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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM WILLIAMSBURG COUNTY
Court of General Sessions
W. Jeffrey Young, Circuit Court Judge

The State, Respondent,

v.

Casey Lewis, Petitioner.

Appellate Case No. 2014-001564

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. Should appellant be held to the same standards as an attorney of law?

II. Should harmless error bar appellant from receiving an appeal of the merits of appellant's claim?

(Petition, p. III).

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals erred in granting the State's motion to dismiss where Petitioner failed to timely serve a notice of appeal?

RESPONDENT'S STATEMENT OF THE CASE

Petitioner, Casey Lewis, is attempting to appeal from the denial of a post-trial motion filed in 2013 in the Court of General Sessions in regard to his 1999 conviction and sentence. On or about January 21, 2014, Petitioner filed a notice of appeal in the South Carolina Court of Appeals. On March 19, 2014, the State moved to dismiss as the notice of appeal was not timely served.[1] See *White v. State*, 263 S.C. 110, 119, 208 S.E.2d 35, 39 - 40 (S.C. 1974) ("it is well settled that in the absence of a notice of appeal having been given and timely served [an appellate court] has no jurisdiction over such an appeal"). On May 14, 2014, the South Carolina Court of Appeals granted the State's motion and dismissed the notice finding Petitioner failed to timely serve the notice. In particular, the Court of Appeals found Petitioner was provided written notice of the Order denying the post-trial motion on September 12, 2013, but did not serve notice of intent to appeal until January 24, 2014. This exceeded the maximum of ten (10) days to appeal as provided by Rule 203(b)(2), SCACR for appeals from the Court of General Sessions. Thus, the Court dismissed the appeal. Petitioner sought rehearing which was denied on July 30, 2014. By letter dated July 22, 2014, this Court acknowledged receipt of the petition for writ of certiorari seeking review of the Court of Appeals' dismissal. The State now submits this return. The following procedural history preceded the attempt to appeal.

Procedural History

Petitioner is currently incarcerated in Broad River Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the

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[1] The State's Motion to Dismiss is attached as an appendix to this return and is incorporated by reference.

Clerk of Court of Williamsburg County. Petitioner was indicted in February 1999 for murder, armed robbery, possession of a weapon during the commission of a violent crime, and carrying a pistol onto premises or business selling alcoholic liquors, beers or wines for consumption. Legrand Carraway, Esq., Public Defender for Williamsburg County, represented Petitioner on the charges. A jury trial on the charges of murder, armed robbery, and possession of a weapon, began on June 21, 1999, before the Honorable James E. Brogdon. On June 23, 1999, Petitioner informed the court that he wished to enter a guilty plea. Judge Brogdon accepted the plea, and sentenced Petitioner to fifty-five (55) years for murder, thirty (30) years for armed robbery, and five (5) years on the weapons charge. The remaining charge was dismissed. Petitioner, through counsel, attempted to file a notice of appeal; however, the appeal was filed late and rejected by the Court of Appeals. The Court subsequently issued the remittitur on January 4, 2000.

On May 26, 2000, Petitioner filed an application for post-conviction relief ("PCR"). The Honorable Howard P. King found Petitioner had not voluntarily waived his right to appeal, but denied relief on all remaining grounds raised in the action. On April 8, 2004, this Court allowed the review of direct appeal issues, but denied relief.[2] *Lewis v. State*, Memorandum Opinion No. 2004-MO-016 (S.C.Sup.Ct. filed April 8, 2004). The Court issued the remittitur on April 26, 2004.

Petitioner filed a second PCR action on June 30, 2004, which was dismissed as untimely and successive on January 29, 2007.

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[2] Respondent notes that within the PCR appeal, Petitioner attempted to raise a *pro se* issue that the murder statute did not support his fifty-five (55) year sentence. The *pro se* filing was dated June 19, 2003.

On or about February 11, 2013, Petitioner filed a document titled "Motion to Modify and Correct Sentence Pursuant to S.C. RCP Rule 29(b), Rule 60 (b)1, Rule 60 (b) 3, Rule 60 (b) 4, and § Title 17-23-110" with the Williamsburg County Clerk of Court in his General Sessions Case Number 99-GS-45-18. (Motion to Dismiss, Attachment 1). On August 17, 2013, the State filed a Motion to Quash Defendant's Motion to Modify and Correct Sentence. (Motion to Dismiss, Attachment 2). The State argued, as its first position, that Petitioner's post-trial motion was untimely. (Motion to Dismiss, Attachment 2, p. 1). Petitioner filed a response on September 23, 2013. (Motion to Dismiss, Attachment 3). A hearing on the State's motion was held September 12, 2013. (Motion to Dismiss, Attachment 4). The Honorable W. Jeffrey Young heard the motion and issued, that same day, an Order dismissing the action as untimely: "Post-Trial motions following a trial in the Court of General Sessions generally must be filed within ten days of the imposition of the sentence. See Rule 29 (a) SCCRimP." (Motion to Dismiss, Attachment 5, p. 2). Judge Young, rejecting the assertion of "newly discovered evidence under any definition of the term," concluded: "The sentence in this matter was imposed on June 23, 1999. This action was filed on February 11, 2013. Accordingly, this Court finds that this action is untimely and therefore must be dismissed with prejudice." (Motion to Dismiss, Attachment 5, p. 3).

