did not err by failing to address Magee's claim that he pled guilty in reliance on incorrect advice regarding his sentence. (3) Because the circuit court has discretion to appoint counsel in PCR proceedings where the court determines that the petitioner qualifies and displays a need for counsel, and because the record failed to reflect Magee's need for appointment of counsel, the circuit court did not err by denying Magee's motion to continue the evidentiary hearing. Therefore, the Court of Appeals affirmed the judgment of the Walthall County Circuit Court.

CONCURRENCE IN PART & DISSENT IN PART

Judge Emfinger agreed that the circuit court did not abuse its discretion by denying Magee's motion for a continuance and that the circuit court did not err by failing to require Magee's trial counsel to respond to the PCR Motion and appear at the evidentiary hearing. Nevertheless, he argued that the circuit court erred because its statements and rulings during the evidentiary hearing effectively prevented Magee from putting on proof that his guilty pleas were involuntary as a result of erroneous advice from his counsel. Specifically, he argued that there was nothing in the plea colloquy that showed the circuit court addressed or corrected the misinformation that Magee allegedly received from his attorney prior to entering his guilty pleas. Therefore, he would have reversed the circuit court's decision and remanded the case for a full hearing as to whether Magee was misinformed as to the consequences of his guilty pleas and whether those pleas were given in reliance on the alleged misinformation.

Affirmed - 2019-CP-01794-COA (Sept. 21, 2021)

Opinion by Judge Greenlee - Concurrence in Part & Dissent in Part by Judge Emfinger

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

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

Briefed by [John C. Nelson, Jr.](#)

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RODGERS V. STATE

CIVIL - POST-CONVICTION RELIEF

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

CRIMINAL PROCEDURE - OUT-OF-TIME APPEAL - STATUTE OF LIMITATIONS - Miss. Code Ann. § 99-39-5(2) provides that a party may make a motion for an out-of-time appeal within three years after the time for taking an appeal from the judgment of conviction or sentence has expired

POST-CONVICTION RELIEF - APPEAL - EVIDENTIARY HEARING - An evidentiary hearing is necessary when there is no documentary evidence that contradicts a petitioner’s claim that he asked his attorney to appeal his conviction

FACTS

In June 2018, James Rodgers was convicted of one count of possession of methamphetamine with the intent to sell and one count of conspiracy to sell methamphetamine. In August 2018, the trial court sentenced Rodgers to serve sixty and twenty years respectively, both sentences to be served concurrently without the eligibility for parole. In May 2020, Rodgers filed a post-conviction relief (“PCR”) motion for an out-of-time appeal, asserting that he had received ineffective assistance of counsel. The trial court concluded that Rodgers had not filed his motion within the required time limit and had not given an excuse for his failure to file a timely motion. Therefore, the trial court denied Rodgers’s motion. Rodgers appealed.

ISSUE

Whether the trial court erred by failing to consider Rodgers’s PCR motion for an out-of-time appeal under the Uniform Post-Conviction Collateral Relief Act (“UPCCRA”).

HOLDING

Because the UPCCRA allows an inmate to file a PCR on the basis that the inmate is entitled to an out-of-time appeal, because Rodgers filed the PCR within the three-year time frame pursuant to Miss. Code Ann. § 99-39-5, and because the record contained no documentary evidence to contradict Rodgers’s claim that his attorney failed to comply with his requests, the trial court erred in failing to review the motion under the UPCCRA. Therefore, the Court of Appeals reversed and remanded the judgment of the Madison County Circuit Court.

