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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
The Honorable Letitia Verdin, Circuit Court Judge

Appellate Case No. 2020-001122
S.C. Court of Appeals Order dated June 21, 2023

State of South Carolina……..Respondent,

vs.

Marquez D. Glenn……Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner certifies that the Petition to Reinstate/File Out of Time was made and finally ruled on by the Court of Appeals by Order dated June 21, 2023.

QUESTIONS PRESENTED

I. Did the Court of Appeals abuse its discretion by reflexively refusing to reinstate this appeal and consider Petitioner's Request for Rehearing on the merits where Petitioner has shown good cause to reinstate the appeal after mistakenly calendaring the wrong due date for the Request for Rehearing, the opposing party could not have been prejudiced by the 21 day delay in the filing of the Request for Rehearing or the granting of the motion, and Petitioner has already submitted the Request for Rehearing?

STATEMENT OF THE CASE AND FACTS

Following Petitioner Marquez D. Glenn's ("Petitioner" or "Glenn") prior successful appeal to the South Carolina Supreme Court, which reversed and remanded this case to the circuit court for reconsideration of Glenn's Motion for Immunity pursuant to S.C. Code Ann. §§ 16-11-450(A) and 16-11-440, this is the second appeal resulting from the trial court's denial of immunity to Petitioner. As of August 17, this case will have been on appeal for all but five (5) months of the last eight (8) years—during all of which undersigned counsel has continued to represent Petitioner on a pro bono basis because of my belief in Petitioner's case.

After ultimately denying the State's request for rehearing of the Supreme Court's December 18, 2019 Opinion, this case was finally remanded to the circuit court on March 12, 2020. Due to the passage of time, Judge John C. Hayes ("Judge Hayes"), the original trial judge, was not able to preside over the reconsideration of Glenn's Motion for Immunity, which resulted in Judge Letitia Verdin ("Judge Verdin") agreeing to hear the

Motion in his stead. In addition to Judge Hayes not being able to preside, the state of the COVID-19 pandemic in March 2020 rendered it impossible to conduct a new evidentiary hearing in connection with the Motion for Immunity. As such, to expedite reconsideration of the Motion for Immunity, Judge Verdin, after review of the original hearing transcript and consultation with counsel for the State and Glenn, indicated that, in conjunction with argumentation by the parties, she felt able to rule from the original transcript. Thereafter, Judge Verdin filed an Order denying immunity on June 15, 2020. Appellant received written notice of entry of this order on July 6, 2020. Appellant timely filed a motion pursuant to Rule 29(a), SCRCrimP, requesting reconsideration of various points of law and fact, which was denied on July 28, 2020. Appellant received written notice of entry of this order on August 5, 2020. Appellant's Notice of Appeal was properly and timely filed and served upon all parties of interest in this matter on August 13, 2020.

Ultimately Petitioner's Final Brief was timely filed with the Court of Appeals on June 17, 2021. Unfortunately due to the impact that the pandemic had on the judicial system and community throughout South Carolina, this honorable Court was not able to consider Appellant's case until the February 2023 term after which the Court issued an unpublished opinion affirming the trial court on March 1, 2023. Accordingly, the correct due date for Petitioner's Request for Rehearing was March 16, 2023.

Regrettably, due to mistake on the part of undersigned counsel, whether through an overzealous email filter or computer operator, i.e., Undersigned Counsel, error, Undersigned Counsel did not receive the email that the Court sent out on March 1, 2023 serving the Court's unpublished opinion, and as such was unaware of the Court's decision

until March 20, 2023. Accordingly, upon receiving correspondence from the Court on March 20, 2023 and seeing for the first time the opinion of the Court affirming the decision of the trial court, Undersigned Counsel incorrectly assumed the March 20 correspondence was the original notice of the decision and dove into analysis of the opinion and crafting with particularity the meritorious points that I believe have been overlooked and misapprehended. In my haste to dig into the substance of the Request for Rehearing, Undersigned Counsel mistakenly believed the due date for the Request for Rehearing was April 5, 2023—which is in fact the date Appellant's Request for Rehearing was filed and served.

