

IN THE COURT OF APPEALS 03/26/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01071 COA

**IN THE MATTER OF THE LAST WILL AND TESTAMENT OF MINNIE MARKS,
DECEASED**

RUTH VAUGHN

APPELLANT

v.

**HEIRS AT LAW OF CECIL MARKS, WILLIAM MARKS, DELBERT MARKS, ROY
MARKS AND TROY MARKS, DECEASED**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. TIMOTHY EDWARD ERVIN

COURT FROM WHICH APPEALED: LEE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

RHETT R. RUSSELL

ATTORNEY FOR APPELLEES:

CHARLES MATTHEW HOLLEB

NATURE OF THE CASE: WILL CONSTRUCTION

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF DEFENDANTS

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

On April 12, 1993, the Lee County Chancery Court admitted Minnie Marks' last will and testament to probate as muniment of title to certain parcels of land. On September 14, 1994, the chancellor rendered a decree in which he held, first, that Marks' will devised to Ruth Vaughn a life estate in those parcels of land; secondly, that her will did not vest Vaughn with any remainder interest in the land; and, thirdly, that each of Marks' four sons, William Marks, Delbert Marks, Roy Marks, and Troy Marks, inherited an undivided one-fourth (1/4) remainder interest in those parcels of land. The chancellor concluded that the descendants of each of the four brothers (Marks brothers' heirs) would take the four brothers' undivided one-fourth (1/4) interest in the land. Ruth Vaughn appeals from this decree. We reverse and render.

I. FACTS

Minnie Marks executed her last will and testament on September 24, 1958. In her will she appointed her daughter, Ruth Vaughn, to serve as the executrix of her estate. The provisions of Marks' will which are pertinent to the issues in this appeal state:

SECOND

After the payment of all my just debts and funeral expenses, I give, devise and bequeath all of the real and personal property to which I may be entitled, or over which I may have any disposing power at the time of my death, to my daughter, Mrs. Ruth Vaughn, of Tupelo, Mississippi, for her use during her lifetime.

THIRD

Upon the death of my said daughter, Mrs. Ruth Vaughn, I give, devise and bequeath all of my real and personal property then remaining, to my sons, Roy Marks, Troy Marks, William Marks, Cecil Marks and Delbert Marks, or to those sons who survive my aforesaid daughter, absolutely and in fee simple, share and share alike.

When Minnie Marks drafted her will in 1958, she had one daughter, Ruth Vaughn, and five sons, Roy Marks, Troy Marks, William Marks, Cecil Marks, and Delbert Marks. Cecil Marks died before his mother, and he left neither a spouse nor any children who survived him. When Minnie Marks died as a widow, her heirs at law were her four living sons, Roy, Troy, William, and Delbert, and her daughter, Ruth Vaughn. All four of Minnie Marks' sons died before this litigation began.

Vaughn filed a complaint in the Lee County Chancery Court requesting construction of her mother's will and entreating the court to confirm title of the real property to her in fee simple absolute. In response to this complaint, the Appellees, who are the heirs of Vaughn's four brothers, maintained that they were the sole remaindermen and that Ruth Vaughn had only a restricted life estate in the subject lands. As we shall see, the lower court ruled that Vaughn's right in the subject property was

limited to a life estate and that the entire remainder interest passed to the heirs at law of the four sons of the Testatrix who survived her.

As to the subject real property's current state of title, Ruth Vaughn conveyed by quitclaim deed dated December 19, 1992, an undivided one-third interest in and to all of her right, title, and interest in these parcels of land to William F. Randle, Joe B. Timmons, and Rhett R. Russell. The legal descriptions of the parcels of land described in the above quitclaim deed were corrected in a correction quitclaim deed which Ruth Vaughn executed and delivered to these same three grantees on May 24, 1993. Also, on that same day, May 24, 1993, Ruth Vaughn conveyed by another quitclaim deed to her daughter, Frances Vaughn, all of her remaining right, title, and interest in and to these same parcels of land. Thus, the Appellant, Ruth Vaughn, has no further interest in these parcels of land.

