

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2012-KM-01883-COA**

**GREG WILLIAMS A/K/A GREGORY W.  
WILLIAMS A/K/A WILLIAMS, GREGORY  
WAYNE A/K/A GREGORY WILLIAMS**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT:	10/22/2012
TRIAL JUDGE:	HON. ROGER T. CLARK
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	BLEWETT W. THOMAS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BRAD ALAN SMITH
NATURE OF THE CASE:	CRIMINAL - MISDEMEANOR
TRIAL COURT DISPOSITION:	AFFIRMED DISMISSAL OF APPEAL
DISPOSITION:	AFFIRMED - 06/24/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**EN BANC.**

**ROBERTS, J., FOR THE COURT:**

- ¶1. The appellant, Greg Williams, was convicted in justice court of misdemeanor home-repair fraud in violation of Mississippi Code Annotated section 97-23-103(5)(a) (Rev. 2006). The issue on appeal is whether it was reversible error for the circuit court to have affirmed the county court's dismissal of Williams's appeal for failure to timely file a notice of appeal, cost bond, and appearance bond as required by Uniform Rule of Circuit and County Court 12.02.
- ¶2. Finding that the dismissal was proper, we affirm.

### Facts and Procedural History

¶3. In December 2005, homeowner Roslyn Robertson and Williams entered into a contract for him to repair damage to her residence caused by Hurricane Katrina. On August 21, 2007, Robertson signed an affidavit alleging that Williams committed felony home-repair fraud against her in violation of Mississippi Code Annotated section 97-23-103. The district attorney's office declined to prosecute the matter as a felony, and it was referred to the county prosecutor's office. On February 9, 2009, the justice court approved the prosecutor's handwritten amendment of the affidavit to reduce it from a felony charge to a misdemeanor charge.<sup>1</sup>

¶4. Williams's attorney sought and obtained continuances in March and June 2008. Trial was finally set for May 11, 2009, almost two years after the criminal affidavit. On May 9, 2009, Williams's attorney moved again to postpone the trial. The motion alleged only that Williams's counsel was unavailable on May 11, and said nothing about a federal subpoena served on Williams, as he later alleged in his July 8, 2009 motion for an out-of-time appeal. The motion to continue was denied and trial was held on May 11, 2009. Williams was not present, although his attorney was. Williams was found guilty and sentenced to serve six

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<sup>1</sup> The affidavit with the handwritten amendment and the justice court's acceptance of the amended affidavit are found in the record. The motion to amend was not made by an unknown party, as the dissent claims. In the hearing before the circuit court on Williams's motion to allow an out-of-time appeal, the county prosecutor, Herman F. Cox, testified:

Judge, as you noted, when there was initially a felony affidavit[,] . . . the District Attorney's Office . . . declined to handle it as a felony . . . and sent it back to the justice court. And I as the county prosecutor review it, and that's my handwriting on the affidavit where I moved to amend that to a misdemeanor home repair fraud case, and the judge in February of [2009] granted that amendment.

months in the county jail, but the sentence was suspended. He was placed on six months of reporting probation. The sentence further imposed a \$500 fine, \$145 in assessments, and \$5,000 in restitution.

¶5. On June 4, 2009, Williams’s attorney faxed a notice of appeal to the circuit court clerk, without any bond. Williams did not submit a cost bond or an appeal bond as required by Rule 12.02.<sup>2</sup> In fact, his notice of appeal stated that it was filed “without supersedeas.” The appeal was not docketed.<sup>3</sup>

¶6. The first official docket entries in county court concerning this appeal were filed on July 8, 2009, some fifty-eight days after the conviction and sentence on May 11, 2009. These docket entries reflect, and the file contains, a notice of appeal and a motion for an out-of-time appeal filed that day.<sup>4</sup> The docket entries for July 9, 2009, reflect a \$5,000

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<sup>2</sup> Rule 12.02(A)(1) is entitled “Mandatory Bonds or Cash Deposits” and governs appeals from justice court to county court. A valid appeal requires:

filing simultaneously a written notice of appeal, and both a cost bond and an appearance bond (or cash deposit) as provided herein within 30 days of such judgment with the clerk of the circuit court having jurisdiction. This written notice of appeal and posting of the cost bond and appearance bond or cash deposit perfects the appeal. The failure to post any bond or cash deposit required by this rule shall be grounds for the court, on its own motion or by motion of another, to dismiss the appeal with prejudice and with costs.

URCCC 12.02(A)(1).

<sup>3</sup> Rule 12.02(A)(1) provides, in part: “The clerk of the court *shall not accept, file and docket* the written notice of appeal without the accompanying cost bond and appearance bond or cash deposit, unless the court has allowed the defendant to proceed in forma pauperis.” (Emphasis added).

<sup>4</sup> The motion for an out-of-time appeal explained the late attempt to file a bond by alleging that Williams had “attempted, but was unable to find a bonding agency that would work with him.”

appearance bond by “A Sonshine Bail Bonds, Inc.” The appearance bond is defective for at least three reasons. The bond is returnable to justice court rather than to county court. A power of attorney authorizing “Robert Cohen” to sign bonds on behalf of A Sonshine Bail Bonds was filed, but the appearance bond was not signed by Cohen; it was instead signed by “Stacy Goodison.” Perhaps most importantly, although there was a signature line for approval of the bond by either a judge or the clerk, the signature line is blank. As to the second bond required to perfect an appeal, there is no reference in the record to a cost bond at all. Only a docket entry indicates that a cash payment of \$220 was tendered to the clerk by Williams’s attorney.

¶7. Williams fired and rehired his initial counsel several times after May 11, 2009, and placed a lien on his house. His counsel filed a motion to withdraw in August and was released by order of the court dated August 28, 2009. New counsel (currently representing Williams in this appeal) entered the case on November 12, 2009.