Undersigned Counsel was actually unaware of the error concerning the deadline for the filing of the Request for Rehearing until after Undersigned Counsel filed Petitioner's Request for Rehearing when correspondence was received from the Court on April 13, 2023, at which time Undersigned Counsel immediately called the Clerk of Court's Office for the Court of Appeals and spoke with Ms. Jacklyn Orr about the situation. Ms. Orr confirmed an email was sent to Undersigned Counsel on March 1, 2023 and Undersigned Counsel after speaking with Ms. Orr was eventually able to locate the March 1, 2023 email. Because Undersigned Counsel was unaware of his mistake until after deadline for filing of the request for rehearing had passed, Undersigned Counsel was unable to request an extension of the deadline for the filing of the request for rehearing in advance thereof.

After speaking with Ms. Orr and Counsel for the State, William Blitch, on April 13, 2023, Undersigned Counsel moved on April 14 to reinstate this appeal by Requesting to Recall the Remittitur and to file the Request for Rehearing out of time.

In the motion to reinstate the appeal through recall of the remittitur and acceptance of the already filed Request for Rehearing, undersigned counsel apologized for the delay and endeavored to tactfully explain that the inadvertent mistake was a result of my wife and I going through IVF and the loss of multiple pregnancies this year, including one in February, which has in all honesty been emotionally devastating and quite frankly debilitating. In addition to the compounding emotional toll associated with the loss of multiple pregnancies, due to the immunosuppressant drugs that IVF requires, both my wife and I have been working from home during this period to avoid exposing my wife to COVID-19 or other illnesses and jeopardizing our IVF efforts—a fact which Undersigned Counsel further acknowledged likely contributed to my inadvertent oversight as to the deadline for the filing of the request for rehearing.

On June 21, 2023, two months and eight days after Petitioner filed the motion to reinstate this appeal, Petitioner received an email with a one-page order denying the motion to reinstate the appeal and to consider the merits of Petitioner's already filed Request for Rehearing.

Petitioner now timely files the Petition for Writ of Certiorari to the Supreme Court.

ARGUMENT

I. The Court of Appeals abused its discretion by reflexively refusing to reinstate this appeal and consider Petitioner's Request for Rehearing on the merits where Petitioner has shown good cause to reinstate the appeal after mistakenly calendaring the wrong due date for the Request for Rehearing, the opposing party could not have been prejudiced by the 21 day delay in the filing of the Request for Rehearing or the granting of the motion, and Petitioner has already submitted the Request for Rehearing

Although the service of the notice of appeal is jurisdictional, other deadlines for appellate fillings and perfecting an appeal before the Court of Appeals or Supreme Court are not jurisdictional. State v. Scott, 351 S.C. 584, 587, 571 S.E.2d 700 (2002); cf. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985) (service, but not filing, of notice of appeal is jurisdictional requirement for appellate court and appellate court may not extend the time for doing it); Rule 263(b), SCACR ("time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof").

Accordingly, the requirements of Rule 221 concerning rehearings and remittitur are not jurisdictional in nature and the times prescribed therein, and specifically the fifteen (15) day deadline for filing of a petition for rehearing, can be extended by the the Court. Contrary to the "very strong showing" standard the Court of Appeals applied to Petitioner's request to reinstate this appeal through recall of the remittitur, the Court is free upon a showing of "good cause" to reinstate an appeal that has been involuntarily dismissed for failure to comply with the South Carolina Appellate Court Rules. See State v. Glenn, S.C. Ct. App. Order dated June 21, 2023 (quoting State v. Keels, 39 S.C. 553, 17 S.E. 802 (1893)); Rule 260, SCACR ("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…A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties."). The "good cause" standard for relief is further consistent with the S.C. Code Ann. § 18-1-100 that provides that "[w]hen a party shall give, in good faith, notice of appeal from a judgment or order and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings the court may permit an amendment on such terms as may be just," and the "rule" laid down by the Supreme Court in Crosswell v. Conn. Indem. Ass'n, 49 S.C. 374, 377, 27 S.E. 388, 389 (1897), a case in which the Court granted a motion to reinstate an appeal where the appeal had been properly dismissed by the clerk for failure to timely file the return and appellant's counsel, through "honest mistake," "only discovered their mistake, by accident, after this appeal had been dismissed by the clerk…."