II. Litigation

In her complaint for construction of Marks' will, Vaughn contended that the will should be construed so as to grant her fee simple title to the subject property as of the time of Marks' death or, alternatively, as of the time of the death of William Marks. William Marks was the last of Marks' four sons to die. In response to Vaughn's contention, the trial court's opinion stated:

In construing the will in question, the court must look at the entire instrument and carry out the intent of the testatrix if possible and still be within the law.

This Court is of the opinion that Ruth Vaughn was vested only with a life estate in the land in question. Under applicable laws, she may only use the land, not commit waste or sell the same. She, like other life tenants, may rent or use the land, may cut timber for use in the home, for fencing, but has no authority to sell the timber on said land. Should the timber be sold by the remaindermen she would be entitled to the interest derived from the investment of such sums of money received from the sale.

This Court is of the further opinion that paragraph numbered "Third" of Minnie Marks' will, does not under current Mississippi law vest Ruth Vaughn with any remainder interest in the land in question.

The law favors early vesting of title. Each of the surviving four sons each inherited an undivided one-fourth (1/4) interest in the land, and their descendants under Mississippi law would take their respective share.

In her appeal from this decree entered on the previously quoted opinion, Vaughn seeks to reverse the chancellor's finding that her brothers' interest in the subject property was indefeasibly vested; instead,

she contends that her brothers' interest was contingent on their surviving Vaughn.

III. STANDARD OF REVIEW

This Court will not disturb a chancellor's finding of fact unless the chancellor was manifestly wrong or unless the finding of fact was not supported by substantial, credible evidence. *Smith ex rel. Young v. Estate of King*, 579 So. 2d 1250, 1251 (Miss. 1991). However, this rule does not apply to questions of law. "When presented with a question of law, the manifest error/substantial evidence rule has no application and we conduct a *de novo* review." *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993). Therefore, our review of these issues will be a *de novo* review.

IV. ISSUES AND THE LAW

We quote from Vaughn's brief to state the three issues which she argues require the reversal of the chancery court's judgment:

I. The chancellor erred in adjudicating that Ruth Vaughn did not take the real estate in question in fee simple.

II. Alternatively, the chancellor erred in adjudicating that Ruth Vaughn received no remainder interest in the subject real property as a result of her surviving her brothers and application of Mississippi Code Annotated § 91-1-13 (1972).

III. Alternatively, the chancellor erred in adjudicating that Ruth Vaughn's life estate in the subject real property carried only limited rights and powers to utilize and dispose of the property.

The heirs of Minnie Marks' four deceased sons named in her will restate the above mentioned issues differently in their own brief and also raise an issue as to Ruth Vaughn's standing to appeal from the chancellor's decree rendered on September 14, 1994. The Marks brothers' heirs did not raise this issue of Ruth Vaughn's standing by perfecting a cross-appeal. In their brief, the Marks brothers' heirs state their issues as follows:

I. Whether this Court should conclude that Appellant has no standing to appeal, thereby causing this appeal to be moot?

II. What standard of review should be used by this Court?

III. Whether the Last Will and Testament of Minnie Marks granted an estate to Ruth Vaughn greater than a life estate?

IV. Whether the Last Will and Testament of Minnie Marks granted an estate to her four sons lesser than an immediate vested remainder?

V. Whether Mississippi Code Annotated § 91-1-3 (1972) is applicable to this proceeding?

VI. Whether Mississippi Code Annotated § 91-1-13 (1972) is applicable to this proceeding?

We think that Vaughn's first and third issues and the Marks brothers' heirs' Issue III., although stated differently by the litigants, embody the same elements and can be resolved under the same analysis. Therefore, we incorporate the Marks brothers' heirs' Issue III. as a part of our discussion and analysis of Vaughn's first and third issues. We also think that Vaughn's second issue and the Marks brothers' heirs' Issue VI. are the litigants' dissimilar statements of the same issue. As to the Marks brothers' heirs' Issue II., we have already established the standard of review which we find to be applicable to these issues. Furthermore, Marks brothers' heirs' Issues IV. and V. depend upon the disposition of the other issues mentioned above. Finally, we shall reserve our consideration of the Marks brothers' heirs' Issue I. for the conclusion of this opinion.

A. First Set of Issues

The chancellor erred in adjudicating that Ruth Vaughn did not take the real estate in question in fee simple.

