

IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00659 COA

GERALD RHODES F/D/B/A GERALD RHODES BONDING

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

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

TRIAL JUDGE: HON. HOWARD Q. DAVIS JR.

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

R.L. WONG

ATTORNEYS FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: MICHAEL C. MOORE, WAYNE SNUGGS, CHARLES W. MARIS, JR.

NATURE OF THE CASE: BAIL BOND FORFEITED

TRIAL COURT DISPOSITION: DENIED APPLICATION FOR REMISSION OF BOND

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

BRIDGES, P.J., FOR THE COURT:

This is an appeal from an order entered by the Circuit Court of Sunflower County on May 31, 1994, which denied Gerald Rhodes' motion to alter, amend, or vacate an earlier order. The earlier order dated March 7, 1994 denied Rhodes' application for remission of bond. On appeal Rhodes argues that (1) the court had no jurisdiction over him, and (2) his first filing of the application for remission tolled the twelve-month time limit.

FACTS

Gerald Rhodes entered into a bail bond as surety on behalf of Chester Lawrence Walker, principal, on June 11, 1992. He agreed to pay \$7,500 to Sunflower County, Mississippi, if Walker failed to appear before the Circuit Court of Sunflower County on October 5, 1992. Nemiah Wayne acted as Rhodes' agent and signed the bond on Rhodes' behalf.

Walker failed to appear, and the court issued a *scire facias* on October 16, 1992. The *scire facias* was served on Nemiah Wayne, Rhodes' agent, on December 4, 1992.

On February 1, 1993, a final judgment on judgment *nisi* was entered. Ninety days later, when Rhodes had still not paid the bond, the court ordered the forfeiture of Rhodes' qualification bond and the revocation of his license pursuant to section 83-39-7 of the Mississippi Code. From the proceeds of Rhodes' qualification bond, \$5,043.78 was credited toward the \$7,500 which Rhodes owed to the county.

On November 22, 1993, the principal was surrendered to the Sunflower County Sheriff's Department by the surety, and a receipt for the surrender of Walker was signed by Deputy Swift. The principal was served with a *scire facias* and the final judgment on the judgment *nisi* by the Sunflower County Sheriff's Department on November 22, 1993.

On December 1, 1993, Rhodes filed an application for remission of bond. He explained that Walker was now in custody, that the final judgment had been partially satisfied, and that one year had not elapsed from the entry of the final judgment. This application was denied by the court because the entire final judgment had not been paid.

On March 1, 1994, Rhodes paid the remainder of the judgment and all court costs and on March 3, 1994, filed another application for remission of bond; this time noting that the judgment had been fully satisfied.

On March 7, 1994, the lower court entered its order denying Rhodes' application because the judgment had not been satisfied within one year of the entry of that judgment pursuant to section 83-39-7. On March 24, 1994, Rhodes filed a motion to alter, amend, or vacate judgment, in which he alleged, two arguments. The first argument being that the lower court had been without jurisdiction since Nemiah Wayne, his agent, was served and not him personally with the *scire facias*. The second argument being that the one-year requirement of section 83-39-7 had been tolled by his filing of his first application for remission on December 1, 1993. The court denied the motion on May 31, 1994, and Rhodes now appeals.

I. DID RHODES WAIVE THE DEFENSE OF LACK OF PERSONAL JURISDICTION BY NOT ADDRESSING THIS ISSUE IN HIS FIRST MOTION OR APPEARANCE BEFORE THE COURT?

Rhodes claims that service of the *scire facias* on his soliciting agent was not adequate to furnish the lower court with jurisdiction over him. Rhodes did not plead this issue until he had twice appeared before the court. According to Mississippi Rule of Civil Procedure 12(h), a defendant in a civil action must raise the defense of lack of jurisdiction over the person or insufficiency of process in a motion or in his responsive pleading. If he fails to do this, he waives this argument.

Rhodes had the opportunity to raise this defense on December 1, 1993, when he filed his first application for remission of bond. He should have raised the lack of jurisdiction defense at this time; either by motion or during the hearing itself. Because he failed to do so, Rule 12(h) denies him the right to bring this defense at a later time.

In addition, Rhodes had already submitted himself to the jurisdiction of the lower court by filing his application for remission on December 1, 1993. *Hawkins v. Hawkins* explains that a party who moves to discharge judgment on the grounds of insufficient process submits himself to the jurisdiction of the court. *Hawkins v. Hawkins*, 45 So. 2d 271, 272 (Miss. 1950). One over whom the court has no jurisdiction may, by his appearance in court, waive venue and lack of personal jurisdiction especially when asking for affirmative relief. *Bryant v. Lovitt*, 97 So. 2d 730, 733 (Miss. 1957).

For the reasons explained, we find this issue has no merit and affirm the lower court.

II. WAS THE SURETY'S MOTION FOR REMISSION OF BOND WITHIN THE TIME ALLOTTED BY THE STATUTE CONCERNING REMISSION OF FORFEITED BAIL BONDS?

Section 83-39-7 states:

In the event of a final judgment of forfeiture of any bail bond written under the provisions of this chapter, the amount of money so forfeited by the final judgment of the proper court, less all accrued court costs and excluding any interest charges or attorney's fees, shall be refunded to the bail agent or his insurance company upon proper showing to the court as to which is entitled to same, provided the defendant in such cases is returned to the sheriff of the county to which the original bail bond was returnable within twelve (12) months of the date of such final judgment

Miss. Code Ann. § 83-29-7 (1972).

The final judgment on the judgment *nisi* was entered against Rhodes on February 1, 1993. Rhodes filed his first application for remission on December 1, 1993. It was denied because he had only paid a portion of the outstanding judgment. Instead of appealing this ruling, he paid the existing portion of the balance. He filed his second application for remission on March 3, 1994. This time his application

mentioned that he had in fact paid the outstanding balance of the judgment.

In order to grant an application for remission, the bonding agent must, within twelve months of the final judgment, return the principal to the State. Rhodes returned the principal to the State on November 22, 1993, within the twelve-month time period. The State argues that since Rhodes did not satisfy the judgment until after the twelve-month period had elapsed, Rhodes is not entitled to a remission. This is incorrect because section 83-39-7 does not require the bondsman to pay the entire final judgment before the twelve-month period elapses. After Rhodes's first application for remission was denied because of failure to pay the full amount, he filed his second and paid the outstanding balance of the final judgment. The fact that full payment occurred after the one-year time limitation (for return of the principal) is irrelevant. Rhodes is entitled to a remission and does not have to pay the full judgment within the one-year limit, but he must pay the full judgment prior to asking for a remission of the forfeited money. Yet, as stated in the Code, it is at the discretion of the trial court whether or not a bonding agent receives a remission of forfeited bail.

Section 83-39-7 states: "The bond forfeiture shall be stayed and remission made upon petition to the court, *in the amount found in the court's discretion to be just and proper . . .*" Miss. Code Ann. § 83-39-7 (1972) (emphasis added). Therefore, it is truly at the discretion of the trial court whether or not to refund such forfeited money. We reverse, as to the denial of remission, because of the erroneous way in which the State argued section 83-39-7, and remand this issue back to the lower court.

THE JUDGMENT OF THE SUNFLOWER COUNTY CIRCUIT COURT IS AFFIRMED IN PART, ON THE ISSUE OF PERSONAL JURISDICTION, AND REVERSED AND REMANDED IN PART, ON THE ISSUE OF REMISSION OF THE FORFEITED BAIL BOND. ALL COSTS OF THIS APPEAL ARE TAXED TO SUNFLOWER COUNTY.

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