

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County
Court of General Sessions

Honorable Paul Burch, Circuit Court Judge

Appellate Case No. 2014-002344

RECEIVED

NOV 25 2014

S.C. Supreme Court

THE STATE,

Respondent,

vs.

AKEEM ALIM-NAFI ABDULLAH-MALIK,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Petitioner asks whether the Court of Appeals of South Carolina erred in dismissing his appeal for failure to timely serve the notice of appeal.

STATEMENT OF THE CASE

It appears that on March 11, 2014, Appellant forwarded a *pro se* Notice of Appeal to the York County Clerk of Court. The Notice of Appeal appears to have been filed by the York County Clerk of Court on March 14, 2014. The cover letter for the Notice of Appeal states that Petitioner was sentenced by the Honorable Paul Burch on March 10, 2014. In the cover letter, Petitioner also states the he is unable to make copies to serve on the solicitor or the appropriate appellate court and asks the clerk to “copy o[r] transfer **to the S.C. Appellate Courts.**” (Emphasis added). The Notice of Appeal includes a statement that Petitioner was awaiting transfer to the South Carolina Department of Corrections and “moves judicial notice be served on the State of South Carolina . . . and the Appellate Court of S.C...” (See Notice of Appeal and letter). Petitioner’s certificate of service for the Notice of Appeal certifies that he served the clerk of the court of general sessions. (Certificate of Service for Notice of Appeal filed by the York County Clerk of Court on March 14, 2014).

On May 19, 2014, Petitioner moved the Court of Appeals to file his Notice of Appeal out of time. He also provided a Rule 2039d)(1)(B)(iv), SCACR, explanation for appealing a guilty plea and served Notice of Appeal on the State by mailing the Notice of Appeal to the prosecuting attorney.

By letter dated July 2, 2014, the South Carolina Court of Appeals asked Petitioner to provide the date the State was served with the Notice of Appeal. In his response to the Court of Appeals, Petitioner acknowledged that he did not serve the State with the March 11, 2014, Notice of Appeal in March but contended that forwarding the Notice of Appeal to the York County Clerk of Court was sufficient to serve the Notice of Appeal on the

State. (See Petitioner's "Response" dated July 10, 2014). By order filed September 11, 2014, the Court of Appeals dismissed Petitioner's appeal because Petitioner failed to timely serve the Notice of Appeal.

On September 21, 2014, Petitioner moved for rehearing of the order dismissing his appeal arguing the appellate court rules should be relaxed, that serving the York County Clerk of Court with a request that the clerk forward Notice of Appeal was sufficient service on the opposing party to his case and, that because the prosecutor's office and the office of the York County Clerk of Court are physically located in the same building (Moss Justice Center), forwarding the Notice of Appeal to the Clerk of Court at that address should suffice as service upon the prosecutor. The Court of Appeals denied Petitioner's request for rehearing by order filed October 24, 2014.

Petitioner now asks this Court to review the propriety of the dismissal of his appeal.

ARGUMENT

The Court of Appeals soundly dismissed Appellant pro se appeal for failing to timely serve notice of appeal on the State.

Petitioner asks this Court to review the order of the Court of Appeals dismissing his appeal for failure to timely serve the Notice of Appeal on the State. The petition begins with Petitioner's claim that he timely **filed** Notice of Appeal in the Court of General Sessions on March 11, 2014, from a March 10, 2014, sentence of the York County Court of General Sessions. He thereafter contends he has been subjected to multiple constitutional violations and that his guilty plea was not knowingly and voluntarily entered. He further complains that he was denied a pretrial competency hearing, reasonable bail, and a preliminary hearing. He further makes complaints about the South Carolina Department of Corrections, Judge Burch, and the solicitor's office. He seeks review of the order dismissing his appeal but also of these other matters that have not been properly presented in the petition for writ of certiorari as either not previously raised to the Court of Appeals or as being irrelevant to the order dismissing his appeal which is the only issue before this Court for review. As such, the issues and arguments should not be considered by this Court. Rule 242(d) (2), SCACR.

First, the matter at issue is not the timely **filing** of the Notice of Appeal as asserted by Petitioner in the Petition for Writ of Certiorari but, rather, whether Petitioner **served** Notice of Appeal upon Respondent within ten (10) days of the sentence so as to confer jurisdiction of the appeal. The State submits that Petitioner failed to accomplish timely service of the Notice of Appeal and that the appeal was properly dismissed by the Court of Appeals.