Alternatively, the chancellor erred in adjudicating that Ruth Vaughn's life estate in the subject real property carried only limited rights and powers to utilize and dispose of the property.

Whether the Last Will and Testament of Minnie Marks granted an estate to Ruth Vaughn greater than a life estate?

Whether the Last Will and Testament of Minnie Marks granted an estate to her four sons lesser than an immediate vested remainder?

Due to the similarity, if not identity, of the above four issues, this Court will resolve all four of them in the same discussion and analysis. Paragraph "**SECOND**" of Marks' will devised all of her real and

personal property to her daughter, Ruth Vaughn, "for her use during her lifetime." Ruth Vaughn contends that the "then remaining" language found in Paragraph "**THIRD**" is an actual or implied power on her part as the life tenant to sell or convey the estate in fee simple. However, we do not find that the "then remaining" phrase grants such an unlimited power of disposition to Vaughn as would allow her to defeat the remainder persons' interest. The Mississippi Supreme Court held that the similar phrase "all remaining" when used to denote the corpus of an estate going to remaindermen after a life tenancy did not imply a power of disposition by the life tenant. *Old Ladies' Home Ass'n v. Miller*, 217 Miss. 187, 63 So. 2d 786, 789 (1953). The court stated "[a] power of disposal accompanying a life estate is limited to such disposition as a life tenant can make, unless there are other words clearly indicating that a larger power is intended." *Id.*

In the case at bar there are no such clear words which indicate that Minnie Marks manifestly intended to grant an unlimited power of disposition to her daughter, Ruth Vaughn, as life tenant. Besides, "[a] life estate expressly created by the language of an instrument will not be converted into a fee or any other form of estate greater than a life estate merely by reason of there being coupled with it a power of disposition." *McClelland v. Bank of Clarksdale*, 238 Miss. 557, 119 So. 2d 262, 266 (1960). Thus, this Court concludes that the only feasible interpretation of the language, "for her use during her lifetime," is that Minnie Marks devised to Ruth Vaughn a life estate, and nothing more.

This Court's determination that in Paragraph "**SECOND**" of her will Minnie Marks devised to her daughter only a life estate requires that it now address the nature and disposition of the remainder interest which the Testatrix devised in Paragraph "**THIRD**" of her will "to those sons who survive my aforesaid daughter." Ruth Vaughn interprets the clause "to those sons who survive my aforesaid daughter" to mean that her brothers held only a contingent remainder. She then argues that because the contingency of her brothers' surviving her was not fulfilled, her mother's devise of the remainder interest in the land to her four brothers, Roy, Troy, William, and Delbert, failed. Because all four of her brothers failed to survive her, Ruth Vaughn urges this Court to adjudicate that the land must pass to her in fee simple.

First, we note that "generally if after words giving a vested interest, a clause is added divesting it, the remainder is [nonetheless] vested." 96 C.J.S. *Wills* § 947. "The actual existence of the remaindermen at the time when the will was executed is evidence that a vested estate was intended." *Id.* In the case at bar, all of the four brothers were in existence and were intended beneficiaries of their mother's will. Finally, "[i]f futurity is annexed to the substance of the gift, the remainder is contingent; if [futurity is] merely annexed thereto as the time of payment, *enjoyment, or delivery of possession, it is vested.*" *Id.* (emphasis added). In Mississippi "[t]he law favors vested estates, especially where descendants are being provided for and if there were doubt . . . it should be resolved in favor of a vested estate." *Carter v. Berry*, 243 Miss. 321, 136 So. 2d 871, 876 (1962); *modified*, 243 Miss. 321, 140 So. 2d 843 (1962). As did the chancellor, we find in harmony with *Carter v. Berry* that the remainder interest of the four sons who survived their mother, but not their sister, vested in them upon the probate of their deceased mother's will.

While we agree with the chancellor that the remainder interest in Minnie Marks' land vested in her four sons, we proceed onward to find that while their interests were vested, their interests were also subject to becoming divested under Mississippi law. About the divesting of vested interests, the Mississippi Supreme Court has written:

A vested remainder may be determinable upon the happening of a contingency, in which case it is said to be vested, *subject to being divested on the happening of a contingency subsequent*, and this will not affect its vested character, for a remainder is none the less vested because it is liable to be divested or destroyed, for example, a remainder is not made contingent by the fact that the interest of the remainderman may be divested by his death before the death of the life tenant.

