

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-CA-00590 COA**

**STATE OF MISSISSIPPI**

**APPELLANT**

**v.**

**THIRTEEN THOUSAND DOLLARS (\$13,000) U.S.  
CURRENCY AND ONE (1) 1987 BUICK; 4-DOOR;  
SILVER VIN 1G4HR5F439HH524119; TX TAG HDC  
31K**

**APPELLEE**

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

DATE OF JUDGMENT:	4-30-96
TRIAL JUDGE:	HON. JOHN H. WHITFIELD
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RUFUS ALLDREDGE
ATTORNEYS FOR APPELLEE:	DALE ROBINSON MACK BETHEA
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	SET ASIDE DEFAULT JUDGMENT AND GRANTED JUDGMENT ON THE PLEADINGS IN FAVOR OF THE DEFENDANT
DISPOSITION:	AFFIRMED IN PART; REVERSED IN PART AND REMANDED - 10/21/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/12/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

The State of Mississippi appeals the decision of the Harrison County Circuit Court to set aside the default judgment entered against Pedro Valenzuela and the subsequent decision of the circuit court to enter judgment on the pleadings thereby dismissing the State's forfeiture petition and ordering the return of \$13,000 in cash and one 1987 Buick to Pedro Valenzuela. Finding no error in the court's decision to set aside the default judgment, we affirm that portion of the judgment. However, finding that the trial judge erred in granting a judgment on the pleadings, we reverse that portion of the

judgment and remand for a trial on the merits.

## FACTS

On November 13, 1992, Pedro and Clara were stopped by a Harrison County sheriff's deputy for speeding. During the course of the stop, the deputy's drug dog alerted, and Pedro consented to a search of his vehicle. In the trunk of the car, the deputy found a small blue tote bag containing marijuana residue. The deputy also found, concealed in a compartment under the back seat of the car, \$13,000 in U.S. currency. Pedro explained that the money was given to him by his brother and that he and Clara were traveling from New York to Texas to purchase a house.

The deputy issued Pedro a speeding ticket and seized the car and the money pursuant to Mississippi Code Section 41-29-153(b)(4) (Rev. 1993). No other charges were filed against Pedro; however, a forfeiture petition was filed on December 28, 1992, by the Harrison County District Attorney. On January 19, 1993, Pedro moved for a continuance and was granted an additional thirty days to file his answer to the State's forfeiture petition. On February 17, one day before Pedro's continuance expired, the State made application to the clerk for a default judgment. On February 26, a default judgment was entered against Pedro for failure to file an answer to the forfeiture petition. On March 16, Pedro left his answer to the forfeiture petition with the district attorney's office but failed to file the answer with the clerk of court. Two and one-half years later on October 5, 1995, Pedro filed a motion to set aside the default judgment. Upon a hearing by the trial court, the default judgment was determined to be void for lack of notice to Pedro that application had been made for a default judgment.

Thereafter, the trial court permitted the State to put on evidence of probable cause, a proceeding that should have been conducted prior to application for default. Miss. Code Ann. § 41-29-179 (Rev. 1993). The court found that the State had sufficient probable cause to detain the property but ordered the State to place the money in an interest-bearing account. The State thereafter moved for summary judgment or, in the alternative, judgment on the pleadings. The basis for the State's motion for summary judgment was that because Pedro did not timely produce his response to the State's request for admissions, the admissions were deemed admitted; thus, no genuine issue of fact remained to be litigated. The court, however, determined that the entry of the default judgment stayed all deadlines as of February 17, 1993 (the date the State applied for default) that pertained to pleading and discovery matters. Nevertheless, the court instructed the parties to prepare for argument on the State's summary judgment/judgment on the pleadings motion. On the date of the scheduled argument there was some confusion as to what was to be argued. Pedro insisted that he had prepared only for arguments pertaining to the State's motion for judgment on the pleadings while the State insisted that they were under the impression that the argument was to pertain to their summary judgment motion. The court did not permit argument on the summary judgment motion. The trial court subsequently entered judgment on the pleadings stating that the State had failed to prove that the property was subject to forfeiture. Feeling aggrieved, the State filed this appeal asserting five issues. However, in the interest of clarity, we will reduce the assignments of error to three issues.