Reversed & Remanded - 2020-CP-00687-COA (Sept. 21, 2021)

Opinion by Judge Smith

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

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

Briefed by [Chandler Coleman](#)

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SMITH V. STATE

CIVIL - POST-CONVICTION RELIEF

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL - GUILTY PLEA - When a defendant pleads guilty, a claim of ineffective assistance of counsel requires a showing of unprofessional errors of substantial gravity, a showing that counsel’s deficiency was the proximate cause of the guilty plea, and a showing that the defendant would not have entered the plea but for the defective counsel

GRAND JURY INDICTMENT - FOREMAN REQUIREMENTS - SIGNATURE AND AFFIDAVIT - Miss. Code Ann. § 99-7-9 requires the grand jury foreman to sign an indictment and provide an accompanying affidavit

CRIMINAL PROCEDURE - GUILTY PLEA - WAIVER - A valid guilty plea admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant

CRIMINAL PROCEDURE - REVERSIBLE ERROR - CUMULATIVE-ERROR DOCTRINE - Under the cumulative-error doctrine, individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial

FACTS

Facing two life sentences and an aggregate sentence of up to 200-years for his other charges, Vincent Smith, Jr., on advice of his court-appointed attorney, agreed to the State’s plea recommendation and pled guilty to several of the counts he was charged with. The trial court ordered Smith to serve a forty-year sentence followed by five years of

supervised probation. Smith filed three motions for post-conviction relief (“PCR”), claiming ineffective assistance of counsel, a defective indictment, and cumulative error. The trial court denied all three motions. Smith appealed.

ISSUES

Whether (1) the trial court erred in denying Smith’s claim for ineffective assistance of counsel; (2) the lack of the foreman’s signature and an affidavit from the foreman rendered Smith’s indictment defective; and (3) Smith’s guilty plea should be vacated under the cumulative-error doctrine based on his combined claims of ineffective assistance of counsel and the alleged defective indictment.

HOLDING

(1) Because Smith failed to show that his defense was deficient or that his attorney’s conduct and recommendations were anything other than sound trial strategy that constituted reasonable professional assistance based on the totality of the circumstances, the trial court properly denied Smith’s claim for ineffective assistance of counsel. (2) Because the lack of a signature and the lack of an affidavit were both technical and non-jurisdiction deficiencies, and because Smith failed to timely raise them in the trial court, the issues were waived; therefore, the assignment of error was procedurally barred, and the indictment was not defective. (3) Because the Court of Appeals found that the trial court committed no error regarding Smith’s ineffective assistance of counsel claim or the alleged defective indictment claim, the issue of cumulative error was without merit. Therefore, the Court of Appeals affirmed the judgment of the Hinds County Circuit Court.

Affirmed - 2020-CA-01043-COA (Sept. 21, 2021)

Opinion by Judge Westbrook

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

John Michael Duncan for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Consolidated with:

Affirmed - 2020-CA-01044-COA (Sept. 21, 2021)

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

John Michael Duncan for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Consolidated with:

Affirmed - 2020-CA-01045-COA (Sept. 21, 2021)

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

John Michael Duncan for Appellant - Barbara Wakeland Byrd (Att’y Gen. Office) for Appellee

Briefed by [Katharine Van Pelt](#)

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COURT OF APPEALS - CRIMINAL CASES

JONES V. STATE

CRIMINAL - FELONY

CONSTITUTIONAL LAW - DOUBLE JEOPARDY - SAME-ELEMENTS TEST - Double jeopardy protections are not applied if an offense has one or more elements unique to it

CRIMINAL PROCEDURE - SENTENCING ENHANCEMENTS - DOUBLE JEOPARDY - Enhancements to a sentence do not overlap with the elements of another felony, and, therefore, sentence enhancement statutes under which additional terms of imprisonment are imposed do not result in double jeopardy violations

CRIMINAL LAW - AGGRAVATED ASSAULT - AGGRAVATED CIRCUMSTANCE - Miss. Code Ann. § 97-3-7(14)(c) provides that an assault upon a person who is sixty-five years or older or a person who is a vulnerable person

is an aggravating circumstance, which increases the possible penalty from twenty years' incarceration to thirty-years, plus an additional \$5,000 fine

CRIMINAL LAW - VULNERABLE PERSONS - ABUSE - Miss. Code Ann. § 43-47-19(3) provides that any person who willfully inflicts physical pain or injury upon a vulnerable person shall be guilty of felonious abuse or battery, or both, of a vulnerable person and, upon conviction thereof, may be punished by imprisonment in the State Penitentiary for not more than twenty years