¶8. The county prosecutor moved to dismiss the appeal because it was not timely filed in compliance with Rule 12.02. A hearing was held on the motion to dismiss the appeal on November 18, 2009. Williams was represented by his present counsel. The county court dismissed the appeal as untimely under Rule 12.02 on December 7, 2009. In a letter sent to the parties dated December 7, 2009, explaining the ruling, the court noted that Rule 12.02 was controlling and that a “rule not enforced is not a rule.” The court expressed the view that Rule 12.02 was “mandatory, and in my judgment, jurisdictional.”

¶9. Williams filed a motion to reconsider, arguing that the court should exercise its discretion to overlook the late appeal and that he had received ineffective assistance of

counsel regarding the late appeal. The county court denied the motion to reconsider on March 31, 2010.

¶10. Williams timely appealed to the circuit court. Following briefing by the parties and a hearing, the circuit court affirmed the dismissal of the appeal and remanded for execution of the sentence. Williams timely appealed the dismissal to this Court.

### **Discussion**

¶11. Williams raises the following issues which we have recharacterized for clarity: (1) the justice court exceeded its jurisdiction by imposing a \$5,000 fine; and (2) counsel was ineffective in failing to properly perfect the appeal, which entitles Williams to a discretionary out-of-time appeal.

¶12. Before we may consider Williams's issues, we must first consider our jurisdiction to hear this appeal.

¶13. The Mississippi Supreme Court has sole authority for the adoption of rules of court. The Mississippi Rules of Appellate Procedure apply to appeals to the Mississippi Supreme Court and appeals it assigns to this Court. By enacting Rule 2(c), the Mississippi Supreme Court has permitted "suspension" of these appellate rules for "good cause" shown to the supreme court or this Court. M.R.A.P. 2(c).

¶14. The Mississippi Rules of Appellate Procedure do not govern appeals from justice or municipal courts to county or circuit court, however. Appeals from justice court are governed by Rule 12.02. This is a distinction we made clear in *Reeves v. City of Crystal Springs*, 54 So. 3d 322 (Miss. Ct. App. 2011). In *Reeves*, we rejected an argument that Rule 4(h) permitted the appellate court to excuse untimely notices of appeal based upon

“excusable neglect.” M.R.A.P. 4(h). We stated:

We agree with the City’s argument that Rule 4(g) is not applicable to appeals from municipal court to circuit court. Rule 1 of the Mississippi Rules of Appellate Procedure states that the rules “govern procedure in appeals to the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, and proceedings on petitions for writs or other relief which the Supreme Court or the Court of Appeals . . . is empowered to grant.” As already stated, appeals from municipal court are governed by Rule 12.02 of the Uniform Rules of Circuit and County Court. There is no “excusable neglect” provision or condition for an extension applicable to that rule. While Rule 12.02(C) “provides for liberal amendments to allow a case to go to trial[,] . . . this language only applies to an appeal that is timely perfected.” *Hill* [*v. City of Wiggins*], 984 So. 2d [1086, 1089 (¶14)] (Miss. Ct. App. 2008)] (citing *Riley* [*v. Town of Lambert*], 856 So. 2d [721, 725 (¶6)] (Miss. Ct. App. 2003)]. While we acknowledge that this interpretation may result in a seemingly unfair dismissal of a case, this Court must interpret the rule as written. Modifications to the Uniform Rules of Circuit and County Court may only be made by the Mississippi Supreme Court.

*Reeves*, 54 So. 3d at 326 (¶14). We noted that “[t]his Court has applied a strict standard when interpreting Rule 12.02” and affirmed the dismissal of the untimely appeal from municipal court. *Reeves*, 54 So. 3d at 325 (¶10) (citing *Hill*, 984 So. 2d at 1089 (¶15); *Riley*, 856 So. 2d at 724 (¶11)).

¶15. Rule 12.02 was adopted to address a very specific concern of the trial courts. If a convicted defendant did not appeal, immediate steps could be taken to enforce collection of whatever fines, assessments, or restitution were imposed. If an appeal was taken, however, no enforcement of the judgment was possible. An appeal of a misdemeanor conviction to the county court or circuit court was not, in the traditional sense, a true appeal to review errors made by the trial court. By statute, Mississippi Code Annotated section 99-35-1 (Rev. 2007), as well as by Rule 12.02(C), a timely and properly perfected appeal stayed the lower court conviction and entitled the appellant to a “trial de novo.” No appeal “without

supersedeas,” as was attempted by Williams, is permitted since trial de novo is required. If the appellant was acquitted in county or circuit court, no punishment, fines, or assessments could be lawfully imposed on him at all. Upon appeal, the appellant was again presumed innocent, and he was entitled to a trial anew, as if there were no prior conviction. On the other hand, if the appellant failed to appear before the appellate court for trial or his appeal was dismissed by the court, a mechanism – appearance and cost bonds – would be in place to help insure compliance with the lower court’s judgment of conviction. Such provisions promote the integrity of the criminal-justice system and discourage the county and circuit court dockets from effectively becoming boneyards for stale appealed misdemeanor convictions destined to eventually die a slow death on the docket.

¶16. The Mississippi Supreme Court adopted Rule 12.02, which does not provide for an exception to the thirty-day perfected-appeal deadline. Further, the Mississippi Supreme Court has not interpreted Rule 12.02 to contain a “suspension for good cause” component. Cases applying Rule 12.02 have consistently upheld the dismissal of untimely appeals.

¶17. For example, in *Riley v. Town of Lambert*, 856 So. 2d 721 (Miss. Ct. App. 2003), the defendant was convicted in municipal court. He filed a notice of appeal within thirty days but no cost bond was filed until two months after the conviction. *Id.* at 722 (¶6). The defendant did not file an appearance bond. *Id.* at 723 (¶8). This Court affirmed the circuit court’s dismissal of the appeal, noting, “We know of no case which permits the filing of the required bonds past the thirty-day appeal time.” *Id.* at 725 (¶19).

