

2021 WL 248050

Only the Westlaw citation is currently available.
Court of Appeals of Mississippi.

Jamar ALLEN, Appellant

v.

STATE of Mississippi, Appellee

NO. 2019-KA-01436-COA

01/26/2021

Rehearing Denied May 18, 2021

Synopsis

Background: Defendant was convicted in the Circuit Court, Alcorn County, John R. White, J., of two counts of aggravated assault, one count of shooting into a dwelling, and one count of being a felon in possession of a firearm. Following denial of his motion for judgment notwithstanding the verdict or a new trial, defendant appealed.

Holdings: The Court of Appeals, Lawrence, J., held that:

[1] prosecutor's comment during closing argument that there was no gun because defendant ran off to Wisconsin, did not create unjust prejudice against defendant so as to result in a decision influenced by the prejudice so created;

[2] even if the State committed prosecutorial misconduct during closing arguments by commenting on defendant's travel to Wisconsin as justification as to why no weapon was recovered, the error would have been harmless based on the overwhelming evidence of guilt; and

[3] defense counsel's strategic decision to not request a circumstantial evidence instruction did not prejudice defendant, and thus could not amount to ineffective assistance of counsel.

Affirmed.

Barnes, C.J., and Westbrook and McDonald, JJ., concurred in result only without separate written opinion.

Appendix A

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (12)

[1] **Criminal Law** ⇌ Arguments and conduct of counsel

Criminal Law ⇌ Statements as to Facts, Comments, and Arguments

The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created; even when a prosecutor has made an impermissible comment, the appellate court requires a showing of prejudice to warrant reversal.

[2] **Criminal Law** ⇌ Assault and battery

Criminal Law ⇌ Weapons and explosives

Prosecutor's comment during closing argument that there was no gun found because defendant ran off to Wisconsin did not create unjust prejudice against defendant so as to result in a decision influenced by the prejudice so created, at defendant's trial for aggravated assault, shooting into a dwelling, and being a felon in possession of a firearm; such statement was not evidence of flight, as prosecutor did not state that defendant traveled to Wisconsin because he was guilty or fled Mississippi because he was guilty, but rather, he suggested that no weapon was recovered because defendant presumably took it with him to Wisconsin.

[3] **Criminal Law** ⇌ Particular statements, comments, and arguments

Even if the State committed prosecutorial misconduct during closing arguments in defendant's prosecution for aggravated assault, shooting into a dwelling, and being a felon in possession of a firearm, by commenting on defendant's travel to Wisconsin as justification

as to why no weapon was recovered, the error would have been harmless based on the overwhelming evidence of guilt; female victim testified that defendant threatened to "shoot the place up" if he caught her with another man, defendant engaged in a physical altercation with male victim, both victims saw defendant at the door immediately prior to being struck by projectiles, and suspicious vehicle found at the scene was confirmed to be the same vehicle driven by defendant in a previous traffic stop.

[4] **Criminal Law** ⇌ Conduct of Trial in General

Criminal Law ⇌ Preferability of raising effectiveness issue on post-conviction motion

Generally, ineffective assistance of counsel claims are more appropriately brought during post-conviction proceedings; however, such claims will be addressed on direct appeal when (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate and the court determines that the findings of fact by a trial judge able to consider the demeanor of witnesses are not needed. U.S. Const. Amend. 6.

[5] **Criminal Law** ⇌ Conduct of Trial in General

Ineffective assistance of counsel claims may be resolved on direct appeal when the record affirmatively shows those claims are without merit. U.S. Const. Amend. 6.

[6] **Criminal Law** ⇌ Determination

Judicial scrutiny of counsel's performance must be highly deferential when reviewing whether counsel's assistance was ineffective. U.S. Const. Amend. 6.

[7] **Criminal Law** ⇌ Presumptions and burden of proof in general

Criminal Law ⇌ Prejudice in general

Criminal Law ⇌ Strategy and tactics in general

A strong but rebuttable presumption exists that counsel's performance was effective: first, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy, and second, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; if the defendant cannot satisfy both *Strickland* prongs, his claim fails. U.S. Const. Amend. 6.

[8] **Criminal Law** ⇌ Circumstances to be consistent with hypothesis of guilt and inconsistent with that of innocence

A circumstantial evidence instruction provides that the State must prove the defendant guilty beyond a reasonable doubt and to the exclusion of all reasonable hypotheses consistent with innocence.

[9] **Criminal Law** ⇌ Necessity of instructions in general

Where the State is without a confession and wholly without eyewitness testimony to the gravamen of the offense charged, the defendant is entitled to a circumstantial evidence instruction.