Based on the precursor to S.C. Code Ann. § 18-1-100,[1] the Supreme Court in Crosswell held that "[t]he statutes provide, that when an appeal has been taken, and due notice thereof has been given within the time prescribed by law, this Court may, in its discretion, and upon such terms as may be just, relieve a party from the consequences of any omission in taking any subsequent step necessary to perfect an appeal, arising from mistake or inadvertence." Id. (emphasis added). The Crosswell Court further expressly

[1] Section 349 of the Code of Procedure of 1894 is the precursor to what is now S.C. Code Ann. § 18-1-100 and provided that "[w]hen any party shall omit, through mistake or inadvertence, to do any act or acts necessary to perfect an appeal, or to stay a proceeding, the Supreme Court may, in their discretion, permit such act or acts to be done at any time to perfect the appeal on such terms as may be just, provided that the Court shall be satisfied that the appeal was taken bona fide, and provided that notice of the same was given as now required by law."

rebuked prior cases where an appellant had "been held to strict compliance with the rule of Court" on the grounds that those refusals to reinstate an appeal failed to pay "due regard…to the liberal provisions contained in the [precursor to S.C. Code Ann. § 18-1-100], which manifest a disposition on the part of the law-making power that a party shall not be deprived of the important right of appeal by reason of some mistake or inadvertence in taking some step necessary to perfect his appeal, after he has given due notice of his intention to appeal." Id. To protect the important right of appeal from deprivation through mistake or inadvertence, the Crosswell Court "determined to lay down a rule for the guidance of the bar, which will carry out what we understand to be the true intent and spirit of the legislation upon the subject." Id. The Court expressly provided that the rule may be stated as follows:

> Whenever this Court is satisfied, from the showing made, that a party has, in good faith, given due notice of his intention to appeal within the time prescribed by law, and has, through an honest mistake, either of law or fact, or through excusable inadvertence, or from sickness or other cause beyond his control, has omitted to take some step necessary to perfect his appeal, this Court will relieve the party from the effect of such omission, upon such terms as may seem to the Court to be just under the circumstances of the case. But, in doing so, care will be taken to prevent, as far as possible, any injury, by delay or otherwise, to the respondent, whose rights are as much entitled .to be respected as are those of the appellant.

Id. at 377-78, 27 S.E. at 389. Given the substantive similarity of S.C. Code Ann. § 18-1-100 to its longstanding precursors, Section 18-1-100 should still be interpreted in accordance with the Supreme Court's ruling in Crosswell to allow relief to appellants from good faith mistakes that would otherwise act as a waiver of the right to the determination of a properly noticed appeal on its merits.

The rule laid down by the Crosswell Court in 1897 is entirely consistent with two recent decisions reinstating appeals based on good faith calendaring errors: Jordan v. Hartford Fin. Grp., Inc., 435 S.C. 501, 868 S.E.2d 400 (Ct. App. 2021), in which the Court of Appeals held that "[t]he touchstone here is good cause, a standard designed to excuse honest, harmless human mistakes so a case may be judged on its merits rather than its missteps.," and Morris v. BB&T Corp., Op. No. 28131 (S.C. Sup. Ct. filed Jan. 25, 2023) (Howard Adv. Sh. No. 4 at 13, 15), in which the Supreme Court expressly adopted the reasoning for reinstatement of an appeal explained by the Court of Appeals in Jordan. Jordan, 435 S.C. at 505, 868 S.E.2d at 403 ("The good cause standard exists to ensure the interests of justice are protected even when a party missteps, so a harmless procedural foot fault does not spring a trap door that mindlessly jettisons innocent parties out of court, regardless of the circumstances."). Specifically, "[t]hese cases recognize, as we do again today, that the practice of law is challenging enough without having to endure the overbearing enforcement of technicalities when prejudice is absent from the scene." Jordan, 435 S.C. at 506, 868 S.E.2d at 403 (citing Mictronics, Inc. v. S.C. Dep't of Rev., 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) and Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986) and noting that although some decisions have refused to find good cause to set aside a default due to a party lawyer's neglect concerning "time-triggering paperwork," "those cases dealt with degrees of carelessness and periods of inattention far greater than we have here, and none tossed a party out of court for not timely filing a brief at a later stage of a perfected case.") (emphasis added).

