6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00821 COA

STRATFORD P. CHILDERS APPELLANT

v.

CELESTINE ROYSTON, NESTLELYNN R.

GARRETT, SIDNEY WAYNE ROYSTON,

DELORIS R. MINOR, HOMER RUDELL

ROYSTON, JACQUELYNN A. ROYSTON,

JOHN WILLIS ROYSTON, ALLEN SCRUGGS,

AND JAMES SCRUGGS,

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. DON GRIST

COURT FROM WHICH APPEALED: BENTON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: HELEN KENNEDY ROBINSON

ATTORNEYS FOR APPELLEES: MILDRED J. LESURE

C. EMANUEL SMITH

NATURE OF THE CASE: REAL PROPERTY

TRIAL COURT DISPOSITION: JUDGMENT FOR DEFENDANTS IN ADVERSE POSSESSION COMPLAINT

MANDATE ISSUED: 7/8/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

BRIDGES, C.J., FOR THE COURT:

This is an adverse possession case involving land in Benton County, Mississippi. Appellant, Stratford P. Childers (Childers) bought a 41 acre tract of land from Jack Bowen on March 4, 1977. Abutting the 41 acre tract, but not within the calls of the deed, was a 24.11 acre tract of land that Childers now claims through adverse possession. Neither Childers nor his predecessor in interest, Bowen, had the land surveyed at the time of purchase. Childers assumed that the description of the abutting 24.11 acre tract was within the calls of his deed because he had seen Bowen farming it. The title to the 41 acres and the 24.11 acres comes from a common grantor, Hollis Royston. After Hollis's death, the land was divided between members of the family Royston and the family Scruggs. At the present time, 11.78 acres of the 24.11 acre tract are within the calls of the Scruggs's deed, and 12.33 acres of the 24.11 acre tract are contained in the Royston deed description. Nonetheless, Childers claims that his farming and timber cutting on the 24.11 acres as well as other various activities meet the requirements of adverse possession.

The chancellor determined, however, that Childers had not proven all the requirements of adverse possession by clear and convincing evidence. The chancellor found that "the dominion which Childers exercised over the disputed property was not so open and notorious as to amount to a waving of his flag over the property." On appeal, Childers presents the following issues for consideration:

I. THE CHANCELLOR ERRED IN RULING THAT WARRANTY DEEDS TO THE 41.00 ACRE TRACT WERE IRRELEVANT.

II. THE CHANCELLOR ERRED BY REFUSING TO ADMIT AERIAL PHOTOS FROM THE ASCS OFFICE.

III. THE CHANCELLOR'S FINDINGS OF FACT WERE INACCURATE, CONTRARY TO THE TESTIMONY PRESENTED AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

IV. WHETHER THE CHANCELLOR'S FINDINGS REGARDING THE FAILURE OF APPELLANT TO PROVE THE ELEMENTS OF HIS ADVERSE POSSESSION OR THE ADVERSE POSSESSION OF HIS PREDECESSOR IN TITLE WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, CONTRARY TO THE LAWS OF THIS STATE AND MANIFESTLY ERRONEOUS.

Finding no error, we affirm.

FACTS

Childers claims that when he purchased the 41 acres from Bowen in 1977, he also took possession of the 24.11 acre tract now in dispute. The following is the description of the land in dispute:

24.11 acres of land located in the Northwest Quarter of Section 11, Township 4 south, Range 1 west, Benton County, Mississippi.

When questions arose about Childers' use of the 21 acre tract, he had the property within the calls of his deed surveyed. On May 19, 1993, Childers' land was surveyed and he learned that the 24.11 acre tract was not within his deed and was not part of the property sold to him by Bowen. When the 24.11 acre tract was surveyed, it revealed that 11.78 acres of the tract belonged to the Scruggs, and 12.33 acres of the tract belonged to the Roystons. Subsequently, on August 23, 1993, Childers filed suit against the Roystons and the Scruggs, and asking the chancellor to "adjudge the Plaintiff to be the true owner of said real property in fee simple by virtue of his actual adverse possession thereof."

