

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID DORELL DORA

APPELLANT

VS.

NO. 2008-KA-1020

STATE OF MISSISSIPPI

APPELLEE

SUPPLEMENTAL BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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Pursuant to this Court's Order dated March 12, 2009, the State of Mississippi submits its Supplemental Brief regarding the issue of "whether the trial court erred by granting the appellant an out of time appeal and/or whether [the Mississippi Court of Appeals] should grant an out-of-time appeal pursuant to Rule 2(c) of the Mississippi Rules of Appellate Procedure."

STATEMENT OF THE FACTS

On September 6, 2006, the Appellant, David Dora, was convicted of business burglary and on September 7, 2006 was sentenced to serve five years in the custody of the Mississippi Department of Corrections with two years post-release supervision. (Record p. 96 - 99). Dora filed a motion for new trial on September 7, 2006. (Record p. 100). The trial court entered an order denying said motion the same day. (Record p. 102). On September 7, 2006, Dora filed a waiver of appeal which stated as follows:

I, David Dora, having been convicted of burglary of a commercial business on

September 6, 2006 by jury, and having advised my rights by my attorney Michael Farrow to appeal my conviction to the Supreme Court of Mississippi, hereby waive said appeal and direct that no appeal be filed in this case. No coercion or undue influence was used and my decision is an informed one.

(Record p. 91). The waiver was signed by Dora and by two witnesses. (Record p. 91).

On June 12, 2008, Dora filed a Notice of Appeal indicating that the trial court granted an out-of-time appeal and attached a copy of the order granting the out-of-time appeal as Exhibit "A." (Record p. 106 - 109).¹ The trial court's order granting the out-of-time appeal was entered on May 28, 2008. (Record p. 108 - 109). The order indicated that Dora moved for an out-of-time appeal and that the trial court heard oral argument from his counsel regarding the matter; however, the order did not indicate the date in which Dora moved for an out-of-time appeal. (Record p. 108). The order also indicated that Dora argued to the trial court that within thirty days of his filing his waiver of appeal that he contacted his counsel to inform him that he changed his mind and now wanted to appeal the conviction. (Record p. 108). Dora's counsel informed the trial court that he did not remember Dora contacting him regarding the matter. (Record p. 108). The trial court ultimately granted the out-of-time appeal holding as follows:

... the Court, erring on the side of caution, finds that it will grant the Petitioner an out-of-time appeal of his conviction in Lowndes County Criminal Cause Number 2003-0450-CR1 due to the fact that Petitioner's counsel failed to have the Petitioner's statement that he did not wish to appeal sworn and notarized.

(Record p. 108).

¹ The record does not contain Dora's motion for an out-of-time appeal.

ARGUMENT

The applicable rules regarding the timeliness of appeals are set forth in pertinent part below:

Mississippi Rule of Appellate Procedure 4. Appeal as of Right - When Taken

(a) Appeal and Cross-Appeals in Civil and Criminal Cases. Except as provided in Rules 4(d) and 4(e), in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. . . .

* * *

(e) Post-Trial Motions in Criminal Cases. If a defendant makes a timely motion under the Uniform Criminal Rules of Circuit Court Practice: (1) for judgment of acquittal notwithstanding the verdict of the jury, or (2) for a new trial under Rule 5.16, the time for appeal for all parties shall run from the entry of the order denying such motion. Notwithstanding anything in this rule to the contrary, in criminal cases the 30 day period shall run from the date of the denial of any motion contemplated by this subparagraph, or from the date of imposition of sentence, whichever occurs later. . . .

* * *

(g) Extensions. The trial court may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time otherwise prescribed by this rule. Any such motion which is filed before expiration of the prescribed time may be granted for good cause and may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties, and shall be granted only upon a showing of excusable neglect. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(h) Reopening Time for Appeal. The trial court, if it finds (a) that a party entitled to notice of the entry of judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

* * *

Mississippi Rule of Appellate Procedure 2 Penalties for Noncompliance with Rules; Suspension of Rules

(a) Dismissal of Appeal.

(1) *Mandatory Dismissal.* An appeal shall be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 or 5.

* * *

As noted by the Rules, Dora had thirty days from entry of the order denying his motion for new trial

to file a notice of appeal. He did not do so and, in fact, filed a waiver of appeal on the same day as the entry of said order.

Rule 4(g) does, however, grant a defendant an opportunity to file for an extension of time in which to file a notice of appeal within 30 days after the expiration of the time otherwise prescribed by the rule. Extension is also allowed if a motion for an extension is filed after this prescribed time upon a showing of excusable neglect. In the case at hand, Dora did not file for an extension within the time allowed by Rule 4(g). Dora's motion, on which the trial court ruled granting an out-of-time appeal, is not in the record and therefore, the State is unable to ascertain whether he filed a motion pursuant to Rule 4(g) and attempted to show excusable neglect.