## ANALYSIS

### I. WHETHER THE TRIAL COURT ERRED IN FINDING THE DEFAULT JUDGMENT TO BE VOID.

The State argues that the February 26, 1993, default judgment was a final disposition of the case and was therefore appealable. The State contends that Pedro's proper recourse was either to file an appeal within the thirty day time frame as required by Rule 4 of the Mississippi Rules of Appellate Procedure or to comply with the requirements of Rule 60(b) of the Mississippi Rules of Civil Procedure for setting aside a judgment. The State argues that because Pedro chose neither means of recourse within the proper time frame, the trial court did not have the authority to set aside the default judgment and dismiss the forfeiture petition. The State argues further that the trial court's actions in not upholding the default judgment prejudiced the State in that the State, during the thirty-two months that had passed since entry of the default judgment, had disbursed the funds in question and had placed the vehicle into service with the Harrison County Sheriff's Department.

The State asks this Court to reinstate the default judgment against Pedro on the ground that Pedro did not follow the proper procedure in having the judgment set aside. While the State is correct in that Pedro failed to jump through all of the procedural hoops generally necessary to have a judgment set aside, the State ignores the fact that their own procedural neglect voided the judgment before it was formally entered by the trial judge. First, the State erred in failing to notify Pedro that application for default had been made. Rule 55(B) of the Mississippi Rules of Civil Procedure clearly states that "[i]f the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment at least three days prior to the hearing of such application . . . ." There is no evidence in the record that any such notice was given.

Second, a review of the record indicates that the State also did not follow the requirements of Section 41-29-179(1) of the Mississippi Code. This code section specifically states that "[i]f an answer [to a forfeiture petition] is not filed, the court *shall* hear evidence that the property is subject to forfeiture . . . ." *Id.* (emphasis added). The statute goes on to state that when an answer has not been filed, "the petition for forfeiture may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture." Miss. Code Ann. § 41-29-179(2) (Rev. 1993). The State took no steps to prove that the property was subject to forfeiture prior to applying for a default judgment. *See* Thomas E. Payne, *An Introduction To Civil Forfeiture In Mississippi: An Effective Law Enforcement Tool Or Cash Register Justice?*, 59 Miss. L. J. 453, 465 (Fall 1989) ("The requirement that the court 'hear' evidence when no answer is filed may necessitate an actual recitation in the record and may therefore preclude a default judgment based solely on the default procedures outlined in the Mississippi Rules of Civil Procedure").

The Mississippi Rules of Civil Procedure sets out the reasons why a judgment may be set aside. M.R.C.P. 60(b). Pertinent to this case is Rule 60(b)(4) which provides for the setting aside of a judgment that is void. In the present case, the procedural failures on the part of the State which we discussed above makes the default judgment entered against Pedro a void judgment. In addressing a void judgment the Mississippi Supreme Court has stated that "[t]he grant or denial of a 60(b) motion is generally within the discretion of the trial court, unless the judgment in question is found to be void. In that case the trial court has no discretion; it must set the void judgment aside." *Sartain v. White*, 588 So. 2d 204, 211 (Miss. 1991). The supreme court has also stated that "no amount of time or delay may cure a void judgment." *Overbey v. Murray*, 569 So. 2d 303, 306 (Miss. 1990). As such, we find that the State's argument is without merit and that the trial judge did not abuse his discretion in setting aside the default judgment.

## II. WHETHER THE TRIAL COURT IMPROPERLY GRANTED PEDRO'S REQUEST TO SET ASIDE THE STATE'S DISCOVERY REQUESTS FOR ADMISSIONS WHICH HAD BEEN TAKEN AS ADMITTED SINCE PEDRO REFUSED TO RESPOND FOR WELL OVER TWO AND ONE-HALF YEARS.