Of particular note in Crosswell, Jordan, Morris, and other cases in which the courts have granted relief from good faith mistakes on the grounds of good cause is the common thread that "prejudice is absent from the scene." Jordan, 435 S.C. at 506, 868 S.E.2d at 403. This lack of prejudice is in fact what appears to distinguish cases in which "good cause" is sufficient to obtain relief from a good faith mistake and State v. Keels, 39 S.C. 553, 17 S.E. 802 (1893) and State v. Barnes, 413 S.C. 1, 774 S.E.2d 454 (2015) in which the courts stated that a "very strong showing" would be required to recall a remittitur. From the opinions in Keels and Barnes, it is apparent that the remittitur after being sent down had been "acted upon by [the trial] court," which certainly would have caused prejudice and justified a "very strong showing" to justify recall of remittitur. Keels, 39 S.C. at 554; 17 S.E. at 802 (emphasis in original); Barnes, 413 S.C. at 4, 7, 774 S.E.2d at 456, 457 (citing the "very strong showing" language from Keels in refusing to recall the remittitur of a first appeal after the Supreme Court "decided the appeal on its merits, and properly returned the remittitur to the circuit court" and the parties and the trial court had begun the process of retrial, which ultimately resulted in the State's attempt to recall the remittitur, reinstate defendant's conviction, and have the appellate courts "review the issues raised but not reached in the first appeal"); see also McKenzie v. Sifford, 52 S.C. 394 (1898) (refusing to "recall the remittitur sent down nearly a year ago, under which a new trial has been had in the Circuit Court, a judgment rendered, and an appeal taken from such judgment, for the purpose of allowing the plaintiff to file a petition for a rehearing of the appeal from the judgment of Judge Brnest Gary, long after that judgment had been reversed and a new trial ordered, which has been had. Such a

proposition, to say the least of it, is very unusual — not to say extraordinary"); State v. Merriman, 35 S.C. 607, 14 S. E. 394, 395 (1892) ("The court are unanimously of the opinion, and it is so adjudged, that the remittitur of this court having been duly sent to the circuit court, under the seal of this court, and the circuit court having already acted in carrying out the mandate thereof, in reassigning a day for the execution of the sentence before imposed, it is now too late to make this motion.") (emphasis added).

Implicit in both Keels and Barnes is also the fact that in both cases the remittitur had been sent down after "judgment" by the court of last resort, the Supreme Court, and thus the Court's requirement of a "very strong showing" to recall remittitur is logical given that a final decision on the merits has been made by the ultimate authority and thus there are very limited justifications for disturbing the judgment of the Court. Conversely, were remittitur from the Court of Appeals is sent on the basis of a good faith mistake by appellate counsel in the absence of prejudice to the opposing party, the justification for requiring a "very strong showing" to recall remittitur is absent and the policy in favor of deciding cases on the merits must prevail in the interest of justice. Tribble v. Poore, 28 S.C. 565, 571-72, 6 S.E. 577, 581 (1888) (differentiating between a case in which a motion to dismiss an appeal was heard, granted, and an order of the court to that effect was entered and a case in which the "court had not heard or determined any question when the motion [to reinstate pursuant to the precursor to S.C. Code Ann. § 18-1-100] now before us was presented" and holding that in cases in the latter category a motion to reinstate an appeal based on an honest mistake can be entertained after dismissal and, in the discretion of the Court, be granted).