Petitioner was provided written notice of the entry of the Order on September 12, 2013. (See Motion to Dismiss, Attachment 6 and Attachment 9). On September 23, 2013, Petitioner filed a document, again in his General Sessions Case Number 99-GS-45-18, titled "Motion to Alter or Amend Pursuant to Rule 59(e)." (Motion to Dismiss,

Attachment 7). Judge Young denied the motion to reconsider his ruling. (Motion to Dismiss, Attachment 8).

On or about January 21, 2014, Petitioner served the Attorney General's Office with a notice of appeal and filed a copy of the notice with the Williamsburg Clerk of Court and with the Court of Appeals. (Motion to Dismiss, Attachments 9 and 10). Petitioner alleged within the notice that he "received written notice of entry of the order" denying the motion to reconsider on January 17, 2014. Id. By Certificate of Service notarized February 6, 2014, Petitioner served the solicitor's office with a copy of the notice of intent to appeal. (Motion to Dismiss, Attachment 10).

ARGUMENT

"Service of the notice of intent to appeal is a jurisdictional requirement, and the Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Conner v. City of Forest Acres*, 348 S.C. 454, 461, 560 S.E.2d 606, 609 (S.C. 2002) (*citing Mears v. Mears,* 287 S.C. 168, 337 S.E.2d 206 (1985)). See also *State v. Scott*, 351 S.C. 584, 587, 571 S.E.2d 700, 701 - 702 (S.C. 2002) (differentiating filing of notice and service of notice: "this Court has consistently held service of the notice of appeal is a jurisdictional requirement"); Rule 263, SCACR (b) ("The 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.") (emphasis added). "[I]t is well settled that in the absence of a notice of appeal having been given and timely served [an appellate court] has no jurisdiction over such an appeal." *White v. State*, 263 S.C. 110, 119, 208 S.E.2d 35, 39 - 40 (S.C. 1974). Consequently, untimely appeals should be

dismissed. The Court of Appeals simply dismissed the appeal based on ordinary application of well-established rules regarding timeliness. Petitioner fails to show a "special and important reason" to prompt review by this Court. See Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons."). The petition for a writ of certiorari should be denied.

Analysis

The timing for appeal differs for Common Pleas and General Sessions cases. At issue here is a case from General Sessions. An appeal from General Sessions after a guilty plea must be served "on all Respondents" within ten (10) days from sentencing. Rule 203 (b)(2), SCACR. However, "[w]hen a *timely* post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion." Id (emphasis added).

Rule 29(a), SCCrimP provides: "Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence." Again, like Rule 203, SCACR, Rule 29(a) allows that "[t]he time for appeal for all parties shall be stayed by a *timely* post-trial motion...." (emphasis added). Rule 29(b) also provides, in the alterative, that a motion for new trial based on after discovered evidence must be made within one-year of the discovery of such evidence. There is no mechanism under Rule 29 to allow for further reconsideration of an order denying the motion beyond the ten (10) day period.

Petitioner's notice of appeal is untimely. As a first matter, the "Rule 29" motion filed February 11, 2013, was not timely filed. Thus, by application of the plain language of the rule, the time for service of the notice of appeal was not stayed past the ten (10) days from sentencing. Judge Young found Rule 29, section (a) controlling as there was no "newly discovered" evidence at issue. (Attachment 5, p. 3). Consequently, the time to appeal ran from sentencing on June 23, 1999, and the February 11, 2013 filing was over thirteen years late.[3] The instant attempt to appeal from that filing is also not timely.[4]

Even so, as the Court of Appeals found – giving Petitioner the benefit of the doubt of the initial filing – the attempt to appeal from the post-trial motion was itself untimely. Petitioner admits having received written notice of the entry of the Order denying his motion on September 12, 2013. (See Motion to Dismiss, Attachment 6 and Attachment 9). Petitioner would have had up to and including Monday, September 23, 2013, in which to timely serve his notice of intent to appeal. Rule 263 (a), SCACR (providing where last day of time period falls on weekend or holiday, the time shall run to the next business day). He did not serve the notice until January 2014. (Motion to Dismiss, Attachment 10). Thus, the service was not timely.

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[3] The time in which Petitioner could have timely filed extended to Tuesday, July 6, 1999, when the weekend and state holiday are considered. Between Tuesday, July 6, 1999 and February 11, 2013, four thousand nine hundred and sixty-nine (4969) days lapsed. Thus, Petitioner is over thirteen years late.

