

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of General Sessions

J. Michael Baxley, Circuit Court Judge

Case No. 20111-GS-13-627
Appellate Case No. 2013-000148

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JUL 01 2013

SC Court of Appeals

The State,

Appellant,

v.

Graham Franklin Douglas,

Respondent.

RESPONDENT GRAHAM FRANKLIN DOUGLAS' S
MOTION TO DISMISS

Pursuant to the South Carolina Rules Appellate Court Rules, Respondent hereby moves this court to dismiss this appeal with prejudice. The Respondent was charged with the murder of Charles Eden Smith and possession of a weapon during the commission of a violent crime, arising out of a shooting incident at the home of the Respondent on May 31, 2011.

The Court of General Sessions issued and filed an order dated November 5, 2012. A more formal order was filed with the Clerk of Court for Chesterfield County on January 4, 2013. The Petitioner issued a Notice of Appeal dated January 14, 2013.

This matter is not properly before the Court, as Appellant did not timely issue the Notice of Appeal and has failed to follow the South Carolina Appellate Rules with regard to preparing filing and serving the initial brief.

FACTS

The Respondent was charged with murder and possession of a weapon during the commission of a violent crime for a shooting incident occurring on May 31, 2011. Respondent filed a motion to dismiss pursuant to the protection of persons and property act, S.C. Code Ann. § 16-11-410, *et seq.* The motion was heard before the court of general session on October 2-3, 2012. The respondent was, and continues to be, represented by S. Jahue Moore, M. Brooks Biediger and M.W. Cockrell, III.

On November 5, 2012 the court released its ruling and judgment in a four page letter addressed to each of the attorneys of record, specifying that the letter was to serve as notice of the court's decision. The Appellant issued a Notice of Appeal dated January 14, 2013. No indication regarding the ordering of the transcript of record, as required by Rule 207 of the South Carolina Appellate Court Rules, has been received by counsel for the Respondent. However, investigation into the ordering of the transcript shows the same being mailed to counsel for the Appellant on December 4, 2012.

The court filed a more formal order regarding Respondent's Motion to Dismiss on January 4, 2013. On January 14, 2012, ten days after the filing of the more formal order, Appellant executed a Notice of Appeal. The Notice of Appeal was served on all attorneys of record, and was served by mail on M.W. Cockrell, III, attorney for Respondent. Clearly, counsel for Appellant was and is aware, has knowledge and understanding that M.W. Cockrell, III is not

a member of the firm or associated with Respondent's other counsel of record and/or the law firm of Moore Taylor and Thomas, PA.

By letter dated February 12, 2013 counsel for Appellant requested a thirty day extension from the Court of Appeals. Counsel for Respondent has received no further pleadings, briefs or correspondence in this matter from Appellant's counsel.

ARGUMENT

I. APPELLANT HAS FAILED TO COMPLY WITH THE SOUTH CAROLINA APPELLATE RULES.

Counsel for respondent, M.W. Cockrell, III, was made aware that Appellant had completed its initial brief on June 3, 2013 and served the same on Jahue Moore, Sr. as one of the attorneys of record for Respondent on or about June 18, 2013. This information was conveyed to the undersigned upon being contacted regarding preparation of the initial brief for Respondent.

The certificate of service accompanying Appellant's initial brief states that Jahue Moore, Sr. alone was served with a copy of Appellant's initial brief. The certificate of service further certifies that all parties required by Rule to be served have been served. This is completely incorrect, as M.W. Cockrell, III, has not been served as an attorney of record, required by Appellate Rule 262, which states "whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney." Further, Rule 208 requires that Appellant serve "one copy of his brief on all parties to the appeal." Finally, Rule 260 states "whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." These Rules require that

Appellant serve one copy of his initial brief on all attorneys of record. Appellant has failed to do so, and an order of dismissal should be issued.

Counsel for the Appellants received the transcript in this matter on or about December 4, 2012. Rule 208 (a)(1), SCACR directs, “within thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the appellate court one copy of the brief with proof of service.” The plain reading of this rule requires the initial brief to be filed and served on or about January 3, 2013, but certainly not later than January 8, 2013 with the five (5) day accommodation provided for in Rule 6(e), SCRCF. Ironically, the plain meaning of the Rules requires this brief to be filed before the appellate filed the Notice of Appeal.

Here, counsel for the Appellant failed to serve a copy of the initial brief on all parties, specifically each of Respondent’s attorneys of record. Furthermore, Appellant has not properly requested extensions of time to prepare the initial brief in this matter. At the latest, the initial brief was required to be filed and served together with the Notice of Appeal on January 14, 2013. Respondent is informed and believes that failure to follow these Rules divests the appellate court of jurisdiction of this matter and for that reason, this appeal should be dismissed.