Childers testified that he had farmed the 24.11 acres every year from 1977 until the dispute arose in 1993, except for one year that he leased the property to someone else to farm. Additionally, Childers stated that he had timber cut off the land in a spot that was uncultivatable. However, Childers had not erected any buildings or permanent structures on the land, nor had he placed any "no trespassing" signs on the property. Although he claimed that he thought he had bought the disputed property in 1977, Childers never paid any taxes on the land, nor did he borrow money against the land. When questioned about the timber he caused to be cut off the disputed property, Childers could not produce any documentation. He also could not produce any documentation of the lease of the disputed land to someone else to farm for a year.

Mr. Skelton testified on Childers' behalf, and stated that while he had never seen Childers farming the land, he had seen hands out there farming it and assumed they were Childers' workers. Additionally, Skelton testified that the first time he had seen anyone working the disputed property was three or four years before the trial. Mr. Bryant testified on Childers' behalf and stated that both Bowen and Childers farmed the disputed property. However, Bryant also testified that Ulysses "Humpy" Royston may have also farmed the property. Mr. Matthews stated that he worked for Childers and plowed the disputed property for him. Additionally, Matthews testified that Ulysses "Humpy" Royston had sold the disputed property to Bowen in the 1950's and had subsequently bought a new Pontiac Streamline with the proceeds from the sale. Childers' father also testified, stating that his son had worked the property since he had supposedly purchased it from Bowen in 1977.

Celestine Royston (Celestine) testified that she married Ulysses "Humpy" Royston in 1939, and has lived on the family place ever since. Celestine's house is across the road from the disputed property, and she has other property that also lies across the road and abuts the disputed 24.11 acres. According to Celestine, her husband farmed the disputed property from 1960 to 1977, with Bowen and the Skeltons renting it at times. After "Humpy's" death in 1981, Celestine rented all of her cultivatable land to the Skeltons. Additionally, Celestine stated that she went to the disputed property several times a year to gather walnuts, and she gave people permission to hunt on the property. Also, she let her church use the property for socials and other gatherings. Celestine produced the tax receipts showing that she had paid the taxes on the disputed property. Finally, Celestine stated that she was never put on notice that Childers was claiming the land as his own, that she always knew that it was her land, and she exercised control over it by renting it out.

Other members of Celestine's family testified that during their visits home between 1977 and the present, they had never been aware of Childers' supposed working the land in dispute. Additionally, Allen Scruggs testified that his Uncle "Humpy" either worked the land in dispute himself or rented it out until his death in 1981.

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FROM THE ASCS OFFICE.

Childers claims that the chancellor erred in excluding two key pieces of evidence: the deed to Childers' 41 acres and certain aerial photographs from the ASCS office. In response to Childers' attempt to introduce his deed to his 41 acres, the defense objected, stating that while they had no objection to introduction of deeds to the land in dispute, deeds to land not in dispute were irrelevant and would not aid an understanding of the ownership of the disputed property. The chancellor sustained the objection, but reserved his ruling as to the admission of the deed to Childers' 41 acres to a later time. Ultimately, he did not admit the deed to the 41 acres.

The chancellor also refused to admit into evidence certain aerial photographs Childers claimed he obtained from the ASCS office. Childers attempted to testify about reporting his acreage to the ASCS office for the years he farmed the disputed property. However, Childers was unable to produce any official ASCS reports to substantiate his claims. Counsel for Childers explained to the chancellor that it was impossible to subpoena employees to testify about records from the ASCS office. When asked if he had tried to obtain a map or photographs from the ASCS office, Childers replied that he had not done so. However, after a recess, Childers returned to the stand with certain documents from the ASCS office which had not been previously produced to the other parties. The defense objected on the grounds of lack of authentication. Regardless whether an ASCS employee could have testified or not about the aerial photos, Childers could have had the document accompanied by a certificate of acknowledgment from the ASCS employee providing the copies of the documents. *See* M.R.E. 902 (8). Objection to the maps and photographs was sustained because of lack of authentication and absence of explanation as to the section, township, or range of the property depicted.