Hays v. Cole, 221 Miss. 459, 73 So. 2d 258, 263 (1954) (emphasis added).

Although Roy, Troy, William, and Delbert Marks' respective remainder interests in their mother's land vested when her will was admitted to probate as muniment of title to that land, those same vested remainder interests were "*subject to being divested on [the] happening of a contingency subsequent.*" In the case at bar, the contingency subsequent was that one or more of the brothers would live longer than their sister, Ruth Vaughn. Not one of the four sons of Minnie Marks survived Ruth Vaughn, their sister. Their respective vested remainder interests became divested the moment each of them died before his sister.

Pursuant to the foregoing analysis, the chancellor erred not when he found that Ruth Vaughn had but a life estate in her late mother's lands and that her four brothers' remainder interests in this land had vested with the probate of their mother's will. Nevertheless, in further pursuance of the foregoing analysis, we find that the chancellor erred when he found that the four sons' "descendants under Mississippi law would take their respective share." His finding was error because all four sons' remainder interests had divested immediately when each of them died before his sister, Ruth Vaughn.

B. Second Set of Issues:

Alternatively, the chancellor erred in adjudicating that Ruth Vaughn received no remainder interest in the subject real property as a result of her surviving her brothers and application of Mississippi Code Annotated § 91-1-13 (1972).

Whether Mississippi Code Annotated § 91-1-13 (1972) is applicable to this proceeding?

Whether Mississippi Code Annotated § 91-1-3 (1972) is applicable to this proceeding?

Our status in the case at bar is as follows: Ruth Vaughn holds a life estate in the subject lands; but the remainder interests of her four brothers were divested pursuant to the provisions of Paragraph "**THIRD**" of Minnie Marks' will. The question becomes, "What happens to the entire remainder interest in this land after Ruth Vaughn dies?" There is no residuary clause in Minnie Marks' will. Section 91-1-13 of the Mississippi Code of 1972 provides that "All estate, real and personal, not devised or bequeathed in the last will and testament of any person shall descend and be distributed in the same manner as the estate of an intestate." Miss. Code Ann. Sec. 91-3-13 (1972). Thus, this section requires that the remainder interest in Minnie Marks' land descend and be distributed to her

heirs-at-law as they are determined by Section 91-1-3 of the Mississippi Code of 1972.

In *Williams v. Gooch*, 208 Miss. 223, 44 So. 2d 57 (1950), the Testatrix, Corinne S. Gooch, left her husband, O. P. Gooch, as her sole and only heir at law. *Williams*, 44 So. 2d at 58. In Item 7 of her will, she provided:

I give and devise to my said husband for and during his natural life, all of the rest and residue of such of my real estate as I may own at the time of my death, and at his death, I give and devise the said real estate to the following devisees who shall take said property in kind as joint tenants, their shares therein to be determined according to the values the shares herein devised to them, shall bear to the value of said entire real estate, that is, to Corinne Smith Wiggins shall take 25 per cent of the value of said entire real estate: Burch Williams shall take 25 per cent of the value of said entire real estate; _____ shall take _____ per cent of the value of said entire real estate; _____ shall take _____ per cent of the value of said entire real estate; _____ shall take _____ per cent of the value of said entire real estate; and _____ shall take _____ per cent of the value of said entire real estate.

Id. In other words, the Testatrix devised a life estate in the rest of her land to her husband, O. P. Gooch, but of the remainder interest in the rest of her land, she devised only fifty percentum (50%) of it to Corrine Smith Wiggins and Butch Williams. *Id.* The Mississippi Supreme Court held that pursuant to section 473 of the Mississippi Code of 1942, the predecessor of section 91-1-13 of the Mississippi Code of 1972, the undevised fifty percentum (50%) of the remainder interest was intestate property and descended to O. P. Gooch, widower and sole heir of the Testatrix. *Id.* at 59.