Rule 4(h) allows the trial court to reopen the period for filing a notice of appeal when a defendant did not receive a copy of the entry of judgment and when no prejudice will result therefrom. Dora cannot now claim that he did not know that the entry of judgment was filed as he filed a waiver of appeal the day his judgment was entered indicating that he had been advised concerning his rights regarding an appeal. Moreover, while the record does not show when Dora's motion regarding an out-of-time appeal was filed, it was most likely filed more than 180 days after entry of the judgment as the order granting the out-of-time appeal was not entered until almost two years after the trial court entered the order of judgment and ruled on the post-trial motion. Furthermore, the comment to Rule 4(h) states that "if the motion [for re-opening time for appeal] is granted, the trial court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal." (*emphasis added*). In the case at hand, the trial court's order granting the out-of-time appeal was entered on May 28, 2008. The notice of appeal was not filed until June 12, 2008, fifteen days after the entry of the order. As such, it is clear that Dora wholly failed to comply with Rule 4; and therefore, according to Rule

2(a)(1), the appeal should be dismissed.

Additionally, as this Court very recently held in *Moore v. State*, “our appellate courts have opined that a trial judge probably does not have the authority to grant an out-of-time appeal later than 180 days after the entry of judgment.” 2007-CP-01548-COA, (Miss. Ct. App. March 24, 2009) (quoting *Parker v. State*, 921 So.2d 397, 399 (Miss. Ct. App. 2006)). Accordingly, the trial court lacked the authority to grant Dora’s out-of-time appeal.

However, Mississippi Rule of Appellate Procedure 2(c) states as follows:

(c) Suspension of Rules. In the interest of expediting decision, or for other good cause shown, the Supreme Court or the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its motion and may order proceedings in accordance with its direction; provided, however, in civil cases the time for taking an appeal as provided in Rules 4 or 5 may not be extended.

As noted by this Court in *Parker v. State*, “the appellate courts do have the authority to grant a criminal defendant [an out-of-time appeal after 180 days of the entry of judgment] if failure to perfect the appeal was ‘through no fault his own’ and if ‘justice demands.’” 921 So.2d 397, 399 (Miss. Ct. App. 2006) (quoting *McGruder v. State*, 886 So.2d 1, 2 (Miss. 2003)). According to Dora’s signed waiver it is apparent that he was aware of his right to appeal his conviction. Again Dora’s motion requesting an out-of-time appeal is not in the record; and therefore, the reasons asserted by Dora as to why he was entitled to an out-of-time appeal are not before the Court. However, one can glean from the order granting the out-of-time appeal that at the hearing on the matter, Dora alleged that within thirty days of signing his waiver of appeal, he informed his counsel that he had changed his mind. His counsel testified that he did not remember being contacted regarding an appeal at that time. As noted by the Mississippi Supreme Court in *Minnifield v. State*, a defendant has the burden of proving by a preponderance of the evidence that within the time for

giving notice of appeal, he requested that his attorney appeal his conviction and that through no fault of the defendant's, the attorney failed to perfect the appeal.² 585 So.2d 723, 724 (Miss. 1991). Likewise, in *Diggs v. State*, the Mississippi Supreme Court held that "to prove his right to an out-of-time appeal, the movant must show by a preponderance of the evidence that he asked his attorney to appeal within the time allowed for giving notice of an appeal." 784 So.2d 955, 956 (Miss. 2001). The *Diggs* Court further held that "since the burden of proof lies squarely on [the defendant], who has provided nothing but his own in-court statements contradicted by his attorney, this Court is not left with the definite and firm conviction that a mistake has been made." *Id.* at 957.

Certainly at some point, Dora did express to his counsel that he wanted to appeal his conviction as evidenced by the fact that he moved for an out-of-time appeal. As noted above, considering the date on which the motion for out-of-time appeal was ruled upon, one must assume that the motion was not filed until shortly before the ruling; and therefore, Dora most likely did not contact his attorney regarding his decision to file an appeal until arguably at least a year after entry of the judgment of conviction. The record as it stands does not suggest that this delay was through no fault of Dora's own. Furthermore, as of the date of the State's filing this supplemental brief, Dora has not demonstrated any reason why this Court should suspend the Rules.

² The defendant in *Minnifield*, like Dora, originally indicated to his counsel that he did not desire to file an appeal and signed a memorandum to that effect.

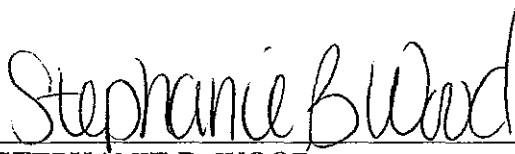
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court dismiss the Appellant's appeal as the trial court did not have authority to grant an out-of-time appeal and as Dora has not shown any reason why this Court should suspend the Rules of Appellate Procedure with regard to timely appeals.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY:


STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **SUPPLEMENTAL BRIEF FOR THE APPELLEE** to the following:

Honorable Lee J. Howard
Circuit Court Judge
P. O. Box 1344
Starkville, MS 39760

Honorable Forrest Allgood
District Attorney
P. O. Box 1044
Columbus, MS 39703

W. Daniel Hinchcliff, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 N. Lamar Street, Suite 210
Jackson, MS 39201

This the 30th day of March, 2009.



STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680