¶18. In *Spencer v. State*, 880 So. 2d 1044 (Miss. 2004), the defendant was convicted in justice court and filed a timely notice of appeal. He did not file a cost bond with the notice

of appeal, however.<sup>5</sup> Agreeing with and quoting extensively from *Riley*, the supreme court affirmed the circuit court’s dismissal of the appeal. *Spencer*, 880 So. 2d at 1046-47 (¶¶8-9).

¶19. In *Hill*, 984 So. 2d 1086, the defendant was convicted in municipal court. He filed a timely notice of appeal but posted neither an appearance bond nor a cost bond. On appeal after his appeal was dismissed for failure to comply with Rule 12.02, the defendant argued that his payment of all the fines imposed and a \$100 filing fee with his notice of appeal should be construed as posting the two required bonds. This Court disagreed and affirmed the dismissal of his appeal, noting that he had neither filed the required bonds nor a motion to correct that deficiency. *Hill*, 984 So. 2d at 1089 (¶13).<sup>6</sup>

¶20. The most recent consideration of Rule 12.02 was our unanimous opinion in *Ray v. State*, 124 So. 3d 80 (Miss. Ct. App. 2013), *cert. denied*, 123 So. 3d 450 (Miss. 2013). In *Ray*, we considered the case of a defendant who had been convicted in justice court. The defendant filed a timely notice of appeal and a single “appeal bond.” *Id.* at 81 (¶2). On the county prosecutor’s motion, the appeal was dismissed for failure to comply with Rule 12.02. The county court dismissed the appeal, and the dismissal was affirmed by the circuit court. *Ray*, 124 So. 3d at (¶3). On appeal, the defendant argued that dismissing his appeal for filing one piece of paper, rather than two, was placing form over substance. *Id.* at 83 (¶12). We disagreed and detailed the two very different purposes served by the two bonds. *Id.* at 82-83 (¶¶7-12). We affirmed the dismissal of the appeal, noting: “Here, Ray’s failure to file an

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<sup>5</sup> Prior to its amendment in 2007, Rule 12.02 required the filing of only one bond.

<sup>6</sup> The opinion cited *Riley*, with approval, and analogized *Hill*’s situation with that in *Riley* in which there was no timely but deficient bond filed which could be corrected by a motion to amend. *Hill*, 984 So. 2d at 1088 (¶11).



appearance bond was not a mere technicality but a failure to comply with a substantive requirement of the rule necessary to stay the judgment from the justice court and vest the county court with appellate jurisdiction.” *Id.* at 83 (¶13).

¶21. The clear language of Rule 12.02, which this Court is not authorized to ignore or alter, requires dismissal of the appeal. The clerk properly refused to docket the June 4, 2009 notice of appeal because there were no simultaneously filed bonds as required by Rule 12.02(A)(1). When the notice of appeal was docketed on July 8, 2009, it was too late. In addition, only a defective appearance bond was then filed, and there is only a mere docket entry concerning receipt of \$220 from Williams’s attorney, with no cost bond evident in the file.

¶22. The appeal was properly dismissed for lack of jurisdiction. Neither the county court, circuit court, or this Court in this appeal is empowered to consider issues relating to the amount of restitution or ineffective assistance of counsel.<sup>7</sup>

¶23. For the foregoing reasons, we affirm the dismissal of appeal and remand to the justice court for execution of the sentence.

**¶24. THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT DISMISSING THE APPEAL IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**LEE, C.J., GRIFFIS, P.J., ISHEE, MAXWELL AND FAIR, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY IRVING, P.J.; BARNES AND JAMES, JJ., JOIN IN PART. JAMES, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY CARLTON, J.**

**CARLTON, J., DISSENTING:**

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<sup>7</sup> We nonetheless note that the record is quite clear that the case was tried on the amended affidavit as a misdemeanor and that the restitution of \$5,000 was proper under Mississippi Code Annotated section 99-37-3(1) (Rev. 2007).

¶25. I must respectfully dissent from the majority's finding of no reversible error in the trial court's dismissal of Williams's appeal.

¶26. Williams appeals the county court's dismissal of his appeal of his justice court criminal conviction for home-repair fraud. The procedural history reflects that on August 21, 2007, Roslyn Robertson issued an affidavit alleging Greg Williams violated Mississippi Code Annotated section 97-23-103 (Rev. 2006) for committing felony-home repair fraud against her in an amount exceeding \$5,000. The record reflects that on December 5, 2007, the district attorney's office declined to prosecute the alleged offense as a felony, but the record shows that the county prosecuted the case in justice court on May 11, 2009, and the justice court convicted Williams in absentia.

¶27. On May 9, 2009, Williams's counsel filed a pretrial motion requesting a delay in his case in justice court. However, on May 11, 2009, the Harrison County Justice Court found Williams guilty, in absentia, and the justice court also sentenced Williams in absentia to serve six months at the county jail, which was suspended upon the completion of six months of reporting probation, the payment of a \$500 fine, \$145 in assessments, and \$5,000 in restitution.

¶28. On June 4, 2009, Williams's counsel filed a notice of appeal with the County Court of Harrison County via facsimile, but failed to file the required appeal bonds until July 9, 2009. Williams had instructed his counsel to appeal the conviction but was unaware that the appeal had not been properly perfected for lack of posting the required bonds. As a result, the appeal was not properly perfected within thirty days of the judgment in compliance with Uniform Rule of Circuit and County Court 12.02 until July 9, 2009, but was instead perfected

in fifty-eight days.

