IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RACHEL D. NELSON — APPELLANT

VS. — NO. 2010-KA-0698

STATE OF MISSISSIPPI — APPELLEE

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 4

THE COUNTY COURT DID NOT ERR IN REINSTATING THE APPELLANT'S APPEAL FROM MUNICIPAL COURT AFTER DISMISSING THE APPEAL AND REMANDING THE CASE BACK ON WRIT OF PROCEDENDO 4

THE APPELLANT'S PROTECTION AGAINST DOUBLE JEOPARDY WAS NOT INVOKED BY THE COUNTY COURT'S RULING 8

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

STATE CASES

Bang v. State, 106 Miss. 824, 64 So. 734 6

Bang v. State, 64 So. 734 (Miss. 1949) 2, 7

Deeds v. State, 27 So.3d 1135, 1140 (Miss. 2009) 8

Parham v. State, 229 So.2d 582 (Miss. 1969) 7

Peeples v. State, 63 So.2d 236 (Miss. 1953) 7

Raspberry v. City of Aberdeen, 964 So.2d 1211, 1213 (Miss. Ct. App. 2007) 5

Sartain v. State, 406 So.2d 43, 44 (Miss. 1981) 5

Thigpen v. State, 39 So.2d 768, 768-69 (Miss. 1949) 6

Walton v. City of Tupelo, 90 So.2d 193, 196 (Miss. 1956) 8

Ward v. State, 914 So.2d 332, 336 (Miss. Ct. App. 2005) 8

York v. State, 751 So.2d 1194, 1199-1200 (Miss. Ct. App. 1999) 9

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RACHEL D. NELSON **APPELLANT**

VS. **NO. 2010-KA-0698**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

THE COUNTY COURT DID NOT ERR IN REINSTATING THE APPELLANT'S APPEAL FROM MUNICIPAL COURT AFTER DISMISSING THE APPEAL AND REMANDING THE CASE BACK ON WRIT OF PROCEDENDO.

THE APPELLANT'S PROTECTION AGAINST DOUBLE JEOPARDY WAS NOT INVOKED BY THE COUNTY COURT'S RULING.

STATEMENT OF THE FACTS

On October 27, 2006, the Appellant, Rachel Nelson, was involved in an automobile collision in the City of Richland, Mississippi. (County Court Record p. 12). Sgt. Christy Sonneberg of the Richland Police Department responded to the scene, spoke with Nelson, and noticed common signs of intoxication. (County Court Record p. 17). Nelson was asked to submit to a portable intoxilyzer test, which she did with a result of .124% BAC. (County Court Record p. 17). Nelson was placed under arrest, transported to the police station, and given an opportunity to take the Intoxilyzer 8000

test, which she refused. (County Court Records p. 17).

On November 15, 2006, Nelson entered a plea of no lo contendre to the charge of DUI First before the Honorable Richard Redfern, Municipal Judge for the City of Richland. (County Court Record p. 13). She was given a 48 hour suspended sentence along with a $1000.00 fine and $244.00 in assessments. (County Court Record p. 13).

On November 28, 2006, Nelson filed a Notice of Appeal indicating her intent to appeal the Municipal Court judgment to the County Court of Rankin County for a trial de novo. (County Court Record p. 6). On March 27, 2007, Nelson filed a Motion to Dismiss the Appeal stating that she no longer wished to pursue the appeal and moving the court to return the case to the City Court of Richland on a writ of procedendo. (County Court Record p. 23). On the same day, County Court Judge Kent McDaniel entered an Order dismissing the appeal and remanding the matter back on writ of procedendo. (County Court Record p. 25).

On March 30, 2007, the Richland City Prosecutor filed a Motion to Set Aside Order to Dismiss, to Reinstate Appeal, and to Stay Proceeding. (County Court Record p. 26). In this motion, the City Prosecutor argued that the matter had arisen from a automobile collision which resulted in serious injuries to Debra Easterling and that the matter had been "inadvertently presented in Municipal Court as a DUI First Offense, without court personnel or the prosecutor being aware of the injuries." (County Court Record p. 26). The City Prosecutor also argued that Nelson had no right to dismiss the appeal based upon Mississippi Supreme Court case, *Bang v. State*, 64 So. 734 (Miss. 1949). (County Court Record p. 27). The matter was set for a hearing to be held on April 12, 2007. (County Court Record p. 31). During the hearing after Judge McDaniel indicated that he would enter an Order Setting Aside the Order of Dismissal and reinstate the appeal, the City