The State argues that the trial court erred in holding that Pedro's late responses to the State's request for admissions are stayed *nunc pro tunc*. The State contends that Pedro did not respond to the request within the proper time period therefore those matters contained in the request for admissions are deemed admitted. *See* M.R.C.P. 36(a). The State contends that there is no case law which allows requests for admissions to be withdrawn after one year, much less two and one-half years as is the case here. The State argues that the nature of the State's requests in this case, coupled with Pedro's refusal to answer them, constitutes admissions that conclusively establish that the Buick and the currency were involved in illegal drug activity, rendering the items subject to forfeiture. Thus, the State argues: "[s]ince Pedro blatantly ignored the State's requests without submitting a scintilla of justification for his behavior, he is not entitled to the relief of withdrawal of the admissions." The State asks this Court to reverse and render.

The trial court analyzed this issue from the standpoint that a void default judgment returns the parties to the place they occupied prior to the default judgment. The judge indicated that the starting point for a judgment by default must begin at the time application for entry of default is made to the court clerk. In the present case, application was made by the State on February 17, 1993, one day before Pedro's continuance was to expire. Thus, at the point of application, Pedro was not yet late in responding to the State's request for admissions. Following this line of reasoning, the trial judge determined that the clock ceased to run on February 17; therefore, Pedro was no longer under an obligation to respond to any discovery requests and did not become obligated again until such time as the default judgment was set aside. As such, the trial court held that the request for admissions would not be deemed admitted for failure to respond.

The State cites numerous cases in support of their argument that Rule 36(a) is to be strictly applied. We do not disagree with the proposition that Rule 36(a) means what it says, i.e., that requests for admissions are deemed admitted unless within thirty days the requesting party receives a written answer or objection from the adverse party. This case, however, differs significantly from those cited. The State cites no cases that address the situation we have before us nor were we able to find any cases on point. Here, the failure to respond to the request for admissions within the thirty-day time period must be considered in light of the void default judgment. We find the trial judge's analysis and ultimate conclusion to be both logical and fair. We believe that the trial judge was within his discretion in granting Pedro's motion to withdraw the admissions as the record reflects that Pedro was not yet in default when the State hastily made application for the default judgment. The State would have this Court to strictly apply procedural rules to Pedro and at the same time ignore the States own procedural failures. This we decline to do.

## III. WHETHER THE TRIAL COURT VIOLATED MISSISSIPPI RULE OF CIVIL PROCEDURE 12(c) BY RENDERING JUDGMENT ON THE PLEADINGS WHEN THE EXISTENCE OF MATTERS OUTSIDE THE PLEADINGS DICTATED TREATMENT OF THE DISPUTE AS ONE FOR SUMMARY JUDGMENT UNDER RULE 56.

The State argues that Pedro never filed a motion for judgment on the pleadings and it was therefore improper for the trial judge to set aside the default judgment utilizing a Rule 12(c) judgment on the pleadings. The State contends that they had made discovery requests which Pedro failed to answer; therefore, Pedro conceded the factual matters contained in the State's requests. As such, the State argues, the trial judge should have considered the admitted matters and entered summary judgment in favor of the State.

As we stated previously, the trial court did not err in allowing Pedro to withdraw the admissions; therefore, the State's basis for summary judgment is eliminated. We do, however, find that the trial court erred in granting a judgment on the pleadings. A motion for judgment on the pleadings is the avenue by which a party asks the court to test the legal sufficiency of the complaint. M.R.C.P. 12(c) cmt. In order to grant the motion, "there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim." *Id.* Having reviewed the complaint, we cannot say with certainty that the State is entitled to no relief under any set of facts that could be proved in a trial on the merits. We therefore reverse and remand this case for a trial on the merits.

**THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED IN PART AND REVERSED IN PART. THE JUDGMENT SETTING ASIDE THE DEFAULT JUDGMENT IS AFFIRMED. THE JUDGMENT ON THE PLEADINGS IS REVERSED AND THE CASE IS REMANDED FOR A TRIAL ON THE MERITS. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.**

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, AND KING, JJ., CONCUR. SOUTHWICK, J., CONCURS IN RESULT ONLY. THOMAS, P.J., NOT PARTICIPATING.**