Pursuant to the long-standing rules of appellate procedure, a notice of appeal from a criminal conviction must be served upon “all respondents” within ten (10) days of imposition of the sentence. See Rules 203(b)(2); 262(b), SCACR. The timely service is a jurisdictional requirement and the appellate court has no authority to extend or expand the time within which the notice of appeal must be served. State v. Hinson, 303 S.C. 92, 399 S.E.2d 422 (1990); Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985); Miller v. State, 269 S.C. 113, 236 S.E.2d 422 (1977); see also USAA Property and Cas. Ins. Col v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008)(stating that the requirement of notice of appeal within time frame specified is jurisdictional and if a party misses the deadline, the appellate court has no authority or discretion to rescue the delinquent party by extending or ignoring the time for service of the notice of appeal). Also, the State may not consent to appellate jurisdiction because the parties may not consent to jurisdiction if it is not properly acquired. State v. Tatnall, 350 S.C. 135, 564 S.E.2d 377 (Ct.App. 2002).

According to the documents Petitioner filed with the Court of Appeals and as outlined in Respondent’s Statement of the Case herein, Petitioner did not serve Respondent with the Notice of Appeal until May 19, 2014. The Notice of Appeal should have been served on Respondent on or before March 20, 2014 following imposition of the sentence on March 10, 2014. The failure to serve written notice of appeal upon Respondent within ten (10) days after imposition of the sentence deprives the appellate court of jurisdiction over the appeal and must result in dismissal of the appeal, regardless of the reasons for the failure to serve the notice.

To the extent Petitioner relies upon his general request that a copy of the notice of appeal be made and forwarded to the appellate court, Respondent submits that this does not constitute service on Respondent. First, Petitioner did not make a request or make any

statement indicating his intent to serve the Respondent in this case but, instead, asked the notice of appeal to be forwarded to the appellate court. Second, even had the request been made, delivering a notice of appeal to a third party does not suffice as service upon Respondent. This Court has specifically stated that a notice of appeal given to a third party for mailing does not amount to service on the addressee until the notice is deposited in the United States mail. See Southbridge Properties, Inc. v. Jones, 292S.C. 198, 355 S.E.2d 535 (1987) (stating that merely giving notice of appeal to a third party for mailing does not amount to service upon the addressee because when service by mail is permitted, it is complete when the document is deposited in the United State Postal Service and is properly addressed with sufficient postage).

Moreover, Petitioner's contention that filing his notice of appeal with the York County Clerk of Court was sufficient to serve Respondent pursuant to Rule 5(b)(1), SCRCF, is without merit. First, the rule applies to civil and not criminal cases. Second, the rule is inapplicable because it allows for service by leaving the document to be served with the clerk of court but only if no address of the party or his counsel is known. Petitioner never indicated that his act of filing the notice of appeal was intended as service upon Respondent on the ground Respondent's address was unknown. Nevertheless, Respondent's address was clearly known to Petitioner as conceded in the documents Petitioner filed with the Court of Appeals in which he argued the address for the York County Clerk of Court and the solicitor were the same. To the extent Petitioner relies on Rule 262, SCACR, to argue Respondent was served by filing the notice of appeal with the clerk of court, the appellate court rule allows for service of documents by leaving documents with the clerk if no address for Respondent is known. Petitioner did not leave the notice of appeal with the Clerk of the Court of Appeals for Respondent and

the documents offered and arguments advanced to the Court of Appeals reveal Petitioner knew Respondent's address but simply attempted to require the York Clerk of Court to fulfill his obligation to serve Respondent. He also never indicated that his act of filing the notice of appeal was intended as service upon Respondent on the ground Respondent's address was unknown. Additionally, the notice was not filed with the Court of Appeals within ten days of imposition of the sentence so any attempt to use the Court of Appeals receipt of the notice of appeal is unavailing as timely service on Respondent.

Respondent submits that the Court of Appeals applied the correct legal precedent governing the issue and properly dismissed the appeal. The Petition for Writ of Certiorari must be denied.

CONCLUSION

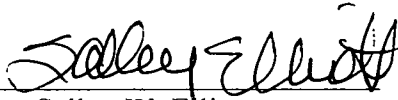
The South Carolina Court of Appeals applied the correct law, properly resolved the question presented, and that resolution is supported by the record. This Court should decline to exercise its discretionary review.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: 
Salley W. Elliott
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ATTORNEYS FOR RESPONDENT

November 25, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Court of General Sessions

Honorable Paul Burch, Circuit Court Judge

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THE STATE,

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vs.

AKEEM ALIM-NAFI ABDULLAH-MALIK,

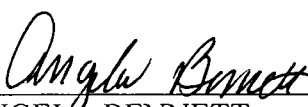
Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to him at Akeem Alim-Nafi Abdullah-Malik, #359150, Kershaw Correctional Inst, 4848 Goldmine Highway, Kershaw, South Carolina 29069

I further certify that all parties required by Rule to be served have been served.

This 25th day of November, 2014.



ANGELA BENNETT
Administrative Assistant

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ALAN WILSON
ATTORNEY GENERAL

November 25, 2014

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S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Akeem Alim-Nafi Abdullah-Malik
Appellate Case N: 2014-002344

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: Akeem Alim-Nafi Abdullah-Malik, #359150
Ms. Trisha Allen