Mississippi Public Defenders Conference

Spring 2018

Appellate Court Update

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1. United States Supreme Court Cases

None. (Well, not really)

There are a lot of cases pending, but, as of now, there are no directly relevant cases to Mississippi Public Defenders.

But…

Let's talk about McCoy v. Louisiana which was argued on January 17, 2018 and has yet to be decided

- Robert McCoy was arrested for the first-degree murders of the son, mother, and step-father of his estranged wife. The State sought the death penalty.
- McCoy was found to be indigent and appointed a public defender. Throughout his representation by the public defender and his subsequent representation by retained counsel McCoy maintained his innocence and repeatedly stated his desire to plead not guilty.

- McCoy moved for his public defender to be removed due to his belief that the public defenders were doing nothing to assist him in proving his innocence.
- The court granted McCoy's motion to represent himself until he could find substitute counsel. McCoy subsequently found new counsel to represent him, and his counsel advised him to take a plea.

- When McCoy refused to take a plea, his counsel notified him that he intended to concede guilt, after which time McCoy moved to discharge him. The court denied McCoy's motion to discharge his attorney as untimely.
- His counsel proceeded to concede McCoy's guilt and argued for verdicts of second-degree murder on a theory of diminished capacity. The jury returned a verdict of first-degree murder on all three counts and recommended the death penalty.

- The Louisiana Supreme Court denied the appeal and affirmed the convictions and the sentence, reasoning that defense counsel's failure to follow McCoy's direction not to concede guilt did not deny McCoy the assistance of counsel or create a conflict of interest because it did not completely abdicate the defense.
- Rather, the decision to concede guilt was a strategic choice by counsel.

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Does it violate a criminal defendant's Sixth Amendment right to assistance of counsel if defense counsel concedes the defendant's guilt over the defendant's express objection?"

OH LOOK! A LAST MINUTE CASE!
SESSIONS V. DIMAYA (APRIL 18, 2018)

The Immigration and Nationality Act's "crime of violence" provision is unconstitutionally vague, in violation of the Due Process Clause of the Fifth Amendment.

To determine whether a person's conduct falls within a "crime of violence" under Section 16(b), courts consider the overall nature of the offense, particularly "whether 'the ordinary case' of an offense poses the requisite risk" of physical force

The Court found that the term "ordinary case" under the "crime of violence" was too vague in that it risked unpredictable and arbitrary interpretation.

In 2015, the Court struck down as unconstitutionally vague a similar provision of a different statute, see Johnson v. United States, (2015), and this provision suffers from the same problems as the one in that case.

Mississippi Supreme Court Cases

Blakeney v. State, No. 2015-DP-00058-SCT (Nov. 9, 2017)

- Blakeney was convicted of capital murder for the death of his girlfriend's 2 year old daughter in the course of child abuse and sentenced to death.

One morning, Blakeney called 911, and reported that the child collapsed with seizures, approximately 45 minutes after the girlfriend left for work.

Despite treatment, the child eventually died at UMMC of brain swelling and head trauma after the mother ordered removal of life support two days later.

Blakeney's girlfriend, an undocumented Mexican immigrant, pleaded guilty to child neglect, received a probationary sentence and repatriated to Mexico.

As is generally the case in death penalty cases, numerous errors were raised. The Court reversed on three issues.

The failure to continue the case after the State identified a new jailhouse informant witness, new documentary evidence and three new expert witnesses shortly before trial.

Massiah error in admitting recorded statements, testimony about verbal statements, and other evidence obtained by two jailhouse informant witnesses acting as agents of the state

Prosecutorial misconduct for failure to preserve and turn over results of forensic examination of defendants' and co-defendants' computers, phones and other electronic devices.

SUTTON V. STATE (MARCH 15, 2018)

- A CI told the Washington County Sheriff's Office that "stolen items" were located at a certain house. Based on that information officers prepared an affidavit for a search warrant. A search warrant was issued for "stolen items"
- A warrant was executed. As a result of the search, officers found sixty pills, nearly $5000 in cash, a handgun and two digital scales.

The Mississippi Supreme Court found that while the circumstances undergirding the warrant were sufficient to support determination of probable cause as to "stolen items," the warrant failed to adequately describe the property to be seized.