[10] **Criminal Law** ⇌ Circumstantial evidence

Failure to request a circumstantial-evidence instruction constitutes a waiver, and a trial judge is not required to sua sponte give a circumstantial evidence instruction.

[11] **Criminal Law** ⇌ Offering instructions

Defense counsel's strategic decision to not request a circumstantial evidence instruction did not prejudice defendant, and thus could not amount to ineffective assistance of counsel in defendant's prosecution for aggravated assault, shooting into a dwelling and being a felon in possession of a firearm; there was overwhelming

¶6. While Sergeant Ken Walker was inspecting Payne's backyard, he saw a small black Nissan or Toyota with its engine running. He watched as the vehicle drove away without its headlights on. As the vehicle braked, Sergeant Walker noticed the driver's side taillight did not work. When Captain Ben Moore arrived, Sergeant Walker told him about the suspicious vehicle. A few weeks before, Captain Moore had pulled over a similar vehicle with a broken taillight. During that traffic stop, Captain Moore arrested the driver, Allen, because there was a warrant out for his arrest in Wisconsin, but then Captain Moore released Allen.¹

*2 ¶7. Captain Moore contacted Detective Jerry Rogers to help locate Allen. Detective Rogers located the vehicle from Captain Moore's traffic stop and issued a "be on the lookout" notice for Allen. Allen was eventually located in custody in Milwaukee, Wisconsin. No weapon was ever recovered.

ANALYSIS

1. Prosecutorial Misconduct

¶8. After Allen's arrest and transport back to Mississippi, a trial commenced on July 30, 2019. A jury convicted Allen of two counts of aggravated assault, one count of shooting into a dwelling, and one count of being a felon in possession of a firearm. Allen first argues that the State committed prosecutorial misconduct during its closing argument when it "asked the jury to consider Allen's travel to Wisconsin as inculpatory evidence of flight." Specifically, the State said, "There's no gun because [Allen] ran off back to Wisconsin, that's why there's no gun." Allen's attorney immediately objected and requested a mistrial, which the court overruled and denied.

[1] ¶9. "The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Jackson v. State*, 174 So. 3d 232, 236 (¶9) (Miss. 2015). "Even when a prosecutor has made an impermissible comment, this Court requires a showing of prejudice to warrant reversal." *Outerbridge v. State*, 947 So. 2d 279, 286 (¶23) (Miss. 2006).

[2] ¶10. At the outset, we acknowledge that the State's comment is not evidence of flight. The prosecutor did not state that Allen traveled to Wisconsin because he was guilty or

fled Mississippi because he was guilty. Rather, he suggested that no weapon was recovered because Allen presumably took it with him to Wisconsin. After review, we cannot say that any of the prosecutor's actions in this case "create[d] unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Jackson*, 174 So. 3d at 236 (¶9).

[3] ¶11. Even if the State had committed prosecutorial misconduct with this statement, the error would be harmless based on the overwhelming evidence of guilt. *See, e.g., Harris v. State*, 37 So. 3d 1237, 1247 (¶38) (Miss. Ct. App. 2010) (holding that "[t]he strength of the State's evidence against Harris was such that if the improper comments by both prosecutors were removed, we are convinced beyond a reasonable doubt, that the jury would have reached the same verdict based on the evidence presented at trial"). Payne testified that Allen threatened to "shoot the place up" if he caught her with other men. The first time Allen returned to Payne's house to get his clothes, he and Hope got into a fight. Later that same night, the second time Allen came to get his clothes, Payne opened the door and threw out his clothes. Both Payne and Hope saw Allen before Payne closed the door. Immediately after Payne closed the door, Payne and Hope were struck by projectiles. Finally, the suspicious vehicle found leaving the scene was confirmed to be the same vehicle driven by Allen in a previous traffic stop. Accordingly, even if the prosecutor's statement was an improper comment, we find any error harmless due to the overwhelming evidence of guilt produced by the State.

2. Ineffective Assistance of Counsel

*3 [4] [5] ¶12. Allen also argues that his attorney was ineffective for failing to request a circumstantial-evidence instruction. "Generally, ineffective-assistance-of-counsel claims are more appropriately brought during post-conviction proceedings." *Ross v. State*, 288 So. 3d 317, 324 (¶29) (Miss. 2020) (quoting *Bell v. State*, 202 So. 3d 1239, 1242 (¶12) (Miss. 2016)). Such claims will be addressed on direct appeal when "[(1)] the record affirmatively shows ineffectiveness of constitutional dimensions, or [(2)] the parties stipulate that the record is adequate and the Court determines that the findings of fact by a trial judge able to consider the demeanor of witnesses, etc., are not needed." *Id.* Additionally, such claims may be resolved "on direct appeal when the record affirmatively shows those claims are without merit." *Id.* After review, we find the record before us is sufficient to decide Allen's claim because Allen could not

CONCLUSION

¶17. We find no reversible error based on the State's remarks during closing argument. Further, we find that Allen has failed to prove his claim for ineffective assistance of counsel because he cannot satisfy both prongs of the *Strickland* test. Therefore, we affirm Allen's convictions and sentences.