¶29. Williams's counsel also filed a motion for an out-of-time appeal on July 8, 2009, acknowledging that the notice of appeal and appropriate attachments, as well as a check for filing fees of \$220, were provided to the county court clerk within thirty days of the judgment on June 5, 2009. The motion also asserts that Williams could not attend trial on May 11, 2009, because he was under a federal subpoena, and the motion averred that the county failed to ever lawfully arrest Williams for the justice court charge. The record reflects that after the tardy perfection of the appeal and upon setting a trial date in county court, the county court judge then released Williams's initial counsel due to conflicts in the attorney-client relationship.

¶30. The county court then dismissed the appeal with prejudice on December 7, 2009, on motion of the county prosecutor after finding that Williams failed to properly perfect his appeal within thirty days of conviction in accordance with Rule 12.02. Williams then filed a motion to reconsider and for amendment of the order in county court. In the motion to reconsider, Williams argued that the county court possessed discretion to allow the appeal of his conviction in justice court, and he alleged that he received ineffective assistance of counsel in the prosecution against him in justice court and also in representation post-trial due to his counsel's failure to timely perfect the appeal of his justice court conviction and sentence. The county court denied Williams's motion to reconsider its order dismissing his appeal.

¶31. Williams then filed an appeal in the Harrison County Circuit Court, which affirmed the county court's dismissal of the appeal. Upon review of the appeal, the circuit court

determined that the county court and circuit court both lacked discretion to allow Williams's untimely appeal, since Williams's appeal was not perfect within thirty days pursuant to Rule 12.02.

¶32. Williams now appeals to this Court, requesting reversal of the county court order that dismissed his appeal of his justice court conviction and remand to county court to proceed with his appeal. Appellate courts review de novo an issue regarding “[w]hether a circuit court has jurisdiction to hear a particular matter [as it] is a question of law[.]” *Raspberry v. City of Aberdeen*, 964 So. 2d 1211, 1213 (¶7) (Miss. Ct. App. 2007) (citing *Edwards v. Booker*, 796 So. 2d 991, 994 (¶9) (Miss. 2001)). Consistent with this precedent, and with respect to the motion to dismiss for an out-of-time appeal in the case at hand, this Court reviews motions to dismiss de novo. *Ray v. State*, 124 So. 3d 80, 81 (¶4) (Miss. Ct. App. 2013). This Court also reviews a dismissal based on a failure to perfect an appeal utilizing a de novo standard of review, and we also apply de novo standard of review to determine the issue of whether the appellate court possessed jurisdiction. *Reeves v. City of Crystal Springs*, 54 So. 3d 322, 324 (¶6) (Miss. Ct. App. 2011).

¶33. As set forth in *Ex parte Grubbs*, due process and precedent applicable to justice court appeals allow an appellate court to suspend the procedural rules regarding the time to perfect an appeal in criminal cases in order to prevent manifest injustice and, when necessary, in the interest of justice. In so doing, I submit that this Court must apply the demands of due process to an application of Rule 12.02 to the facts of this case.<sup>8</sup> *See Ex parte Grubbs*, 80

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<sup>8</sup> This opinion does not apply the Mississippi Rules of Appellate Procedure to resolve this appeal, but merely references them for comparison of the application of due-process demands to the interests of justice in criminal appeals.

Miss. 288, 288, 31 So. 741, 742 (1902) (holding that statutory time limitations on appeals from justice court to circuit court do not apply in criminal cases); *see also Ball v. State*, 202 Miss. 405, 408, 32 So. 2d 195, 196 (1947); *Little v. Wilson*, 189 Miss. 825, 825, 199 So. 72, 72-73 (1940). I acknowledge that this separate opinion applies due-process demands in criminal appeals to Rule 12.02, but for application of due process under these rules, see and compare Mississippi Rule of Appellate Procedure 2(c).<sup>9</sup>

¶34. Rule 12.02 governs appeals from justice and municipal court, and this rule provides that perfecting an appeal to county court from justice court requires the simultaneous filing of a notice of appeal, a cost bond, and an appearance bond or cash deposit within thirty days of the judgment. *See* URCCC 12.02. As discussed, the Harrison County prosecutor moved to dismiss the appeal in county court, arguing that the appeal had not been perfected until July 8, 2009, and that the appeal therefore failed to comply with Rule 12.02. The record herein reflects that the county court dismissed the case due to Williams's failure to perfect his appeal within thirty days of the justice court's judgment, upon finding it possessed no jurisdiction under Rule 12.02. The county court then remanded the case to justice court for the imposition of the sentence. Williams filed a motion to reconsider, which the county court

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<sup>9</sup> *See* and compare the application of due process in Mississippi Rule of Appellate Procedure 2(c), which states:

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 own 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.

denied. Williams then appealed to the circuit court, which found that the county court properly dismissed the appeal due to Williams's failure to perfect the appeal in accordance with Rule 12.02, and the circuit court also found no discretion existed under Rule 12.02 to allow the appeal in this criminal case.

¶35. A comparison of the application of due process to criminal appeals to Mississippi Rule of Appellate Procedure 2(c) and also a review of precedent applicable to appeals from justice court reflect judicial discretion exists to allow the suspension of the rules in criminal cases where demanded by the interests of justice. Precedent pertaining to appeals from justice court, including *Ex parte Grubbs*, 80 Miss. at 288, 31 So. at 742, and *Ball*, 202 Miss. at 408, 32 So. 2d at 196, as well as the comment to Mississippi Rule of Appellate Procedure 2(c), recognizes that a criminal defendant's right to due process protects him from losing his right to appeal for failure to comply with procedural rules for the time period to perfect an appeal when the delinquency or defect in the timely perfection of the appeal was caused by a third party or the defendant's lawyer and not the fault of the defendant. *See and compare* M.R.A.P. 2(c) & cmt.; *Williams v. State*, 456 So. 2d 1042, 1043 (Miss. 1984).