EVIDENCE - AUTHENTICATION - SUFFICIENCY - Under Miss. R. Evid. 901, the authentication requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims

FACTS

Elizabeth Magee, who was seventy-eight years old at the time, was attacked on her front porch when she was attempting to enter her home. The attacker struck Magee from behind with a stick and continued to beat her while she screamed for help. The attacker stole Magee's purse and then fled in a black-and-white SUV parked in the neighbor's yard. While Magee did not see her attacker, she recognized the SUV and knew it belonged to her neighbor's daughter, Landria. Landria was married to Arlaundrius Jones. A neighbor spotted the SUV speed off after he heard Magee screaming. When Landria was contacted about the attack, she stated that she was waiting on Jones to pick her up from work and confirmed that Jones had the SUV at the time of the attack. Jones was later apprehended while driving the SUV and interrogated. During his interrogation, he expressed remorse for Magee's attack but did not confess per se. Sometime after Jones's apprehension, Magee discovered a stick on her porch. Notably, the stick that the attacker used in the assault was not detected when sheriffs first responded to Magee's 911 call. She turned this stick over to the sheriff's department, stating that she believed it looked like the assault weapon. In early 2019, Jones was indicted tried for three crimes: (1) armed robbery for stealing Magee's purse while using a deadly weapon; (2) aggravated assault against her; and (3) felony abuse of a vulnerable adult. Over defense counsel's objections, the stick was admitted into evidence at trial. The jury returned a split verdict and found Jones not guilty of robbery but found him guilty of aggravated assault and abuse of a vulnerable adult for his attack on Magee. The trial court sentenced Jones to twenty years for aggravated assault and fifteen years for abuse of a vulnerable adult; the trial court suspended the last five years on the abuse charge with Jones to be placed on post-release supervision for five years. Jones was also ordered to pay a \$5,000 fine and court costs. Defense counsel filed a motion for a new trial, which the trial court denied. Jones appealed, and the Supreme Court assigned the case to the Court of Appeals for review.

ISSUES

Whether (1) Jones's convictions for aggravated assault and abuse of a vulnerable person placed him in double jeopardy; (2) the admission of the stick found on Magee's porch into evidence was an abuse of discretion; and (3) there was sufficient evidence for Jones's convictions.

HOLDING

(1) Because the age-specific language contained in Miss. Code Ann. § 97-3-7(14)(c) was merely a sentence enhancement within the aggravated assault statute and did not delineate an independent substantive offense, Jones was not placed into double jeopardy. (2) Because Magee testified that she was struck with a stick, she was attacked near a wicker bench on her porch, and she later found a portion of the stick under the wicker bench, which a detective reasoned matched the injuries she sustained, the jury could have reasonably found the Jones committed aggravated assault on Magee, with or without the actual stick, and it was not an abuse of discretion for the trial court to admit the stick into evidence. (3) Because the jury was presented with the uncontested facts that Magee recognized the getaway car that belonged to Jones's wife, Magee's neighbor saw the same car speed off after the attack, Jones's wife confirmed that he was in possession of her car, and Jones was pulled over in the car, and because Jones acted remorseful about Magee during his interrogation, there was sufficient evidence to support the jury's verdict. Therefore, the Court of Appeals affirmed the judgment of the Pike County Circuit Court.

Affirmed - 2020-KA-00583-COA (Sept. 21, 2021)

Opinion by Judge McCarty

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

George T. Holmes & Spencer Mark Ritchie (Pub. Def. Office) for Appellant - Ashley Lauren Sulser (Att'y Gen. Office) for Appellee

Briefed by [Marianna Nichols](#)

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NEWELL V. STATE

CRIMINAL - FELONY

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

EVIDENCE - ADMISSIBILITY - PRIOR BAD ACTS - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith; it may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

CRIMINAL PROCEDURE - INEFFECTIVE ASSISTANCE OF COUNSEL - FAILURE TO OBJECT -

Claims of ineffective assistance of counsel for failure to object to evidence offered by the state or to argument by the state must be raised on direct appeal

