STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-001853

THE STATE, ...RESPONDENT

v.

DONNA BOYD,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

May this Court consider Appellant's argument that the circuit court abused its discretion when it dismissed her appeal for failure to prosecute where the issue was not raised to or ruled upon by the circuit court; nevertheless, the circuit court properly dismissed Appellant's appeal from magistrate's court when Appellant had notice of the hearing and chose to not to appear to prosecute the appeal she initiated? (Appellant's Issues I and II)

STATEMENT OF THE CASE

Appellant was charged with filing a false police report in Greenville County. She proceeded to trial *pro se* before the Magistrate Judge Dean E. Ford, and a jury on June 25, 2014. (R. ___[Magistrate's Return, p. 1]). She was convicted as charged and sentenced by Judge Ford. (R. ____[Magistrate's Return p. 1]; [Appellant's Notice of Appeal to the Court of Common Pleas]). Appellant filed a notice of appeal to the Greenville County Court of Common Pleas on July 7, 2014. (R. ___[Appellant's Notice of Appeal to the Court of Common Pleas]). A hearing regarding Appellant's appeal was convened on August 12, 2014. (R. ___[August 12, 2014 Transcript of hearing]). On August 14, 2014, the Honorable D. Garrison Hill issued an order dismissing Appellant's appeal for failure to prosecute. (R. ___[August 14, 2014 Order of Judge Hill]). Appellant filed and served notice of appeal to this Court from Judge Hill's order of August 14, 2014, and submitted a brief for this Court's consideration. This Brief of Respondent follows.

ARGUMENT

May this Court consider Appellant's argument that the circuit court abused its discretion when it dismissed her appeal for failure to prosecute where the issue was not raised to or ruled upon by the circuit court; nevertheless, the circuit court properly dismissed Appellant's appeal from magistrate's court when Appellant had notice of the hearing and chose to not to appear to prosecute the appeal she initiated. (Appellant's Issues I and II)

The record before this Court reflects that on July 7, 2014, Appellant appealed her June 25, 2014, conviction in magistrate's court for filing a false police report and set forth the grounds for appeal as required. (R.__[July 7, 2014 Notice of Appeal]). The magistrate prepared and filed his return on July 23, 2014. (R. ___[Magistrate's Return]). A hearing regarding the appeal was scheduled by the clerk of court to be heard in the Greenville County Court of Common Pleas on August 12, 2014. See S.C. Code Ann. Section 18-3-60 (Supp. 2013) (stating that upon receipt of the case, clerk of court shall place it upon the motion calendar of the court of common pleas); see also Rules 74 & 75, SCRCP. Appellant does not dispute that she received notice of the hearing or of her obligation to appear and prosecute the matter she initiated.

The hearing regarding Appellant's appeal in circuit court was convened on the date for which Appellant received notice but Appellant was not present. (R. __ [August 12, 2014 Tr. p. 3]). The bailiff called for Appellant three times in the hallway and received no response. (R. __[August 12, 2014 Tr. p. 3]). Counsel for Respondent was present and ready to proceed. (R.__[August 12, 2014 Tr. p. 3]). At the hearing, the circuit court judge made a factual finding that Appellant failed to appear to proceed with the appeal she initiated and dismissed the appeal for Appellant's failure to prosecute. (R. __[August 12, 2014 Tr. pp. 3 – 4]). Appellant received written notice of entry of the judgment of dismissal for failure to prosecute on August 20, 2014. No post-hearing

motions or requests to reconsider the dismissal were made. (R. __[Notice of Appeal to Court of Appeals]).

Appellant argues that the circuit court erred in dismissing her circuit court appeal because the dismissal was unwarranted and too harsh because the facts and circumstances do not support unreasonable neglect by Appellant in proceeding with her appeal. She states that unreasonable neglect is negated because she timely appealed the conviction in magistrate's court to the circuit court and asked the magistrate for the transcript of her trial. She also contends that she made telephone calls to the court coordinator and was under the impression the circuit court judge granted her request to have the charge for which she was convicted dismissed without convening the hearing scheduled for August 12th. She also argues the merits of the issues she raised to the magistrate as well as matters outside of the record and not properly presented to any court, including complaints about the magistrate's return, lack of trial transcript, timing of the circuit court hearing, lack of videotape evidence, the timing of discovery disclosure, communication with personnel for another circuit court judge, and complaints unrelated to the matter before this Court.