Prosecutor moved the Court to enter an Order of Nolle Prosequi on the charge. After the hearing, an Order was entered by Judge McDaniel holding the following:

> . . .
>
> IT IS ORDERED AND ADJUDGED that the previous order to Dismiss and Order to Remand Back on Writ of Procedendo entered March 27, 2007 is hereby set aside and the Appeal is hereby reinstated.
>
> IT IS FURTHER ORDERED AND ADJUDGED that the counsel for the State of Mississippi made a motion ore tenus that the above styled case be Nolle Prosequi and that an Order of Nolle Prosequi in the above styled cause be and hereby is entered.

(County Court Record p. 36 - 37). Nelson filed a Motion for Reconsideration which was denied. (County Court Record p. 33 - 34, and 39).

Nelson then filed a Notice of Appeal appealing the matter from the County Court of Rankin County to the Circuit Court of Rankin County. (County Court Record p. 41). On April 1, 2010, Circuit Court Judge Samac Richardson entered an Order Affirming Judge McDaniel's ruling specifically holding:

> . . .
>
> After reviewing the entire record and court file in this cause, including the hearing transcript, and briefs of the parties, as well as the authorities cited therein, the Court is of the opinion that the assignment of error by the Appellant is not well-taken and is not supported by the record and the authorities cited by the Appellant. The Court finds that the conclusions of law and findings of the trial judge are supported by credible evidence presented at the hearing and are not clearly erroneous or manifestly wrong.
>
> For the foregoing reasons and the arguments presented in the brief of the Appellee, the ruling of the County Court Judge should be and is hereby affirmed in all respects.

(Circuit Court Record p. 81 - 82).

On April 29, 2010, Nelson filed a Motion to Permit Appeal to the Supreme Court of Mississippi. (Circuit Court Record p. 83 - 86). Said motion was granted by this Honorable Court

on May 19, 2010. (Circuit Court Record p. 91).

SUMMARY OF THE ARGUMENT

The County Court did not err in reinstating Nelson's appeal from Municipal Court after dismissing the appeal and remanding the case back on writ of procedendo. First, the County Court did not lack the jurisdiction to do so as Nelson claims. Second, Nelson had no clear right to dismiss an appeal for a trial de novo as she also claims. In fact, this Court has previously held that a defendant has no more right to dismiss the appeal in the Circuit or County Court than he or she had to enter a nolle prosequi in the lower court.

Additionally, Nelson's protections against double jeopardy have not been invoked. Mississippi's Constitution makes it very clear that "there must be an actual acquittal or conviction on the merits to bar another prosecution." An Order of Nolle Prosequi was entered on the charge of DUI First Offense. This is not an actual acquittal or conviction on the merits as required by the Constitution. Thus, Nelson's protections against double jeopardy have not been invoked. Furthermore, an appeal from the County Court's decision to reinstate the appeal and to enter an Order of Nolle Prosequi on the DUI First Offense charge is not the proper place to contest any future charges which may be brought against Nelson on the grounds of double jeopardy as the issue is not ripe for appeal at this time.

ARGUMENT

THE COUNTY COURT DID NOT ERR IN REINSTATING THE APPELLANT'S APPEAL FROM MUNICIPAL COURT AFTER DISMISSING THE APPEAL AND REMANDING THE CASE BACK ON WRIT OF PROCEDENDO.

A. The County Court did not lack jurisdiction to reinstate the appeal.

In support of her argument that the County Court "improperly set aside a previously

dismissed appeal (for a trial de novo) on a signed and filed Writ of Procedendo," Nelson first argues that the County Court lacked jurisdiction to reinstate the appeal. (Appellant's Brief p. 7). In so arguing, Nelson admits that she "finds no Mississippi authorities which affirmatively state that the superior court which issues a writ of procedendo loses jurisdiction." (Appellant's Brief p. 7). There is however, Mississippi authority which indicates that the superior court retains jurisdiction to reinstate such appeals after issuing a writ of procedendo. This Court held in *Sartain v. State* that the circuit court "abused its discretion in **not** setting aside its order of dismissal and for a writ of procedendo to the municipal court." 406 So.2d 43, 44 (Miss. 1981).[1] Clearly, the lower court in *Sartain* had jurisdiction to set aside the order of dismissal or this Court would not have found it in error for not doing so.[2] As such, the County Court in Nelson's case also had jurisdiction to reinstate her appeal.