FACTS

In January 2017, Investigator James Stiglett stopped Patrick Newell in his vehicle for speeding. Once Investigator Stiglett checked his license, he asked Newell to step out of the vehicle. Based upon Newell's nervous and evasive behavior, Stiglett's knowledge of Newell's prior involvement with narcotics, and information from a reliable confidential informant, Stiglett obtained a search warrant for Newell's vehicle. A search of Newell's vehicle revealed sandwich bags, rolling papers, a bag of ammunition, a glasses case containing methamphetamine, a scale with residual methamphetamine, and glass pipes. Newell was arrested. A grand jury indicted Newell for possession of methamphetamine with intent to distribute and as a habitual offender. During trial, the trial court admitted into evidence a video interview between Newell and Patrol Sergeant Jared Lindsey in which Newell was questioned about his knowledge of or participation in other crimes or investigations. Newell's counsel made no objections to this video being admitted into evidence. Additionally, following his indictment, Newell's first attorney filed a motion in limine to suppress the evidence seized during the vehicle search, however, the motion was never brought before the court for a ruling. After a jury trial, Newell was found guilty. Newell filed a motion for judgment of acquittal notwithstanding the verdict or for a new trial and a pro so motion to quash his indictment and vacate the judgment. Both motions were denied. Newell appealed.

ISSUES

Whether Newell's counsel was ineffective under *Strickland* for (1) failing to pursue a motion in limine to suppress the introduction of evidence obtained during the search of his vehicle and (2) failing to object to the testimony and evidence presented at trial regarding prior alleged "bad acts."

HOLDING

(1) Because the record was not fully developed regarding Newell's ineffective-assistance-of-counsel claim related to counsel's failure to pursue suppression of the fruits of the search, the issue could not be decided on direct appeal and must be raised in an appropriate post-conviction proceeding. (2) Because Newell's counsel made an informed and strategic decision to refrain from objecting to the admission of the video interview and the testimony regarding prior "bad acts," Newell failed to satisfy the first prong of *Strickland*, which requires a showing that his counsel's performance was deficient. Therefore, the Court of Appeals affirmed the judgment of the Jones County Circuit Court.

Affirmed - 2020-KA-01137-COA (Sept. 21, 2021)

Opinion by Judge Emfinger

Hon. Dal Williamson (Jones County Circuit Court, First Judicial Dist.)

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SIMS V. STATE

CRIMINAL - MISDEMEANOR

CRIMINAL LAW - DISCLOSURE OF INFORMATION - BRADY VIOLATION - In order to determine whether a *Brady* violation has occurred, the defendant must show (1) that the State or City possessed evidence favorable to the defendant; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different

CONSTITUTIONAL LAW - DUE PROCESS - USE OF FALSE OR PERJURED TESTIMONY - The prosecution violates the defendant’s rights under the Fourteenth Amendment when it knowingly presents false evidence or allows it to go uncorrected when it appears

CRIMINAL LAW - CRIMES AGAINST PUBLIC PEACE AND SAFETY - DISORDERLY CONDUCT - Under Miss. Code Ann. § 97-35-7(1)(i), a person who, with intent to breach the peace, fails or refuses to promptly comply with or obey a request, command, or order of a law enforcement officer, having the authority to then and there arrest any person for a violation of the law, to act or do or refrain from acting or doing as ordered, requested or commanded by said officer to avoid any breach of the peace at or near the place of issuance of such order, request or command, shall be guilty of disorderly conduct

CRIMINAL LAW - OFFENSES AFFECTING ADMINISTRATION OF JUSTICE - OBSTRUCTING OR RESISTING ARREST - Under Miss. Code Ann. § 97-9-73, it is unlawful for any person to obstruct or resist by force, or violence, or threats, or in any other manner, his lawful arrest, or the lawful arrest of another person by any state, local or federal law enforcement officer, and any person or persons so doing shall be guilty of a misdemeanor