The Court concluded that there was no means for the officers to distinguish any stolen items from any items rightfully belonging in the house.

> *The description of 'stolen property' is no description. For property other than what is illicit or contraband, the thing or things to be seized must be described with some particularity.*

The warrant also contained language related to drug activity. The court found there was no probable cause to issue a search warrant for any illegal activity. The record is devoid of any allegation that either the issuing judge or the officers had any reason to believe the house contained drugs. The CI related only activity about theft.

Miscellaneous Cases

- *Amos v. State* (November 30, 2017) – prosecutor's questions regarding a witness's polygraph results were improper, but harmless in light of cautionary instructions. Concurrence from Chief Justice Waller says it is *ALWAYS* error
- *Woods v. State* (March 1, 2018) – it was ineffective assistance of counsel for trial counsel to not file a motion for a new trial, when the trial court might have granted that motion.

Miscellaneous Cases

Moore v. State (April 19, 2018) - circumstantial evidence instruction still good law. There are Justices who wish to do way with it, though.

Let's Talk About Interlocutory Appeals for a Minute

Mississippi Rule of Appellate Procedure 5 governs petitions for interlocutory appeal. Rule 5 provides that "An appeal from an interlocutory order may be sought if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may: (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or (2) Protect a party from substantial and irreparable injury; or (3) Resolve an issue of general importance in the administration of justice."

Not so fast.

Recently, in *McCollum v. State*, the Court dismissed an interlocutory appeal it had previously granted.

In its motion to dismiss, the State argued *Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992) saying that the only issues in criminal cases that are appropriate for interlocutory appeals are Double Jeopardy issues.

So. ..

Mississippi Court of Appeals Cases

SMITH V. STATE (JANUARY 2, 2018)

- During trial, Smith notified the Court that there was an alibi witness. The State objected based upon the timing of Smith's disclosure. The trial Court sustained the State's objection and disallowed the witness from testifying.
- Smith had not previously disclosed this witness.

- URCCCP 9.05, which was in effect at the time, provided:

Upon the written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such other time as the court may direct, upon the prosecuting attorney a written notice of the intention to offer a defense of alibi.

- The Court of Appeals reviewed the record and found that there was nothing to indicate that the prosecution made such a demand. The Court declined to assume such a demand existed.
- Mississippi Rule of Criminal Procedure 17.4 governs this now, and it similarly requires written demand from the State.

PIERCE V. STATE (JANUARY 30, 2018)

Pierce worked as a licensed massage therapist. S.A. was about to receive a massage when Pierce left the room for her to undress. Pierce returned, gave her a massage and left the room again for S.A. to dress.

At that point, S.A. noticed Pierce's iPhone was propped against the backsplash of a counter opposite the massage table.

She picked up the phone, found out she was being recorded. She stopped the recording and texted the video to herself.

Pierce was charged with secretly video taping S.A. in violation of 97-29-63. Pierce told police that he did not realize he was recording.

At trial, the State moved to close the courtroom to the general public, or, at least when the video was played, turn the TV away from the general audience.

The defense objected.

The trial court granted the motion and closed the Courtroom for the entirety of S.A.'s testimony.

Pierce proposed an accident jury instruction, which was denied by the trial court.

The State argued that because the elements instruction required action with "lewd, licentious or indecent intent" and therefore concluded it was not accidental.

The Court rejected that reasoning.

> *However, the fallacy of this argument is that a reasonable finding by the jury with respect to one option given does not prove that another option should not have been given, even if it ultimately would have been rejected by the jury. In other words, the fact that the jury was given an element instruction does not prove that an accident instruction should not have been given.*

Closing the courtroom was error. The trial court could have simply closed the room when the video was being played.

The Court of Appeals concluded that such an error was structural and could not be considered harmless.

A word on post-trial motions.

In *Griffin v. State* (April 17, 2018), the Court of Appeals ruled that a challenge to weight and sufficiency was procedurally barred because trial counsel failed to specifically note how evidence was insufficient/against the overwhelming weight of evidence in post-trial motions.

As a practice, it would be advisable for trial attorneys to specifically indicate why evidence is problematic.

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