[4] Respondent also notes that Petitioner concedes in the Certificate of Service notarized February 6, 2014, that he failed to serve the solicitor's office until February 2014. Even if the motion to reconsider was properly filed, and if Petitioner did not receive written notice of entry of the order until January 17, 2014 – in essence, using all the latest dates for the sake of argument – Petitioner still did not timely serve the notice on the solicitor within ten (10) days. Arguably, not "all respondents" were properly served.

The Court of Appeals also correctly found Petitioner cannot rely on the denial of the motion to reconsider as there is no authorized vehicle to seek reconsideration of the denial of a Rule 29 motion. Petitioner relies upon "Rule 59." (Motion to Dismiss, Attachment 7). There is, of course, no "Rule 59" in the Rules of Criminal Procedure. To the extent Petitioner would rely on the Rules of Civil Procedure, such reliance would be misplaced as those rules are limited to actions in Common Pleas. Rule 1, SCRCP ("These rules govern the procedure in all South Carolina court in all suites of a civil nature..."); Rule 81, SCRCP ("These rules, or any of them, shall apply to every trial court of civil jurisdiction..."); Rule 85, SCRCP(b) (recognizing distinction between civil rules and rules governing criminal cases); Rule 40, SCRCrimP ("These rules shall take effect on September 1, 1988. They govern all proceedings in criminal actions brought after they take effect..."). Simply, the Rules of Civil Procedure do not apply in this context. *State v. Wren*, 470 S.E.2d 111, 113 (S.C.App. 1996) ("Because this was a criminal case, the Rules of Civil Procedure were not applicable."). Consequently, the impermissible and successive action filed under the theory of Rule 59 of the Civil Rules should not be allowed to toll the time to seek appeal from a General Sessions ruling. See generally *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (S.C. 2004) (in civil context: "An appeal may be barred due to untimely service of the notice of appeal when a party-instead of serving a notice of appeal-files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment.").[5] Petitioner may not rely upon the date of his receipt of the second order as starting his time to appeal.

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[5] Respondent notes Judge Young found that Petitioner made "no new legal or

Further still, even if the reconsideration could be recognized, the failure to file within the expiration of the term of court in which the order denying the motion to modify was entered (in this case in September 2013) deprived the court of jurisdiction. *State v. Campbell*, 376 S.C. 212, 215-216, 656 S.E.2d 371, 373 (S.C. 2008) ("It is a long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expires") (*citing State v. Hinson*, 303 S.C. 92, 399 S.E.2d 422 (S.C. 1990)); *State v. Warren*, 392 S.C. 235, 236, 708 S.E.2d 234, 239 (S.C.Ct.App. 2011) ("The court does not retain authority to entertain a motion which is not made within ten days of sentencing."). Again, the notice of appeal was properly dismissed.[6]

Lastly, as to Petitioner's suggestion that this Court should relax the rules for filing, this would be contrary to the plain limitation in Rule 263(b), SCACR, specifically providing that the time for service of the notice may not be extended. It would also be

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factual arguments sufficient to compel" amendment. (Motion to Dismiss, Attachment 8).

[6] As the failure to timely file is dispositive, there is no need to reach the alternative basis for denying relief. *See State v. Warren,* 392 S.C. at 240, 708 S.E.2d at 236. However, Petitioner's allegation is wholly without merit. Petitioner essentially contends the murder statute at the time of the 1999 sentencing did not allow for a term of years greater than the thirty minimum. This Court has plainly indicated rejection of such a reading. *See State v. Morgan*, 367 S.C. 615, 619, 626 S.E.2d 888, 889 (S.C. 2006) ("We therefore look to § 16-3-20(A) for guidance on how a person convicted of murder and who is not subject to the death penalty should be sentenced. Section 16-3-20(A) provides that '[a] person who is convicted of ... murder must be punished by ... imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years.' Therefore, on remand, the trial court may receive additional evidence on the question of whether appellant is entitled to receive a sentence less than life imprisonment and decide on a sentence *that ranges from a mandatory minimum imprisonment term of thirty years to life imprisonment.*") (emphasis added). A similar allegation of error has also been rejected on application of basic statutory construction rules. See *Postell v. Bodison*, 2010 WL 4923108 (D.S.C. 2010) ("To read this code section as the Petitioner suggests, would read several words out of the phrase 'a mandatory minimum term of imprisonment for thirty years to life.'").

contrary to this Court's precedent recognizing and strictly enforcing the timeliness provisions. See generally *State v. Scott, supra.* The petition should be denied.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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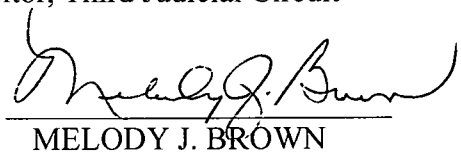
BY: 
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September 2, 2014.
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STATE OF SOUTH CAROLINA
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Casey Lewis, Petitioner.

Appellate Case No. 2014-001564

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing a copy of same in the United States mail, postage prepaid, addressed to him as follows:

Casey Lewis, #259254
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4460 Broad River Road
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This 2nd day of September, 2014.

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