First Respondent submits that Appellant failed to properly preserve the arguments she makes for consideration by this Court on appeal. None of the arguments, including the alleged improper dismissal of the appeal, was presented to or ruled upon by the circuit court by presentation at the hearing or in a motion to alter or amend or reconsider pursuant to Rule 59, SCRCP, after dismissal of the appeal. Appellant never argued to the circuit court that dismissal of her appeal was improper because the sanction was too harsh, that she did not neglect her obligation to pursue the appeal, or that she was under

the impression that the court granted her request to dismiss the charge without a hearing. The circuit court has not ruled on these arguments. Because the arguments presented to this Court on appeal were not properly raised to and ruled upon by the circuit court, the arguments and issues may not be considered by this Court. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (stating that the argument advanced on appeal was not raised to and ruled on below and therefore was not preserved for appellate review); State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (2001) (same); State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (same); see also McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (stating that an objection must be sufficiently specific to present the precise nature of the alleged error so that it can be reasonably understood by the lower court and the same ground argued on appeal must have been argued below). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide (the appellate court) with a platform for meaningful appellate review." Queen's Gate II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E/.2d 902, 919 (Ct. App. 2006); see also I'On v. town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (Ct. App. 2004)(stating that imposition of preservation requirement is intended to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments); State v. Sosebee, 284 S.C. 411, 413, 326 S.E.2d 654, 655 (1985) (finding "[n]o objection was made to either of these alleged errors nor was a motion for a new trial made such that the judge might have an opportunity to correct a mistake if there be such."). Because the lower court was not provided with the opportunity to consider and rule upon the relevant arguments, law and facts now advanced by Appellant in support of her claim the circuit

court abused its discretion in dismissing her appeal, appellate review is precluded. This Court must decline to consider the arguments because Appellant failed to properly preserve them for review.

Nevertheless and assuming *arguendo* the issue respecting dismissal of the appeal was preserved for review by this Court, the circuit court correctly exercised its discretion to dismiss Appellant's circuit court appeal.

Rule 40 (h), SCRCP, provides that "the Chief Judge for Administrative Purposes, in cooperation with the clerk, is responsible for setting all matters on the Nonjury Docket for disposition." Rule 41 (b), SCRCP, addresses involuntary dismissal and provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him." Dismissal for failure to prosecute stems from Rule 41 as well as the inherent power of the court to dismiss actions *sua sponte* for a party's failure to prosecute with due diligence. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1997); State v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970). Broad discretion is provided to our judges in the scheduling and calling of cases for disposition which must not be reversed on appeal absent manifest injustice. Small v. Mungo, 254 S.C. at 442-43; 175 S.E.2d at 804. This inherent authority to dismiss based upon the failure to prosecute is necessary to enable the courts to control and manage the docket. Don Shevey & Spires, Inc. v. American Motors Realty Corp., 279 S.C. at 60, 301 S.E.2d at 758. "Whether an action should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and his decision will not be disturbed except upon a clear showing of an abuse of discretion." McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006),

citing Small v. Mungo, 254 S.C. at 442, 175 S.E.2d at 804; see also Bond v. Corbin, 68 S.C. 294, 47 S.E.2d 374 (1904). It is the duty of the appellant to prosecute his or her appeal with due diligence and to dispose of it promptly. State v. Adams, 244 S.C. 323, 137 S.E.2d 100 (1964). Dismissal for failure to prosecute is a fact-intensive issue. McComas v. Ross, 368 S.C. at 64, 626 S.E.2d at 905. "'Parties in the criminal and civil courts should be ready to try their cases promptly.' Every man is held to know the law." Bond v. Corbin, 68 S.C. 294, 294, 47 S.E. 374, 374 (1904), citing State v. Box, 66 S.C. 402, 44 S.E. 969 (1903).