¶18. **AFFIRMED.**

CARLTON AND WILSON, P.JJ., GREENLEE AND McCARTY, JJ., CONCUR. BARNES, C.J., WESTBROOKS AND McDONALD, JJ., CONCUR IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. SMITH, J., NOT PARTICIPATING.

All Citations

--- So.3d ----, 2021 WL 248050

Footnotes

- 1 The warrant was for Allen's probation violation from a theft conviction. The record is silent as to why Allen was released after the arrest. Allen's arrest was not revealed to the jury at trial. The jury only heard that Captain Moore stopped Allen for a broken taillight and that the stop was long enough for him to accurately identify Allen.
- 2 The Mississippi Supreme Court denied certiorari in *McCray v. State*, 263 So. 3d 665 (Miss. 2019). No petition for writ of certiorari was filed in *Turner v. State* or *Larry v. State*.

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Appendix B

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

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May 18, 2021

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 18th day of May, 2021.

Court of Appeals Case # 2019-KA-01436-COA
Trial Court Case # CR2017-125

Jamar Allen v. State of Mississippi

Current Location:
MDOC #196129
P.O. Box 1057
Parchman, MS 38738

↑
Case Number

The motion for rehearing is denied. Smith and Emfinger, JJ., not participating.

*** NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS ***

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: <https://courts.ms.gov>, and selecting the appropriate date the opinion was rendered under the category "Decisions."

Appendix B

Serial: 238725

IN THE SUPREME COURT OF MISSISSIPPI

No. 2019-CT-01436-SCT

JAMAR ALLEN*Appellant/Petitioner*

v.

STATE OF MISSISSIPPI*Appellee/Respondent***ORDER**

Before the Court are Jamar Allen's letter motion, which is in the nature of a motion for reconsideration, and Petition for Writ of Certiorari. On June 30, 2021, the Court dismissed Allen's petition as untimely. Subsequently, Allen filed his motion for reconsideration and attached proof that his petition was timely filed. Therefore, the Court finds Allen's motion for reconsideration should be granted and the merits of Allen's petition should be considered. After reviewing the merits of Allen's petition, the Court finds it should be denied.

IT IS THEREFORE ORDERED that Jamar Allen's letter motion, which is in the nature of a motion for reconsideration, is hereby granted.


IT IS FURTHER ORDERED that Jamar Allen's Petition for Writ of Certiorari is hereby denied.

TO DENY CERTIORARI: RANDOLPH, C.J., KITCHENS, P.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ.

TO GRANT CERTIORARI: KING, P.J.

SO ORDERED.

DIGITAL SIGNATURE
Order#: 238725
Sig Serial: 100004397
Org: SC
Date: 09/28/2021


Robert P. Chamberlin, Justice

Appendix C



**MANDATE
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

To the Alcorn County Circuit Court - GREETINGS:

In proceedings held in the Courtroom in the City of Jackson, Mississippi, the Court of Appeals of the State of Mississippi entered a judgment as follows:

Court of Appeals Case # 2019-CT-01436-COA
Trial Court Case #CR2017-125

Jamar Allen v. State of Mississippi

Tuesday, 26th day of January, 2021

Affirmed. Alcorn County taxed with costs of appeal.

Tuesday, 18th day of May, 2021

The motion for rehearing is denied. Smith and Emfinger, JJ., not participating.

Thursday, 1st day of July, 2021

DISPOSITION OF THE MISSISSIPPI SUPREME COURT - Jamar Allen's Petition for Writ of Certiorari is dismissed as untimely. Order entered 6/30/21.

Thursday, 7th day of October, 2021

DISPOSITION OF THE MISSISSIPPI SUPREME COURT - Jamar Allen's letter motion, which is in the nature of a motion for reconsideration, is granted. Allen's Petition for Writ of Certiorari is denied. To Deny Certiorari: Randolph, C.J., Kitchens, P.J., Coleman, Maxwell, Beam, Chamberlin, Ishee and Griffis, JJ. To Grant Certiorari: King, P.J. Order entered 9/28/21.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

I, D. Jeremy Whitmire, Clerk of the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, certify that the above judgment is a true and correct copy of the original which is authorized by law to be filed and is actually on file in my office under my custody and control.

Witness my signature and the Court's seal on October 19, 2021, A.D.

A handwritten signature in cursive script, reading "D. Whitmire", written over a horizontal line.

CLERK

Appendix D