The Barnes Court also noted that it was not aware of any authority recalling remittitur based on "post-remittitur conduct by a party," e.g., defendant requesting representation by counsel after a successful appeal on the grounds that the defendant was denied the right to represent himself. 413 S.C. 1, 774 S.E.2d 454. This point is inapplicable to this request to reinstate this appeal as the good faith calendaring error occurred prior to the remittitur. Moreover, the ability to grant the requested relief is specifically acknowledged and exercised by the Supreme Court in Tribble, 28 S.C. at 569-70, 6 S.E. at 580, in which the Court rejected the proposition that the precursor to S.C. Code Ann. § 18-1-100 could not be used to grant relief after an appeal had been dismissed due to an "honest mistake," stating:

> It is, however, ingeniously contended on the part of the respondent, that the appellant is not entitled to relief under the provisions of the act of 1880, because that act applies only to cases in which an appeal is pending, and as this appeal can no longer be regarded as pending after it has been dismissed by the clerk, the act cannot apply. We do not so construe that act. The word "pending" does not appear in the act, and its manifest purpose was to enable a party, who had given notice of appeal within the prescribed time, and who had failed to comply with some other technical requirement, which, under the provisions of the statutes regulating appeals, would operate as a waiver or abandonment of his appeal, to obtain relief from the effects of such failure, so as "to facilitate appeals" and prevent a defeat of justice by the operation of some merely technical requirement. Accordingly this court has uniformly held that where a party has, in good faith, given due notice of appeal, he may, upon a proper showing for the purpose, obtain relief from the effects of any other default, and this court has, in numerous cases, entertained and granted motions to reinstate appeals dismissed by the clerk, even where the clerk has committed no error of law in so doing, because that, as it seemed to us, was-the main object of the act of 1880. It will be observed…that the act of 1880…confers upon the Supreme Court…the power to permit a party who 'shall omit, through mistake or inadvertence, to do any act or acts necessary to perfect an appeal,' to do such act or acts at any time, provided the notice of appeal has been given in due time. It seems to us clear,

> therefore, that this court is invested with full power to entertain this motion, at this time, and grant the relief asked for, provided a proper showing for that purpose is made, which, as we have said above, we think has been done.

(Emphasis in original).

Based on the foregoing case law, the plain language of S.C. Code Ann. § 18-1-100, and the fact that this appeal has been properly noticed not once, but twice, the Court of Appeals erred in holding that an attorney who, while currently dealing with the loss of multiple IVF pregnancies, made a good faith and honest mistake in calendaring the deadline for the filing of a Request for Rehearing to the Court of Appeals failed to establish sufficient cause to reinstate an appeal that is about to enter its eighth year. Crosswell, 49 S.C. at 377-78, 27 S.E. at 389 ("Whenever this Court is satisfied, from the showing made, that a party has, in good faith, given due notice of his intention to appeal within the time prescribed by law, and has, through an honest mistake, either of law or fact, or through excusable inadvertence, or from sickness or other cause beyond his control, has omitted to take some step necessary to perfect his appeal, this Court will relieve the party from the effect of such omission, upon such terms as may seem to the Court to be just under the circumstances of the case.) (emphasis added). Moreover, reinstatement of the appeal to allow a determination on the merits is clearly in the interest of justice given that Undersigned Counsel's good faith mistake caused a delay of a mere twenty-one (21) days in an almost eight (8) year old appeal and as such could not have caused any prejudice to the State. Further, granting of the motion to reinstate this appeal through recall of the remittitur and consideration of the Request for Rehearing on the

merits will not cause the State to suffer any prejudice other than having to prove his case on the merits, which is not the type of prejudice contemplated by Rule 55(c). See Patton v. Miller, 804 S.E.2d 252, 262-63, 420 S.C. 471, 491-92 (2017) (discussing similar prejudice standard under Rule 15 and holding that the "prejudice contemplated in Rule 15 is not that the non-moving party is forced to defend the merits of a valid claim"). Prejudice as contemplated to prohibit the grant of relief from default is some result flowing from the relief from default that puts the non-moving party at a disadvantage pursuing its case on the merits, which disadvantage the party would not have otherwise faced See Id. Given that no such barriers have arisen as a result of the twenty-one day delay in the filing of the Request for Rehearing or will arise from recall of the remittitur, justice dictates that Petitioner be granted relief so that this matter may be decided upon the merits as opposed to mere technicalities.