B. There is no clear right to dismiss an appeal for trial de novo.

Nelson also argues that she had a "clear right to voluntarily dismiss her appeal for trial de novo." (Appellant's Brief p. 11). As noted by Nelson in her brief, the Uniform Rules of Circuit and County Court Practice are silent on the issue of whether one has the right to voluntarily dismiss their appeal to county or circuit court after a conviction in justice or municipal court. However,

---

[1] Sartain's appeal was dismissed for failure to appear. However, the *Sartain* Court held that Sartain's motion to set aside the dismissal should have been granted as she her absence was "justifiably explained." *Id.*

[2] This Court in *Raspberry v. City of Aberdeen* held that it found "authority which states if 'the motion to reinstate the appeal and the order thereon were both filed after the expiration of the term, of court, neither the circuit court nor the Supreme Court has jurisdiction.'" 964 So.2d 1211, 1213 (Miss. Ct. App. 2007)(quoting *McDowell v. State*, 168 So.2d 658, 660 (Miss. 1964)). Nelson's case involved the County Court which does not have set terms of court as do the Circuit Courts. However, the Motion to Set Aside the Order Dismissing the Appeal was filed three days after the Order of Dismissal was entered and a hearing was held on the matter approximately two weeks later. In *Raspberry*, the motion to reinstate was filed four months after the original Order, which was after the conclusion of two terms of court. The hearing on the matter was not held until five months after the motion was filed. *Id.*

Mississippi case law is not silent on the issue. This Court addressed the issue in *Thigpen v. State*, a case wherein the defendant was convicted of the unlawful sale of intoxicating liquors in justice court and appealed to circuit court. 39 So.2d 768, 768-69 (Miss. 1949). On the day of his trial, the defendant moved for a continuance because he was unable to secure the presence of a witness. *Id.* at 769. The Circuit Court, after a hearing on the matter, refused to continue the case and the defendant then moved to dismiss the appeal with a writ of procedendo. *Id.* The motion was denied. *Id.* On appeal, this Court held as follows:

> The only other question necessary for a decision in this case is whether or not the Court erred in overruling the motion to dismiss the appeal with procedendo. This question has been set at rest in this State by the decision in *Bang v. State*, 106 Miss. 824, 64 So. 734. It was there decided that one appealing a conviction from the Justice of the Peace court to the Circuit Court stands there for trial de novo as defendant and he occupies in that court the same attitude of a defendant as he did in the court of the Justice of the Peace and as such is impotent to dismiss the case. He had no more right to dismiss the appeal in the Circuit Court than he had to enter a nolle prosequi in the court of the Justice of the Peace. No defendant charged with a crime for the commission of which he is upon trial has a right to dismiss the case from the docket. He was on trial for the crime charged against him. His case was being disposed of as other and like cases in that court. The lower court was correct in overruling the motion to dismiss the appeal with procedendo.

Id. at 769 - 770. (*emphasis added*). The defendant in *Thigpen*, like Nelson, wanted to appeal for a trial de novo until he learned of facts which would negatively affect his case. These facts caused him to suddenly decide that the conviction from the lower court was a better option. In *Thigpen* those negative facts involved the absence of a witness. In Nelson's case, the negative fact was the City Prosecutor's discovery of the extensive injuries caused by the automobile collision she was involved in while intoxicated. Just as Thigpen was not allowed to dismiss his appeal after learning of the negative facts, Nelson was not either.

In *Bang v. State*, the case relied upon by the *Thigpen* Court, the same issue was before this

Court. 64 So. 734 (Miss. 1914). In *Bang*, the defendant was convicted in justice court for unlawfully selling intoxicating liquors and appealed to the Circuit Court for a trial de novo. *Id.* at 735. At the conclusion of the State's evidence, he moved to dismiss his appeal and the Circuit Court refused. *Id.* In upholding the Circuit Court's decision, this Court held:

> By statute a person convicted of a criminal charge in the justice of the peace court can appeal his case to the circuit court. It is provided in the statute that "on his appearance in the circuit court the case shall be tried anew and disposed of as other cases pending therein." It will be seen that the case is brought into the circuit court by appeal from the judgment of the justice of the peace court. When it reaches the circuit court, it is there for trial anew, and disposition just as other cases therein pending. The circuit court is a trial court. The case, although brought to that court by appeal, is there for trial. In this prosecution for a criminal offense, appellant, while his case was being tried, occupied the same position as any other defendant being tried on a criminal charge.