CRIMINAL LAW - EVIDENCE - WEIGHT OF EVIDENCE - An appellate court’s role is to view the evidence in the light most favorable to the verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice

FACTS

In January 2016, Southaven Police officers responded to a shoplifting call at SuperLo Foods. A female suspect was detained, and the officers were informed of the possibility of a second suspect in the area. One officer saw James Sims walk out of a restaurant and believed that his behavior was suspicious. The officer asked to speak with Sims, but Sims continued walking. After the officer exited his patrol vehicle, Sims walked towards him in an aggressive manner and cursed at him. Sims refused to remove his hands from his pockets when asked to do so. He eventually placed his hands on the patrol car, and an officer performed a pat-down search. His hands were physically removed from the hood of the car by the two officers. There was a brief struggle while placing Sims in the patrol vehicle. Afterwards, it was discovered that Sims was not involved in the shoplifting incident, but he had a warrant for his arrest for contempt. In May 2016, Sims was convicted of disorderly conduct and resisting arrest in the Southaven Municipal Court. He filed an untimely motion for judgment notwithstanding the verdict or a new trial. The county court judge found Sims guilty of both crimes following a bench trial de novo. Consequently, Sims was sentenced to serve six months of supervised probation for the disorderly conduct conviction and six months of unsupervised probation for the resisting arrest conviction. His sentences were to run consecutively. He was also ordered to complete an anger management course and pay \$1,058 in fines, costs, and assessments. Sims appealed to the DeSoto County Circuit Court, which affirmed the judgment. Again, Sims appealed.

ISSUES

Whether (1) the City committed a *Brady* violation; (2) the City presented perjured testimony; (3) there was sufficient evidence to support Sims’s convictions for disorderly conduct and resisting arrest; and (4) the verdicts were against the overwhelming weight of evidence.

HOLDING

(1) Because Sims could not prove that the City of Southaven (“the City”) had additional audio recordings between the officers, because he could not prove that the alleged audio recordings would have changed conditions surrounding his arrest, and because he could not prove that the alleged audio recordings would have resulted in a different outcome at trial, the City did not commit a *Brady* violation. (2) Because Sims could not prove that the officer knowingly provided false testimony, because no other witness contradicted the officer’s testimony, and because he could not prove that the alleged false testimony would have had any reasonable likelihood to affect the judgment at trial, the City did not present perjured testimony, and this issue was without merit. (3) Because Sims repeatedly refused to remove his hands from his pockets, because he was irate, because he cursed at the officers in a public place, because he refused to place his hands behind his back to be handcuffed, and because there was a brief struggle between the officers and Sims when he was placed in the patrol vehicle, there was sufficient evidence to support Sims’s convictions for disorderly conduct and resisting arrest. (4) Because the City presented sufficient evidence to show that Sims was guilty of disorderly conduct and resisting arrest, and because the trial judge determined the credibility of the witnesses and weighed the conflicting testimony, the verdicts were not against the overwhelming weight of evidence. Therefore, the Court of Appeals affirmed the judgment of the DeSoto County Circuit Court.

DISSENTS

Chief Judge Barnes argued that, because Officer Joiner did not see Sims commit a crime, he did not have reasonable suspicion to stop Sims, and he did not have probable cause to arrest Sims; therefore, the arrest was unlawful. She further argued that any disorderly conduct stemmed from Sims’s unlawful detention, and he had the right to use reasonable force to resist an unlawful arrest. Therefore, she would have vacated Sims’s convictions for disorderly conduct and resisting arrest.

Judge Westbrook agreed with Chief Judge Barnes that there was insufficient evidence to support Sims’s convictions for disorderly conduct and resisting arrest. She argued that the officer lacked reasonable suspicion to stop Sims. She further argued that the officer’s testimony showed that he exhibited implicit bias that caused him to target Sims because he was Black.