¶36. I acknowledge that this case is not a case wherein no appeal bonds were ever posted. I further acknowledge that Williams's appeal was perfected within fifty-eight days of judgment, but not within thirty days from his judgment of conviction in justice court as required by Rule 12.02. This Court has held that "[t]he failure to post any bond or cash deposit required by this rule shall be grounds for the court, on its own motion or by motion of another, to dismiss the appeal with prejudice and with costs." *Ray*, 124 So. 3d at 82 (¶8). In *Ray*, this Court affirmed the dismissal of an appeal from justice court where the appellant

failed to properly perfect his appeal because he failed to file an appearance bond. *Id.* at 83 (¶12). In *Ray*, the appellant filed only the cost bond. In contrast, Williams filed both of the bonds required by Rule 12.02 and perfected his appeal on July 9, 2009, fifty-eight days after conviction.

¶37. In the case of *Riley v. Town of Lambert*, 856 So. 2d 721, 723 (¶10) (Miss. Ct. App. 2003), Riley, like the appellant in *Ray*, failed to ever file an appearance bond and filed only one of the bonds, a cost bond, which he filed outside of the time limit. Significantly, I submit that this Court in *Riley* provided that the trial court possessed the discretion to dismiss an appeal therein for failure to comply with Rule 12.02, and this Court found that such discretion was granted to the circuit court by that same rule. *Riley*, 856 So.2d at 723-24 (¶¶ 10-11).

¶38. In deciding whether to dismiss Williams's appeal, this Court should first examine whether due-process concerns allow for suspension of procedural rules establishing the time for Williams to appeal his criminal conviction from justice court, in order to prevent manifest injustice, as allowed pursuant to *Ex parte Grubbs*, 80 Miss. at 288, 31 So. at 742, and *Ball*, 202 Miss. at 408, 32 So. 2d at 196. In comparing the application of due process to the rules of appellate procedure, the Mississippi Supreme Court clearly embraced this appellate authority in *McGruder v. State*, 886 So. 2d 1, 2 (¶4) (Miss. 2003), with respect to the suspension of the Mississippi Rules of Appellate Procedure, stating:

[W]e may grant an out-of-time appeal “where a person is convicted of a crime and through no fault of his own is effectively denied his right to perfect his appeal within the time prescribed by law by the acts of his attorney or the trial court.” We may suspend Rules 2 and 4 ‘when justice demands’ to allow an out-of-time appeal in criminal cases.

(Internal citations omitted); *compare also Adams v. Day*, 212 Miss. 778, 781-82, 55 So. 2d 490, 491 (1951).

¶39. In further comparison of the application of due-process demands to the Mississippi Rules of Appellate procedure, precedent reflects that in addition to granting out-of-time appeals in criminal cases when demanded by justice, this Court has also acknowledged that in some instances we may exercise discretion and suspend the thirty-day limit for perfecting appeals in criminal cases before this Court to prevent manifest injustice, as allowed by Mississippi Rule of Appellate Procedure 2(c), in the interest of justice. *See Parker v. State*, 921 So. 2d 397, 399 (¶5) (Miss. Ct. App. 2006). In *Parker*, this Court held that appellate courts may grant a criminal defendant such an appeal if failure to perfect the appeal was through no fault of his own, and if justice demands. *Id.*, *see McGruder*, 886 So. 2d at 2 (¶4). Therefore, to resolve the issues before us on appeal herein, I submit that this Court must determine if Rule 12.02 requires consideration of due-process demands and also allows the discretion to determine whether the interests of justice require the suspension of the rules for the time to perfect an appeal from justice court in order to prevent manifest injustice similar to the Mississippi Rules of Appellate Procedure's due-process considerations. For this determination, I again turn to the record and precedent to determine if the interests of justice in this case raise sufficient cause to suspend the procedural rule applicable, Rule 12.02, to the period for perfecting the appeal herein to prevent manifest injustice. In so doing, I again acknowledge that Rule 12.02 applies to the appeal herein and that in the precedent of *Ex parte Grubbs*, the Mississippi Supreme Court recognized that due process indeed provides



discretion in appeals from justice court in criminal cases to suspend procedural rules to prevent manifest injustice. *See Ex parte Grubbs*, 80 Miss. at 288, 31 So. at 742.

¶40. As discussed, the record herein shows the justice court tried Williams in absentia on May 11, 2011, over the request for continuance raised by motion from Williams’s counsel. The justice court judgment and sentence were also entered on that date in Williams’s absence, finding him guilty of home-repair fraud. Williams argues that justice court improperly prosecuted him for a felony and imposed a sentence upon him that was outside the authority of justice court to impose for a misdemeanor violation of section 97-23-103. With respect to this claim of an illegal sentence, the record shows that the justice court imposed a six months sentence at the county jail, which was suspended upon the completion of six months of reporting probation, the payment of a \$500 fine, \$145 in assessments, and \$5,000 in restitution. Section 97-23-103(5) shows that the fine and confinement imposed fall within the punishment authorized for misdemeanor home-repair fraud. The record reflects an affidavit alleging felony home-repair fraud. The record also includes a declination to prosecute as a felony by the district attorney’s office.<sup>10</sup> The record also reflects no initial appearance by Williams in justice court on any misdemeanor charge or any amended

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<sup>10</sup> During the argument to the circuit court on appeal, the county prosecutor claimed that the felony affidavit had been amended to a misdemeanor. The transcript shows that the county prosecutor alleged that he wrote a notation on the original affidavit and made a motion to amend the original affidavit. The transcript also references that the motion to amend was granted in February 2009, the same date as the preliminary hearing on the felony charge; however, no amended misdemeanor affidavit appears in the record before us. The original felony affidavit appears in the record, with unidentified handwriting stating that the charge will be prosecuted as a misdemeanor, along with a notation that reads “Granted 2/5/09.” However, the record fails to contain an order by the justice court granting the amendment; an amended affidavit reflecting that Williams would instead be charged with a misdemeanor; or any misdemeanor sworn charges.

charging affidavit. Thus, on its face, the record raises due-process and jurisdictional issues, since justice courts possess no jurisdiction to prosecute felony offenses, and justice court jurisdiction in felony cases is limited to acting as a conservator of the peace to preliminary matters, i.e., determining probable cause, issuing warrants, setting bonds, and conducting initial appearances and preliminary hearings. Miss. Att'y Gen. Op., 96-0301, 1996 WL 306634, *Regan* (May. 10, 1996).<sup>11</sup> A felony charge can be dismissed and misdemeanor charges then filed in justice court. However, justice court loses jurisdiction when a defendant waives his preliminary hearing, and then the jurisdiction lies in such case with the circuit court. Miss. Att'y Gen. Op., 2003-0364, 2003 WL 21962324, *Wood* (July 25, 2003).