Id. (*emphasis added*). Again, as in *Thigpen*, the defendant wanted to appeal his conviction until he learned of negative facts - that the evidence was stacked against him - then suddenly decided that he no longer wished to appeal. And again, just as in *Thigpen*, he was not allowed to dismiss the appeal, just as Nelson was not after learning of the extensive injuries suffered as a result of the automobile collision.

Similarly, in *Parham v. State*, the defendant was convicted in justice court for unlawfully driving a vehicle and appealed to the Circuit Court. 229 So.2d 582 (Miss. 1969). Upon learning that a witness was unavailable, the defendant sought to have the appeal dismissed. *Id.* at 583. This Court upheld the Circuit Court's refusal to dismiss the appeal. *Id.* at 584. *See also Peeples v. State*, 63 So.2d 236 (Miss. 1953).

Mississippi case law does not evidence that there is a clear right to dismiss an appeal for trial de novo. In fact, the cases cited above unequivocally state that there is no such right. Thus, the

County Court did not err in reinstating Nelson's appeal for trial de novo from her justice court conviction.

THE APPELLANT'S PROTECTION AGAINST DOUBLE JEOPARDY WAS NOT INVOKED BY THE COUNTY COURT'S RULING.

Nelson also argues that "the ruling of the County Court described [in the previous issue] invokes the constitutional protection against double jeopardy as guaranteed by the state and federal constitutions." (Appellant's Brief p. 11 - 12). Nelson specifically argues that "since the County Court erroneously allowed the Appellee to nolle prosequi the misdemeanor DUI First Offense charge, Appellant's prior judgement of conviction should properly constitute a conviction for purposes of double jeopardy, and the State is constitutionally barred from pursing an indictment by a grand jury DUI Mayhem in the instant case." (Appellant's Brief p. 12). This argument is flawed for two reasons. First, as set forth in detail with regard to Issue One, the County Court did not erroneously allow the State to nolle prosequi the misdemeanor DUI First Offense charge. Second, "there must be an actual acquittal or conviction on the merits to bar another prosecution." *Walton v. City of Tupelo*, 90 So.2d 193, 196 (Miss. 1956) (quoting Miss. Const. Of 1890, Art. III, §22). "[A] nolle prosequi is not a bar to another indictment for the same offense." *Id.*

Moreover, this Court has previously held that "[i]t is fundamental that an accused must suffer jeopardy before he can suffer double jeopardy." *Deeds v. State*, 27 So.3d 1135, 1140 (Miss. 2009). As there is nothing in the record indicating that jeopardy has attached, Nelson's argument must fail. Furthermore, an appeal from the County Court's decision to reinstate the appeal and to enter an Order of Nolle Prosequi on the DUI First Offense charge is not the proper place to contest any future charges which may be brought against Nelson as the issue is not ripe for appeal. *See Ward v. State*,

914 So.2d 332, 336 (Miss. Ct. App. 2005) and *York v. State*, 751 So.2d 1194, 1199-1200 (Miss. Ct. App. 1999).

CONCLUSION

For the reasons set forth above, the State of Mississippi respectfully requests that this Honorable Court affirm the rulings below.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: Stephanie B Wood

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

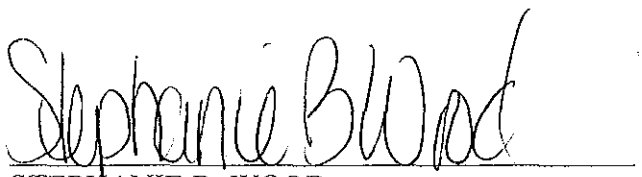
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Samac S. Richardson
Circuit Court Judge
P. O. Box 1885
Brandon, MS 39043

Honorable Michael Guest
District Attorney
P. O. Box 68
Brandon, MS 39043

Lance O. Mixon, Esquire
Attorney At Law
Post Office Box 321453
Flowood, Mississippi 39232

This the 6th day of December, 2010.



STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

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