Affirmed - 2019-KM-01581-COA (Sept. 21, 2021)

En Banc Modified Opinion by Judge Lawrence - Dissents by Chief Judge Barnes & Judge Westbrook

Hon. Celeste Embrey Wilson (DeSoto County Circuit Court)

Wanda Turner-Lee Abioto & Mary A. Brown for Appellant - Ashley Lauren Sulser (Att’y Gen. Office) for Appellee

Briefed by [Idena Allen](#)

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SMITH V. STATE

CRIMINAL - FELONY

EVIDENCE - ADMISSABILITY - CHARACTER EVIDENCE - Miss. R. Evid. 404(b) prohibits the use of prior bad acts to prove a person’s character to show that he acted in conformity therewith; such evidence may be used for another purpose, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident

EVIDENCE - ADMISSABILITY - DEROUEN RULE - In cases involving a sexual crime against a minor, evidence of prior sexual abuse is admissible when admitted under Miss. R. Evid. 404(b), filtered through Miss. R. Evid. 403, and accompanied by a limiting jury instruction

EVIDENCE - ADMISSABILITY - EXPERT TESTIMONY - Under Miss. R. Evid. 702, expert testimony is admissible when the witness is qualified and the testimony is relevant and reliable

FACTS

In 2001, Carlos Smith and his wife adopted three-year-old K.S. In 2004, Smith pled no contest to one count of indecent exposure after a Stone County grand jury indicted him for one count of battery of M.J., K.S.'s minor friend. In 2011, K.S. told two different therapists on separate occasions that Smith had sexually abused her through playing the "blindfold game" and sticking his penis in her mouth. In June 2012, Smith was indicted by a Stone County grand jury for one count of sexual battery for allegedly putting his penis in K.S.'s mouth on several occasions between May 2005 and August 2011. The circuit court ruled that M.J.'s testimony was admissible under Miss. R. Evid. 404(b). During trial, M.J. testified that Smith had played the blindfold game with her and attempted to put his penis into her mouth. The State also brought K.S.'s former therapist, Emily Pfaff, in to testify as an expert in mental health counseling. Despite the defense's objection to Pfaff testifying pursuant to Miss. R. Evid. 702, the circuit court ruled that Pfaff would be allowed to testify. In January 2016, the jury found Smith guilty of sexual battery, and the circuit court sentenced to twenty-two years in the custody of the Mississippi Department of Corrections. Smith filed a motion for a new trial or judgment notwithstanding the verdict, and the circuit court denied his motion. Smith appealed.

ISSUES

Whether the circuit court erred by allowing (1) the testimonial evidence of M.J. and (2) Pfaff to give an expert opinion.

HOLDING

(1) Because M.J.'s testimony, pursuant to Miss. R. Evid. 404(b)(2), was used for a legitimate, alternative purpose of showing both motive and evidence of a common plan, because the circuit court followed Miss. R. Evid. 403 by properly filtering the testimony, which showed a plan of Smith's abuse and determined the probative value outweighed the prejudicial effect, and because the circuit court, following the holding in *Derouen*, gave a limiting jury instruction regarding this piece of evidence, the circuit court did not abuse its discretion by admitting M.J.'s testimony. (2) Because Pfaff qualified as an expert witness based on her educational background in psychology and mental health counseling, three years of experience in mental health treatment facilities, and training in behavioral treatments for traumatic experiences such as sexual abuse, and because Pfaff's testimony was relevant and reliable due to her six months of work with K.S., her use of several professional mental health diagnosis methods in treating K.S., and her testimony remaining within the scope of Miss. R. Evid. 702 by only giving an expert opinion that K.S.'s characteristics were consistent to those of sexually abused children, the circuit court did not abuse its discretion in allowing Pfaff to give her expert opinion. Therefore, the Court of Appeals affirmed the judgment of the Stone County Circuit Court.

Affirmed - 2020-KA-00507-COA consolidated with 2017-CT-01725-COA (Sept. 21, 2021)

Opinion by Judge McDonald

Hon. Roger T. Clark (Stone County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) & *Pro se* for Appellant - Brittney Sharae Eakins (Att'y Gen. Office) for Appellee

Briefed by [William Doherty](#)

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