Undersigned Counsel submits that he has shown good cause to reinstate the appeal for consideration of the Request for Rehearing on its merits. Undersigned Counsel has candidly admitted that as a result of the emotionally devastating loss of multiple IVF pregnancies he calendared the wrong due date for the request for rehearing, which resulted in the missing of a non-jurisdictional deadline and a slight delay that prejudiced no one. Undersigned Counsel has already filed the Request for Rehearing with the Court of Appeals twenty-one days after the original due date of March 15, 2023. If it is the Court of Appeals position that a single, non-jurisdictional calendaring mistake that results in a twenty-one (21) day delay in the course of an eight (8) year appeal is a death sentence for an appeal, Undersigned Counsel respectfully submits that such a position is

arbitrary and an abuse of discretion in conflict with the Court of Appeals own holding in Jordan that expressly acknowledged that "the practice of law is challenging enough without having to endure the overbearing enforcement of technicalities when prejudice is absent from the scene." Jordan, 435 S.C. at 506, 868 S.E.2d at 403.

Even assuming arguendo that Undersigned Counsel was required to make a "very strong showing" (presumably of "good cause") to obtain relief from his good faith mistake, the Court of Appeals in its Order denying reinstatement of the appeal though recall of the remittitur gave absolutely no reason for the denial. The Court of Appeals made no findings of fact and merely citing Keels to justify the requirement of a "very strong showing," offered only a conclusory statement that "Appellant has failed to make such a showing." Glenn, S.C. Ct. App. Order dated June 21, 2023. The Court of Appeals offered Petitioner no opportunity to be heard before denying the motion, instead simply deciding the request for reinstatement on written motion.

"Rules are rules, and due dates matter. The rule of good cause is also a rule. A tribunal cannot strictly enforce due dates but ignore good cause. When that happens, the decision has left discretion's range and wandered into the arbitrary." Jordan, 435 S.C. at 505, 868 S.E.2d at 402. "To be sure, miscalendaring is not always good cause. But a reflexive refusal to consider that a calendaring mistake could be good cause is an abuse of discretion." Id. at 506, 868 S.E.2d at 403; see also As the Supreme Court further explained in Morris, "[t]he exercise of discretion is then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial

court's ruling that follows the law and is supported by the facts and circumstances…This 'thought process' requires analysis, and the 'discretion' standard we employ for reviewing the [court's] analysis requires the analysis be explained." Morris, (Howard Adv. Sh. No. 4 at 13, 15). Because the Court of Appeals "offered no explanation for its decision, [it] did not act within its discretion in refusing to reinstate [the] appeal." Id.

Consequently, Petitioner asks that the Court to grant a writ of certiorari to review the Court of Appeals' opinion which refused Undersigned Counsel's motion to reinstate this appeal through the recall of the remittitur to allow the Request for Rehearing to be decided on its merits.

CONCLUSION

Petitioner may be right or wrong on the merits of the underlying case, but where Undersigned Counsel quickly brought his mistake to the Court of Appeals' attention, admitted his good faith mistake, apologized for the delay and no party was prejudiced thereby, justice dictates that relief be granted to reinstate this appeal and allow it to be determined on its merits rather than mere technicalities. For all the foregoing reasons, Petitioner respectfully requests that this Court GRANT A WRIT OF CERTIORARI to review the decision of the Court of Appeals denying reinstatement of this appeal.

[SIGNATURE ON FOLLOWING PAGE]

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