II. APPELLANT FAILED TO SERVE A TIMELY NOTICE OF APPEAL

The court issued notice of its decision in a four page letter addressed to all parties on November 5, 2011. That judgment was filed in the clerks office the same day. The court subsequently filed a more formal order January 4, 2013. Appellant issued its Notice of Appeal on January 14, 2013.

Rule 203(b)(2), SCACR states that “a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment . . . in those cases in which the State is allowed to appeal a pre-trial order or ruling, the notice of appeal must be served within ten (10) days of receiving actual notice of the ruling or order.” Additionally, the Supreme Court has held that a form order does not toll the time to appeal. *See Leviner v. Sonoco Products Co.*, 339 S.C. 492, 493-494, 530 S.E.2d 127, 127-128 (2000) (*but see Coker v. Cummings*, 381 S.C. 45, 52-53, 671 S.E.2d 383, 387 (Ct.App. 2008) (indicating a form order may toll the time to appeal if the court is reserving jurisdiction.) Chief Justice Jean H. Toal suggests in her treatise on South Carolina appellate practice that the prudent practice would be to timely appeal the form order and then file and serve a second Notice of Appeal when the more complete order issues. Toal, Vafai, and Muckenfuss, *Appellate Practice in South Carolina* 121 (2d Ed. 2002).

Here, the court’s ruling, in letter format, addressed to all attorneys of record, and indicative in its text that it was to serve as notice of the court’s decision, was essentially more complete than any form order. While the Court of Appeals and our Supreme Court appear to offer somewhat mixed signals on the proper timing of service of a Notice of Appeal when a form order is issued, it is apparent from the court’s ruling in this matter, that the judgment in letter form was to serve as notice of the court’s ruling and under Rule 203(b), the clock began to run on the appropriate time for appeal. Furthermore, the fact counsel for Appellant ordered the transcript in this matter after the court’s ruling on November 5, 2012, but before the January 4, 2013 order, clearly evidences the understanding of ALL parties as to the ruling of November 5, 2012.

Respondent further argues that this is an appeal from a pre-trial ruling. As such, Appellant's Notice of Appeal would have been timely if issued within ten days of receipt of the court's decision dated November 5, 2012. As this appeal derives from a pre-trial motion to dismiss, under Rule 203(b) the notice of appeal must be served within ten days of receiving actual notice of the ruling or order. Here, the judgment issued by the court on November 5, 2012 most certainly constituted actual notice of the court's ruling, as is stated within the body of the text.

Based on applicable court rules and case law, Respondent is informed and believes that Appellant's untimely service of notice of appeal divests this court of jurisdiction and for that reason, should be dismissed.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Respondent, Graham Douglas, respectfully requests that this Court dismiss this appeal, with prejudice.

Respectfully Submitted,

COCKRELL LAW FIRM

By: 

M.W. Cockrell, III


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June , 2013
Chesterfield, South Carolina

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PROOF OF SERVICE

I certify that I have served Respondent Graham Franklin Douglas's Motion to Dismiss on the parties listed below by depositing a copy in the United States Mail, postage prepaid, on June 28, 2013, addressed as indicated below.

Alan Wilson
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S, Jahue Moore, Sr.
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June 28, 2013
Chesterfield, South Carolina



**COCKRELL
LAW FIRM, P.C.**

M. W. Cockrell, III (SC)
Jason B. Turnblad (SC)
M. W. Cockrell, Jr. (TX) * +

*of counsel
+Board Certified: Oil, Gas & Mineral Law
Texas Board of Legal Specialization

June 28, 2013

The Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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RE: State v. Graham Franklin Douglas
Appellate Case No. 2013-000148

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the original and ^{7 copies} ~~one copy~~ of the respondent's motion to dismiss in the above referenced matter, along with a certificate of service.

I would appreciate you filing the original and returning ¹ ~~the~~ copy, file stamped, to my office in the self addressed stamped envelope enclosed.

Warmest Highest Regards,
I remain,

M.W. Cockrell, III
MWC/sc
encls.

cc: The Honorable Alan Wilson
The Honorable Ernest A. Finney, III
Tyler B. Brown, Esquire
John W. McIntosh, Esquire
Alphonso Simon, Jr., Esquire
Donald J Zelenka, Esquire
S. Jahue Moore, Esquire
M. Brooks Biediger, Esquire