In the case at bar, we have adjudicated that the entire remainder interest in Minnie Marks' land became intestate property upon the death of the last of her four sons. Therefore, the answer to the question of "What happens to the entire remainder interest in this land after Ruth Vaughn dies?" is that the heirs at law of Minnie Marks, deceased, inherit it pursuant to section 91-1-13 of the Mississippi Code of 1972. The next question becomes, "Who are the heirs of Minnie Marks, deceased?" The following language quoted from section 91-1-3 of the Mississippi Code of 1972 answers that question:

When any person shall die seized of any estate of inheritance on lands, tenements, and hereditaments not devised, the same shall descend to his or her children, and their descendants, in equal parts, the descendants of the deceased child or grandchild to take the share of the deceased parent in equal parts among them. . . .

Miss. Code Ann. § 91-1-3 (1972).

Minnie Marks' five children and/or the children and descendants of her five children, Roy Marks, Troy Marks, William Marks, Delbert Marks, and Ruth Vaughn, inherited the remainder interest in the

Testatrix's land. Just as in *Williams v. Gooch*, the Mississippi Supreme Court held that the Testatrix's widower could inherit both a life estate and an undivided one-half interest in and to the rest of the Testatrix's land, so does this Court hold that Ruth Vaughn can inherit both a life estate and an undivided one-fifth interest in the remainder interest in her late mother's land. The children or grandchildren of each of the four sons of Minnie Marks inherit *per stirpes* the undivided one-fifth interest to which the heirs at law of each of Minnie Marks' four sons' heirs are entitled.

C. Appellees' Issue

Whether this Court should conclude that Appellant has no standing to appeal, thereby causing this appeal to be moot?

The heirs of the four sons of Minnie Marks raise this issue. They raise this issue because the final judgment from which Ruth Vaughn appeals states that before this litigation began, Ruth Vaughn executed and delivered a quitclaim deed to William F. Randle, Joe B. Timmons, and Rhett R. Russell, by the terms of which she conveyed to them an undivided one-third of her interest in the subject land. After the conclusion of the court's hearing on the motion for summary judgment but before it entered its final judgment, Ruth Vaughn conveyed the remaining undivided two-thirds of her interest in the subject land by executing and delivering a quitclaim deed to her daughter, Frances Vaughn. Thus, the Marks brothers' heirs argue that Ruth Vaughn lacks standing to appeal this matter because she lost a "colorable" interest in the land which was the subject matter of this litigation when she conveyed away all of her interest in the subject land.

Vaughn responds to Marks brothers' heirs' contention on this issue by correctly noting that the Appellees did not file and give notice of a cross-appeal. Therefore, Vaughn argues that this Court is not bound to confront an issue that Appellees raise *sua sponte*. Concerning issues not raised on cross-appeal, the Mississippi Supreme Court has stated:

For an appellee to raise an argument other than a response to the appellant, the appellee must comply with the requirements for filing a cross-appeal with this Court. Where an appellee raises an issue not raised by the appellant without filing a notice for cross-appeal, it is within this Court's discretion to either address or ignore the issue.

Morrow v. Morrow, 591 So. 2d 829, 832 (Miss. 1991). Pursuant to *Morrow v. Morrow*, this Court elects to ignore this issue. We ignore it because the Marks brothers' heirs appear to have ignored it in the trial court. It is not our purpose to write a dissertation on the potential avenues for correction or redress which the Mississippi Rules of Civil Procedure afforded the Marks brothers' heirs on this issue; but we do note the following:

Mississippi Rule of Civil Procedure 12(b)(7) authorizes a party to present to the trial court by way of motion the defense of the other party's failure to join a party under Rule 19. Rule 12(h)(2) allows this defense to be "made in any pleading permitted or ordered under Rule 7(a), . . . or at the trial on the merits." M.R.C.P. 12(h)(2). Rule 59(e) provides for motions to alter or amend judgments; and Rule

60(b) provides certain grounds for the trial court's granting relief to a litigant "from a final judgment, order, or proceeding" The Marks brothers' heirs followed none of these avenues for redress and correction of what they now argue was Ruth Vaughn's lack of standing to raise this issue on appeal. Instead, without any attempt to engage the chancellor in ruling on this issue pursuant to any of the previously noted Mississippi Rules of Civil Procedure and without filing and noticing a cross-appeal, Appellees ask this Court to rule favorably for them on this issue.