¶41. As stated, the record shows that Williams was tried in absentia despite the pretrial motion for continuance filed by his counsel. The record also shows that Williams requested his counsel to appeal the justice court judgment and sentence. His counsel filed Williams's notice of appeal and filing fee on June 4, 2011, within thirty days of the justice court judgment, but failed to properly perfect the appeal and file the required bonds within thirty days, in accordance with Uniform Rule of Circuit and County Court 12.02. The record also reveals conflict and communication problems between Williams and his counsel.

¶42. Williams's counsel filed a motion for an out-of-time appeal on July 8, 2009, arguing Williams could not attend trial on May 11, 2009. due to a federal court subpoena, and that success on appeal was likely. The motion also seems to argue that Williams was never lawfully arrested or charged with a misdemeanor charge of home-repair fraud. Again, in

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<sup>11</sup> See also Miss. Code Ann. §§ 99-37-3 (Rev. 2007), 99-33-1 (Rev. 2007), and 9-11-9 (Supp. 2013) for justice court jurisdictional limits.

considering the facts of this case, I acknowledge that since Williams's initial counsel indeed perfected his appeal delinquently on July 9, 2009, with the required bonds and fees, this case is factually distinguished from cases wherein the appellant failed to ever post one or both bonds. I also acknowledge due-process concerns reflected on the face of the record.

¶43. Relative to the time to perfect the appeal, the record reflects Williams's brief asserts that the post office returned numerous letters to him that he had sent to his initial trial counsel, and Williams's relationship with his counsel involved communication problems and conflict. The record is clear, however, that Williams requested his counsel to appeal the conviction and sentence imposed upon him in absentia. Eventually the county court allowed Pittman, Williams's counsel, to withdraw on August 28, 2009. Williams then retained new counsel in November 2009. The county court took no action on Williams's motion for an out-of-time appeal after the Harrison County prosecutor filed a motion to dismiss the appeal for the failure of Williams's first counsel to perfect a timely appeal with the required cost bond in accordance with Rule 12.02.<sup>12</sup> A review of the record shows that both the circuit court and county court reviewed this case pursuant to Rule 12.02. Neither court applied the discretion provided by the demands of due process recognized by *Ex parte Grubbs* in criminal appeals from justice court; hence both found no discretion existed under such

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<sup>12</sup> Rule 12.02 was amended in 2007 to reflect that filing only one bond does not perfect an appeal. The current version of Rule 12.02 provides that the written notice of appeal and posting of cost bond and appearance bond or cash deposit perfects the appeal. *See* URCCC 12.02(a)(1); *see also Nelson v. State*, 72 So. 3d 1038, 1041-42 (¶11) (Miss. 2011); *Ray*, 124 So. 3d at 82 (¶8). *But see McGruder*, 886 So. 2d at 2 (¶4) (Appellate courts "may suspend Rules 2 and 4 'when justice demands' to allow an out-of-time appeal in criminal cases."). *Ex parte Grubbs*, 80 Miss. at 288, 31 So. at 742 (statutory time limits on appeals from justice court to circuit court do not apply in criminal cases).

procedural rule to extend or suspend the procedural rules for the time for perfecting or granting the appeal of Williams's criminal conviction.<sup>13</sup> However, precedent regarding criminal appeals from justice court shows that due process indeed provides judicial discretion exists to prevent manifest injustice. *See Ex parte Grubbs*, 80 Miss. at 288, 31 So. at 742 (finding discretion to waive time to appeal from justice court); *see also Ball*, 202 Miss. at 408, 32 So. 2d at 196; *Little*, 189 Miss. at 825, 199 So. at 72-73. In *Ex parte Grubbs*, the Mississippi Supreme Court acknowledged that the statutory time period for appeal from justice court did not apply in criminal cases. *Ex parte Grubbs*, 80 Miss. at 288, 31 So. at 742.

¶44. The record reflects no dispute as to the fact that Williams obtained a delinquent cost bond on July 9, 2009, or that Williams's initial counsel sought a continuance in the trial by motion in justice court that was denied, resulting in a trial conviction in absentia. The county prosecutor filed no response to Williams's motion for an out-of-time appeal and provided no response to the proffer in Williams's motion for an out-of-time appeal asserting that Williams could not attend the trial in justice court on May 11, 2009, due to a federal district court subpoena.

¶45. As acknowledged, neither the county nor circuit court determined whether in their discretion if the interests of justice in this criminal appeal warranted suspension of the rules for the time to perfect an appeal to allow Williams to proceed to prevent manifest injustice since his appeal was perfected, albeit with tardy bonds. *See and compare* M.R.A.P. 2(c); *McGruder*, 886 So. 2d at 2 (¶5); *see also Ex parte Grubbs*, 80 Miss. at 288, 31 So. at 742;

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<sup>13</sup> *But see McGruder*, 886 So. 3d at 2 (¶4).

