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SC COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM MARLBORO COUNTY
Court of General Sessions

Edward B. Cottingham, *Circuit Judge*

Appeal No. 2012-213461

STATE OF SOUTH CAROLINA,

Plaintiff-Appellee,

vs.

TYRONE J. KING,

Defendant-Appellant.

Defendant-Appellant Tyrone J. King's First Motion for Time

COMES NOW Defendant-Appellant Tyrone J. King, and pursuant to Rule 240(e), SCAR, would respectfully show this Court as follows:

1. Pursuant to the State's Third Motion for Extension of Time, the Court extended the deadline for the State's initial response brief and designation of matter to May 16, 2014. [Order of 4/23/14].

2. Because the State did not serve its brief and designation of matter until May 19, the State has filed its Motion to File Out of Time.

3. "The South Carolina Appellate Court Rules provide that 'upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper.' Rule 208(a)(4), SCACR. Such action may include reversal." *Robinson v. Hassiotis*, 364 S.C. 92, 93 (S.C. Ct. App. 2005) (citation omitted).

4. Mr. King has been unable to locate any published authority guiding the Court in its discretion to determine “actions...it deems proper.” Mr. King respectfully submits that the bar would benefit from a published opinion clarifying the standards for belated briefing.

5. Mr. King does note that the failure of an appellant to timely serve and file an opening brief requires “the clerk of the appellate court [to] sign an order dismissing the appeal,” Rule 208, SCAR, subject to reinstatement upon proof of “good cause shown.” Rule 260, SCAR.

6. Mr. King respectfully submits that, to ensure fairness to the parties, an untimely response brief and designation of matter should also require good cause. *See generally* U.S. Const. Amend. XIV; S.C. Const. Art. I, § 3. What is good for the goose is good for the gander.

7. Mr. King has been unable to locate any published authority addressing the analysis appropriate for determining “good cause” under Rule 260, SCAR, either.

8. In the absence of any other published authority, this Court should consider the same three factors here that govern when “good cause” exists to set aside defaults under Rule 55(c), SCRCF: (1) the length of the delay; (2) whether the movant has meritorious arguments; and (3) prejudice to the opposing party. *Richardson v. P.V., Inc.*, 383 S.C. 610, 616 (2009) (citation omitted). The Supreme Court grants lower courts with wide discretion to decide how to balance those factors, reversing only upon “a clear showing of an abuse of that discretion.” *Id.* (citing *Harbor Island Owners’ Ass’n v. Preferred Island Props.*,

Inc., 369 S.C. 540, 544 (2006). “An abuse of discretion occurs when the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Harbor Island*, 369 S.C. at 544.

9. For the purpose of the first factor, Mr. King concedes that the State’s delay is so short as to tip that factor in favor of accepting the belated filing.

10. The third factor, however, weighs in Mr. King’s favor. The belated brief could already justify summary reversal, thereby permitting Mr. King the opportunity to clear himself of the serious criminal charges at issue in this appeal that have resulted in his incarceration. If—as he anticipates that it will—the Court finds that the judgment below should be reversed on the merits anyway, the State would further delay the *remittur* through *certiorari* proceedings that are unlikely to result in affirmance of the judgment below. Each unnecessary day that this appeal remains pending is another day that Mr. King will be incarcerated as a convicted murderer.¹

11. Under the circumstances, Mr. King submits that the ultimate disposition of the State’s motion should turn on this Court’s view as to factor two: whether the State has any meritorious arguments. If the Supreme Court would likely reverse the judgment below on *certiorari*, then this Court should exercise its discretion to strike the State’s provisionally filed brief and summarily reverse the judgment under Rule 208(a)(4), SCAR. *Cf. Turner v. Santee Cement Carriers, Inc.*, 277 S.C. 91, 96 (1981) (“Th[e] failure [to timely

¹ Mr. King notes that his notice of appeal was filed in November 2012. Before undersigned counsel was appointed, the Division of Appellate Defense requested and received four extensions. Undersigned counsel discovered that a volume of the transcript had not been prepared, necessitating another extension for Mr. King’s opening brief. Throughout the briefing, Mr. King has remained incarcerated.

file a brief] alone would justify reversal; however, we simply consider it as an additional ground.”).

12. This Court can best evaluate the merits of the parties’ arguments after Mr. King submits his reply brief and the record is filed.

13. Judicial economy, therefore, suggests that this Court should keep the State’s motion under advisement while permitting the appeal to progress.

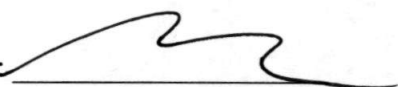
WHEREFORE, Mr. King prays that this Court will:

- A. Deem the State’s brief provisionally filed, without prejudice to the panel’s right to strike it later under Rule 208(a)(4), SCAR;
- B. Grant Mr. King ten days from the date of this Court’s order to prepare and file any reply brief;
- C. Order the parties to proceed with the preparation of the final briefs and the record, in accordance with Rules 210-11, SCRCP;
- D. Consolidate oral argument on the State’s Third Motion for Extension of Time with oral argument on the merits; and
- E. Issue any further relief that justice may require.

Dated: May 22, 2014, at Clemson.

Respectfully submitted,

TYRONE J. KING

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing paper by first-class mail, proper postage prepaid, this 22nd day of May, 2014, on the following parties:

Alphonso Simon, Jr.
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