IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 2001-KA-00754-COA

WINFRED 'WIMP' FORKNER **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	02/28/2001
TRIAL JUDGE:	HON. LILLIE BLACKMON SANDERS
COURT FROM WHICH APPEALED:	WILKINSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PAMELA A. FERRINGTON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JOHN R. HENRY JR.
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	BURGLARY OF STOREHOUSE; SENTENCED TO SERVE A TERM OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IN THE MDOC, AS A HABITUAL OFFENDER.
DISPOSITION:	DISMISSED - 12/17/2002
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE THOMAS, P.J., IRVING AND MYERS, JJ.

MYERS, J., FOR THE COURT:

¶1. Winfred "Wimp" Forkner was convicted of the burglary of a storehouse. Forkner was sentenced to serve a term of life imprisonment without the possibility of parole in the custody of the Mississippi

Department of Corrections, as a habitual offender, pursuant to Miss. Code Ann.§ 99-19-83 (Rev. 2000). This Court dismisses his appeal for lack of jurisdiction.

STATEMENT OF FACTS

¶2. Forkner was convicted on February 26, 2001. The sentencing order was signed on February 28 and filed March 1. Forkner filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial on March 8 and 12. The motions were denied on March 9 and filed on March 12.

¶3. On April 20, 2001, Forkner filed a motion to reopen time to file an appeal. The motion to reopen time to file an appeal alleged that on March 20 and April 9, inquiries were made at the circuit clerk's office and that the order denying the motion for judgment notwithstanding the verdict or in the alternate for a new trial was not found. The motion to reopen time to file an appeal also alleged that on April 18 an inquiry was made at the circuit clerk's office and the order denying the motion for judgment notwithstanding the verdict or in the alternative for a new trial was found. No hearing was held on the motion to reopen time nor does an order denying or granting the motion appear in the record. Forkner filed his notice of appeal on May 2.

LEGAL ANALYSIS

¶4. Mississippi Rules of Appellate Procedure Rule 4 (a) requires the notice of appeal to be filed with the clerk of the trial court within thirty days after the date of entry of the judgment or order being appealed. M.R.A.P. 4(a).

¶5. One exception which allows for an out of time appeal is Mississippi Rules of Appellate Procedure Rule 4 (h). Rule 4 (h) allows for an out of time appeal,

> If [the trial court] finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the

> judgment or order or within seven days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of fourteen days from the date of entry of the order reopening the time for appeal.

¶6. The clear language of the rule is that a trial court may but does not have to reopen the time for appeal. M.R.A.P. 4(h).

¶7. The advisory committee note of Mississippi Rules of Appellate Procedure Rule 4 acknowledges that the party seeking relief carries the burden of persuasion regarding the lack of a timely notice. M.R.A.P. 4.; *see Nunley v. City of Los Angeles*, 52 F.3d 792, 798 (9th Cir. 1995). There must be a specific factual denial of receipt of notice to rebut and terminate the presumption that notice was mailed and received. *Id.* at 798.

CONCLUSION

¶8. This Court is mindful that the Mississippi Supreme Court has allowed the suspension of Mississippi Rules of Appellate Procedure Rule 4 for out-of-time appeals. However, these instances are limited in scope. Timely filing of a notice of appeal is jurisdictional. *Eades v State*, 805 So. 2d 554, 555 (¶4) (Miss. Ct. App. 2000). In the instant case, the record does not reflect that there was ever an order granting or denying Forkner's motion to reopen time for appeal. Since the trial court has made no ruling on Forkner's motion to reopen time for appeal, this Court does not have the jurisdiction necessary to hear this appeal.

¶9. **THE APPEAL OF THE JUDGMENT OF THE WILKINSON COUNTY CIRCUIT COURT IS DISMISSED FOR LACK OF JURISDICTION AS BEING UNTIMELY FILED. COSTS OF THE APPEAL ARE ASSESSED TO WILKINSON COUNTY.**

THOMAS, LEE, IRVING, CHANDLER AND BRANTLEY, JJ., CONCUR. SOUTHWICK, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MCMILLIN, C.J., KING, P.J, AND BRIDGES, J.

SOUTHWICK, P.J., DISSENTING:

¶10. The majority makes a logical and defensible decision to dismiss. My disagreement is that I believe dismissal is an inefficient use of judicial resources. Instead, I would enter an order requiring that the circuit court rule on the motion or, if that has already occurred, provide a certified copy of the order as a supplement to the record. M.R.A.P. 10 (e).

¶10. The State argues that we do not have jurisdiction. I find that an appellate court always has jurisdiction to determine if it has jurisdiction. I would exercise that authority as follows.

¶11. What Forkner should have done is wait for the trial court to grant leave to file a late appeal. Since the motion for leave was filed during the thirty day period immediately following the original thirty days to appeal, the trial court could have granted an extension if good cause was shown. M.R.A.P. 4(g). In addition, if the trial court found that Forkner or his counsel did not get notice of the judgment within the time to file a proper notice of appeal, and if no prejudice would occur, the time for appeal can be reopened. Forkner would need to show that the request to reopen was filed within seven days of discovery of the order denying the post-trial motions. M.R.A.P. 4(h). Forkner clearly filed a timely motion at least under Rule 4(g) to reopen the period for appeal. The circuit court had authority to grant the motion. Forkner just got ahead of himself on the appeal.

¶12. What the majority holds is that since the record does not reflect that the circuit court granted the motion, we must dismiss. This does not necessarily mean that Forkner can now seek a ruling on the motion and start the appeal over again, at least not if the State is correct that if the motion was not promptly brought on for hearing by Forkner, it has lapsed.

¶13. Court rules are not supposed to be a trap for the unwary. Forkner's original counsel may have been unwary when he decided to file a notice of appeal twelve days after filing a motion to reopen the period for appeal. The error was not in the timely bringing of an appeal, but in the sequence of acts that should have been followed. The appellate rules provide that a premature notice of appeal that predates ruling on certain other kinds of post-trial motions becomes effective on the day that those motions are denied. M.R.A.P. 4 (b), (d) & (e). Once the appeal notice was filed, the trial court may well have determined it no longer had jurisdiction to rule on the motion for leave.

¶14. These appellate rules are not statutes issued under the authority of the legislature but court rules promulgated under the authority of the Supreme Court and interpreted and applied by courts. Rules can be suspended in the interest of expediting decision. M.R.A.P 2(c). I find it within the authority of this Court in managing its docket to apply the prospective effectiveness approach to out-of-sequence notices of appeal and rulings on motions to reopen the time for appeal.

¶15. The case is fully briefed on the merits. The State never moved to dismiss the appeal but was content to proceed with briefing though adding the procedural matter to its arguments. I find nothing gained and much lost by dismissing. I would enter an order to require as appropriate either a supplementation of the record to provide a copy of any order on the motion that has been entered, or that the motion now be ruled upon and a copy of the order sent us. Upon receipt, we should then return to our consideration of the case.

McMILLIN, C.J., KING, P.J., AND BRIDGES, J., JOIN THIS SEPARATE WRITTEN OPINION.