*see also Ball*, 202 Miss. at 408, 32 So. 2d at 196; *Little*, 189 Miss. at 825, 199 So. at 72-73.<sup>14</sup>

I, however, have reviewed the record to determine if the demands of due process provide such discretion, and whether the record establishes sufficient due-process concerns, to suspend the procedural rule Rule 12.02 for the time to perfect a criminal appeal from justice court herein to prevent manifest injustice and the forfeiture of Williams's right to appeal his conviction. Based upon that review, I find that upon the due-process concerns and sufficient good cause established herein, justice demands suspension of the applicable rule of procedure, Rule 12.02, for the time to perfect the instant criminal appeal from justice court herein to prevent manifest injustice.<sup>15</sup>

¶46. In so doing, I acknowledge the record reflects no fault of Williams in the delay of the perfection the appeal of his criminal conviction from justice court to county court. In the interest of justice, as acknowledged in *Ex parte Grubbs*, and upon finding sufficient cause in the record exists to suspend Rule 12.02, the procedural rule for perfecting the appeal from justice court in this criminal case, to allow Williams's appeal, I submit reversal of the order of the Harrison County Court dismissing Williams's appeal of his criminal conviction is proper. I would therefore remand this case to the county court to proceed with Williams's appeal. *See Ex parte Grubbs*, 80 Miss. at 288, 31 So. at 742; *see also Ball*, 202 Miss. at 408, 32 So. 2d at 196; *Little*, 189 Miss. at 825, 199 So. at 72-73; compare M.R.A.P. 2(c)

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<sup>14</sup> For other cases applying Mississippi Rule of Appellate Procedure 2(c) in criminal cases, see *Williams v. State*, 107 So. 3d 1016, 1018 (¶¶4-5) (Miss. Ct App. 2012); *Parker*, 921 So. 2d at 399 (¶5).

<sup>15</sup> *See Ex parte Grubbs*, 80 Miss. at 288, 31 So. at 742; *see also Ball*, 202 Miss. at 408, 32 So. 2d at 196; *Little*, 189 Miss. at 825, 199 So. at 72-73.

(appellate court possesses authority to suspend the procedural rules in criminal cases in the interest of justice and may order proceedings in accordance with our discretion). Accordingly, I respectfully dissent from the majority’s opinion.

**IRVING, P.J., JOINS THIS OPINION. BARNES AND JAMES, JJ., JOIN THIS OPINION IN PART.**

**JAMES, J., DISSENTING:**

¶47. Because it appears that the justice court did not have original jurisdiction to entertain this action, I respectfully dissent.

¶48. Williams alleges, as one of his assignments of error on appeal, that the justice court exceeded its jurisdiction under Mississippi Code Annotated section 97-23-103 (Rev. 2006), by trying a claim involving \$5,000 or more. This issue is not addressed in the majority opinion. Section 97-23-103(5)(a), which deals with misdemeanor home-repair fraud, provides in part: “A first conviction under this section shall be a misdemeanor when the amount of the fraud is less than Five Thousand Dollars (\$5,000.00) and shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisonment in the county jail not to exceed six (6) months, or both.” Miss. Code Ann. § 97-23-103(5)(a).

¶49. Robertson alleged that she paid Williams \$15,000 for home repairs that were never completed. Robertson filed an affidavit with the Harrison County Justice Court, charging Williams with felony home-repair fraud in violation of section 97-23-103. Section 97-23-103(5)(c) provides that a “first or subsequent conviction under this section shall be a felony when the amount of the fraud is over Five Thousand Dollars (\$5,000.00) . . . .” Robertson then executed a felony affidavit alleging that Williams did willfully, unlawfully, and

feloniously enter into an agreement with her, stating that she paid Williams a total of \$15,000. This felony affidavit was initiated in justice court to be forwarded to the district attorney so that Williams's case could be given to the grand jury to be considered for an indictment in a criminal action so that the case could be tried in circuit court if Williams were to be indicted by the grand jury.

¶50. Following a preliminary hearing in justice court, the district attorney wrote the officer in the case advising him that his office was declining to prosecute the case. The district attorney advised the officer that the case would best be handled in justice court. This is where the jurisdictional issue arose. The record does not indicate that a misdemeanor affidavit was ever filed in justice court. It appears that the case proceeded on the original felony affidavit. However, in order for a misdemeanor prosecution to properly proceed in justice court, an affidavit needed to be filed alleging a misdemeanor in violation Mississippi Code Annotated section 97-23-103(5)(a), and also stating that the home-repair fraud was \$5,000 or less. It has long been held that an affidavit is “a prerequisite to the prosecution . . . [of] a misdemeanor. The affidavit is the foundation of the jurisdiction of the justice of the peace and the court has no jurisdiction without it.” *Conner v. State*, 196 Miss. 335, 17 So. 2d 527, 528 (1944) (internal quotations omitted) (citing *Bramlette v. State*, 193 Miss. 24, 8 So. 2d 234 (1942)).

¶51. Justice courts do not possess jurisdiction to prosecute felony offenses, and a justice court's jurisdiction in felony cases is limited to acting as a conservator of the peace to preliminary matters, such as making determinations of probable cause, issuing warrants, setting bonds, and conducting initial appearances and preliminary hearings. *See* Miss. Att'y

Gen. Op., 96-0301, 1996 WL 306634, *Regan* (May 10, 1996); *see generally* Miss. Code Ann. §§ 99-37-3 (Rev. 2007), 99-33-1 (Rev. 2007), and 9-11-9 (Supp. 2013) (setting forth the jurisdictional limits of justice court). Here, however, after the district attorney referred the case back to justice court, the record does not show that misdemeanor charges were ever filed. The majority opinion states that the felony affidavit was amended to a misdemeanor affidavit. However, as previously stated, once the preliminary hearing was held, the justice court lost its jurisdiction and a new affidavit, alleging facts constituting a misdemeanor, needed to be filed. This is not the same as an amendment of an indictment in circuit court over a matter in which the circuit court has continuous jurisdiction of both the felony and any possible lesser-included misdemeanor.