"[T]he admission or exclusion of evidence, photographs in particular, is within the sound discretion of the trial court and that decision will be upheld unless there is an abuse of discretion." *Walker v. Graham*, 582 So. 2d 431, 432 (Miss. 1991). Childers failed to prove how the chancellor's decision was an abuse of discretion. Moreover, Childers failed to prove any kind of prejudice or harm resulting from the chancellor's exclusion of the deed and the ASCS document. This issue is meritless.

III. THE CHANCELLOR'S FINDINGS OF FACT WERE INACCURATE, CONTRARY TO THE TESTIMONY PRESENTED AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Childers lists eight of the chancellor's findings and claims that they are all inaccurate and unsupported by the evidence. In each case, he points to the page number cited by the chancellor, compares it with the page number of the official court reporter's transcript, and claims that the inconsistency between the two proves that the chancellor's findings are incorrect. However, the chancellor made his findings before the official transcript was prepared for this appeal, so naturally, his page numbers are different from a transcript that was not even prepared when he made his findings. Moreover, we have examined the record and are satisfied that the chancellor's findings are indeed accurate and supported

by the evidence.

IV. WHETHER THE CHANCELLOR'S FINDINGS REGARDING THE FAILURE OF APPELLANT TO PROVE THE ELEMENTS OF HIS ADVERSE POSSESSION OR THE ADVERSE POSSESSION OF HIS PREDECESSOR IN TITLE WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, CONTRARY TO THE LAWS OF THIS STATE AND MANIFESTLY ERRONEOUS.

Mississippi Code section 15-1-13 states the requirements for adverse possession:

Ten years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten years after the removal of such disability, as provided in section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

M.C.A. 15-1-13 (Rev. 1995). The Mississippi Supreme Court has created a six element test from this statute: "for possession to be adverse it must be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful." *Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1993). "The question is whether the acts by the adverse possessor are sufficient to "fly his flag" over the land and to put the record title holder on notice that the land is being held under an adverse claim of ownership." *Id.* The burden of proving the elements of adverse possession is on the one claiming by adverse possession, and must be by clear and convincing evidence. *Id.*

In the present case, the chancellor held that Childers' acts were not sufficient to "fly his flag" over the disputed property. He stated the following in his final judgment:

The Court finds that Childers has failed to establish his adverse possession claim against Celestine Royston and the other named defendants. Specifically, the Court finds that the dominion which Childers exercised over the disputed property was not so open and notorious as to amount to a waving of his flag over the property. The testimony of Celestine Royston and Allen Scruggs also indicates that Childers' possession of the property may not have been uninterrupted for ten consecutive years. Additionally, certain evidence was presented to show that Childers' possession of the parcel was not exclusive. The evidence with respect to adverse possession is equally insufficient to establish a claim by Childers through his grantor, Jack Bowen. Accordingly, the Court finds that Childers has failed to establish his claim for adverse possession of the disputed property by clear and convincing evidence.

As an error correction court, we do not sit in a fact-finding capacity. Rather, it is our articulated standard of review to uphold the chancellor's findings of fact unless he is in manifest error:

It is where the chancellor was the trier of facts, his findings of fact on conflicting evidence cannot be disturbed by this Court on appeal unless we can say with reasonable certainty that these findings were manifestly wrong and against the overwhelming weight of the evidence.

Pieper v. Pontiff, 513 So. 2d 591, 594 (Miss. 1987). We will not reverse a chancellor's findings where there is any substantial credible evidence supporting them. *Id.*

In the present case, we have reviewed the record and cannot say that the chancellor's findings

were not supported by substantial credible evidence. Childers having failed to prove his claim to the disputed property by clear and convincing evidence, we affirm.

THE JUDGMENT OF THE BENTON COUNTY CHANCERY COURT IN FAVOR OF THE APPELLEES IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.