We are aware that Ruth Vaughn's daughter and the three grantees in Ruth Vaughn's first quitclaim deed, among whom appears to be her counsel of record, may be able to argue in separate litigation that they are not bound by this Court's decision in the case at bar; but we find that Marks brothers' heirs have only themselves to blame for this possibility. This Court thinks that *Coats v. City of Yazoo City*, 562 So. 2d 64 (Miss. 1990) sustains our determination that we need not consider this issue. In *Coats*, an eminent domain proceeding, the Mississippi Supreme Court held that the City of Yazoo City did not have to join an adjoining land owner where the defendant claimed by adverse possession the land to be condemned because the failure to join the adjoining landowner did not extinguish that person's right to protect his or her interest in the land which the city was condemning. Yazoo City's failure to join this party meant that it might undergo multiple litigation. In the case at bar, the Marks brothers' heirs' failure to attempt to join the grantees in Ruth Vaughn's quitclaim deeds as necessary parties, even after the entry of the final judgment, can only mean that like Yazoo City in *Coats v. City of Yazoo City*, they must run the risk of multiple litigation on this issue from Ruth Vaughn's daughter and/or the three grantees in her first quitclaim deed.

Moreover, the fundamental question in this litigation was the appropriate construction of the last will and testament of Minnie Marks, deceased. Ruth Vaughn's stake in that question was whether she had more than a life estate in her late mother's lands pursuant to the terms and provisions of her mother's last will and testament. She had the standing to appeal the chancellor's determination that she had only a life estate; and our determination that she had not only a life estate but a one-fifth interest in the remainder interest in her mother's land unequivocally demonstrates that she had standing to raise this issue in this appeal because it was an integral aspect of the chancellor's construction of the will. We are at liberty to ignore this issue, but we actually resolve it adversely to the Appellees because of their failure to preserve it as error either in the chancery court or in this Court by way of cross-appeal.

IV. Summary

Nearly seventy years ago, the Mississippi Supreme Court wrote in *Patterson v. Patterson*, 150 Miss. 179, 191, 116 So. 734, 735 (1928), "[i]t is a cardinal rule of construction that a will should be so construed, if possible, as to effectuate the purpose of the testator" Because none of Minnie Marks' four sons survived Ruth Vaughn, her will's language becomes ambiguous when applied to the unanticipated deaths of all four of her sons before her daughter, Ruth Vaughn. This Court has resolved that ambiguity by holding, as did the chancellor, that each son's one-fourth interest in the remainder interest in their mother's land vested when Minnie Mark's will was admitted to probate. However, we part company with the chancellor's resolution of this admittedly perplexing issue by proceeding farther down this road of construing her will to hold that while each son's interest in the remainder was vested, his interest was subject to becoming divested by his failure to survive his sister, Ruth Vaughn. Not one son survived his sister, the consequence of which was that the entire

remainder interest became intestate property pursuant to section 91-1-13 of the Mississippi Code of 1972.

When the language of a will becomes ambiguous and the intent of the maker becomes obscured "a construction which will effect a just, natural, and reasonable disposition in accordance with the laws of descent and distribution is favored. . . ." *Patterson*, 116 So. at 735. This Court's adjudication that the remainder interest in Minnie Marks' land became intestate property and thus passed by intestate succession to her heirs-at-law, among whom was Ruth Vaughn, is consistent with a construction of a will "which will effect a just, natural, and reasonable disposition in accordance with the laws of descent and distribution." Thus we reverse the final judgment of the chancery court and remand this case to it with instructions to enter a revised final judgment which adjudicates that the remainder interest for which the Testatrix provided in Paragraph "**THIRD**" of her will became intestate property upon the death of the last of the four sons of Minnie Marks so that it descended to the heirs-at-law of Minnie Marks, deceased.

THE JUDGMENT OF THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI IS REVERSED AND REMANDED. ONE HALF OF THE COSTS ARE ASSESSED TO APPELLANT, AND THE REMAINING ONE-HALF OF THE COSTS ARE ASSESSED TO APPELLEES.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.