¶52. I respectfully disagree with the majority's statement that the justice court's approval of the prosecutor's handwritten amendment to Robertson's affidavit on February 9, 2009, had the effect of reducing the felony affidavit to a misdemeanor affidavit. The record contains Robertson's felony affidavit in which she alleges that, on or about the fifth day of December 2005, she and Williams entered into an agreement to perform home improvements on her residence, and that Williams "did knowingly promise performance which he did not intend to perform[,] or knew would not be performed." In the affidavit, Robertson states that she paid Williams a total of \$15,000, making the alleged crime a felony pursuant to Mississippi 97-23-103. This affidavit was signed by Robertson and notarized on August 21, 2007. The purported amendment, alluded to by the majority, consists of two handwritten



notations.<sup>16</sup> The first notation reads: “Based on the letter from the district attorney’s office[,] the State moves to amend misdemeanor home-repair fraud and will set it for trial.” However, the accompanying signature is illegible and it is not the signature of the affiant, Robertson. The second notation, which is found on the left-hand side of the page, simply states: “Granted J-2 2/5/09,” and nothing more. Finally, the document is not stamped “filed.” Nevertheless, the affidavit still alleges \$15,000 in fraud, making the alleged crime a felony and beyond the jurisdictional limits of justice court. To view this document as an amended affidavit, which amended the charges in order to confer jurisdiction to the justice court, requires quite a bit of guessing and speculation.

¶53. In footnote 1, the majority points to the testimony, or, more precisely, the statements of the county prosecutor, Cox, during a hearing in circuit court on Williams’s motion for an out-of-time appeal. During the hearing, Cox stated:

Judge, as you noted, when there was initially a felony affidavit . . . the District Attorney’s Office . . . declined to handle it as a felony . . . and sent it back to the justice court. And I as the county prosecutor review it, and that’s my handwriting on the affidavit where I moved to amend that to a misdemeanor home repair fraud case, and the judge in February of '09 granted that amendment.

The county prosecutor’s statement does little to obviate the ineffectiveness of the affidavit as a charging document because the “amended affidavit” was not properly sworn to by Robertson. There is nothing, either in the record or on the face of the document itself, that indicates that Robertson took part in the amendment, or that she swore or affirmed that the statements in the amended affidavit were true. In order to proceed on a proper charging

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<sup>16</sup> The handwritten notations are somewhat illegible; therefore, for convenience, a photocopy of the document is attached to this opinion as an appendix.

affidavit, the county prosecutor should have had Robertson execute a new affidavit alleging a misdemeanor violation of the home-repair statute. Further, it was improper to amend an affidavit over which the justice court had lost jurisdiction. The amended affidavit still raises jurisdictional issues in that it alleges home-repair fraud of \$15,000, which is a felony violation pursuant to Mississippi Code Annotated section 97-23-103, and outside the jurisdiction of justice court. A new affidavit needed to allege fraud of \$5,000 or less in order to qualify as a misdemeanor and bring the crime within the justice court's jurisdiction.

¶54. Williams was convicted in justice court in absentia, and ordered to pay \$5,000 in restitution, a fine of \$500, and assessments of \$145. The Mississippi Supreme Court has long held that “where a justice of the peace had no jurisdiction to try a person for a misdemeanor, the circuit court has no power on appeal from such justice of the peace to try the cause, and the question of jurisdiction may be raised at any time. *Ivy v. State*, 106 So. 111, 113 (Miss. 1925). Thus, since a proper affidavit charging Williams with a misdemeanor violation of the home-repair-fraud statute was never filed with the justice court to initiate a misdemeanor case, and the justice court proceeded with the trial by acting on the improperly amended felony affidavit, over which it had lost jurisdiction, I would dismiss this appeal without prejudice, and vacate the conviction for lack of jurisdiction.

¶55. Accordingly, I respectfully dissent.

**CARLTON, J., JOINS THIS OPINION.**

Appendix

AFFIDAVIT - COUNTY OF HARRISON

STATE OF MISSISSIPPI

Before me, Justice Court Judge/Clerk of Harrison County, First Judicial District, State of Mississippi,

Roslyn M. Robertson

makes affidavit on information that

Gregory Wayne Williams

W/M DOB 06/02/70 SSN [REDACTED]

on or about the 5th day of December, 2005, in the said County aforesaid in

Justice's District, did:

willfully, unlawfully, and feloniously enter into an agreement with Roslyn M. Robertson for home repairs to the residence of 13425 Windridge Dr., Gulfport, MS, and did knowingly promise performance which he did not intend to perform or knew would not be performed. In violation of section 97-23-103 of Mississippi code of 1972, annotated. This in the City of Gulfport, First Judicial District of Harrison County, State of Mississippi.

Underlying Facts and Circumstances: Robertson stated that on December 5, 2005, she hired Williams to perform home repairs on her residence such as installing a new roof, drywall work, siding work, installing a new AC unit, and various other home repairs. Robertson stated she paid Williams a total of \$15,000.00 in three or four payments via check. Robertson stated that a few days later she left for New York. When she returned on December 21, 2005, Williams fled and took his tools. She stated she spoke with Williams who informed her he was doing another job and would return. Robertson stated Williams never returned to perform the home repairs.

Granted  
S.2 2/15/09

*Based on the written from  
The District Attorney's Office  
The State now to move  
prosecution have been  
filed & will set it for  
trial*

against the peace and dignity of the State.

*Roslyn Robertson*

Affidavit's Signature

Sworn and subscribed before me this 21st day of August, 2007.

*15727,90*

*Claudia M. Salas*

Claudia Salas - Notary Public

36 MISSISSIPPI STATEWIDE NOTARY PUBLIC  
MY COMMISSION EXPIRES AUG 20 2008  
RENEWED THRU STEGALL NOTARY SERVICE