On appeal, Appellant makes argument respecting the substance of the issues she presented to the magistrate and only vaguely addresses her absence from the hearing convened for her appeal from magistrate's court. She relies upon an email she forwarded to the circuit court judge as support for believing her "charge" was being dismissed without a hearing or the opportunity for Respondent to participate. The August 12, 2014 emails received by the prosecutor from Appellant at 2:50 p.m. and 3:00 p.m. reveal that, the day before the hearing, Appellant engaged in an *ex parte* email communication with the circuit court judge to request dismissal of her charge without a hearing on the ground the magistrate could not produce a copy of the trial transcript due to equipment malfunction. (R. ___[August 12, 2014 email sent 2:49 p.m.]). The emails also reflect that the circuit court directed Appellant to re-send her email request to the judge and to the prosecutor and provided Appellant with the prosecutor's contact information. (R.__[August 12, 2014 email sent at 3:00 p.m.]). Appellant forwarded the email to the prosecutor but only after the hearing was convened on August 12 as scheduled. The appeal had already been dismissed for Appellant's failure to appear. The emails establish

that Appellant did not want to appear for the hearing to resolve her appeal because she was "preparing" for an upcoming semester of school and was "using (her) very limited time to tend to other personal matters." (R. __ [Email from Appellant to Mitchell Byrd on August 11, 2014 at 2:49 p.m.]). Nothing in the judge's response indicated the judge was considering or had granted Appellant's request to dismiss Appellant's "charge" without a hearing or the ability of the prosecutor to participate but clearly provided direction to Appellant as to the proper procedure for communication. Appellant simply failed to follow the circuit court's instruction.

Because there is no evidence justifying Appellant's absence from the hearing, the circuit court's dismissal of Appellant's appeal for failure to prosecute was proper. The only evidence before the circuit court was that Appellant inexplicably failed to appear for the hearing. She did so after being directed to make a request about her appearance simultaneously to the prosecutor and the circuit court judge so that the request could be considered. Appellant ignored the processes of the court. Moreover, Appellant indicated a clear intention not to appear because she chose to take care of other unspecified personal matters rather than appear. The authority of the circuit court to dismiss the case for failure to prosecute is necessary to allow the court to provide for the orderly litigation and disposition of cases. Appellant's willful failure to appear when required was sufficient to allow for dismissal of her appeal. See Joyner, 356 S.C. 460, 589 S.E.2d 762. The lack of unreasonable neglect or harshness of the sanction is not properly before this Court for consideration because the arguments were not presented to or ruled upon by the circuit court. Nevertheless, Respondent submits that the circuit court need not consider Appellant's unreasonable neglect argument also because she relies on non-binding

federal cases and on decisions issued prior to the adoption of the Rules of Civil Procedure and decided pursuant to a repealed code section which required a finding of unreasonable neglect. Rule 41 (b), SCRCP, does not include the requirement of unreasonable neglect. Appellant's mere failure to appear when her case was called was sufficient to support the dismissal. See State v. Adams, 244 S.C. 323, 137 S.E.2d 100 (1964) ("It was the duty of Respondent as he was the moving party in the appeal from Magistrate's Court to prosecute it with due diligence and have it promptly disposed of.").

Nevertheless, unreasonable neglect is established by the record. Appellant clearly engaged in unreasonable neglect by choosing to deliberately absent herself from the hearing on the appeal she initiated. She intentionally and improperly attempted to usurp the court's process and procedure. She should not be permitted to complain about that which her own conduct created. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) (stating a party cannot complain of court error created by his own conduct); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1986) (same).

As to the other arguments presented respecting the rulings and issues presented to the magistrate and other matters outside of the record, Respondent submits that the arguments may not be considered by this Court because Appellant failed to properly present them and receive a ruling from the circuit court regarding the matters. See State v. Browning, 70 S.C. 466, 50 S.E. 185 (1905 (stating that a question not raised in circuit court on appeal from magistrate's court may not be reviewed on appeal); Indigo Associates v. Ryan Investment, 314 S.C. 519, 431 S.E.2d 271 (Ct. App. 1993) ("Nonetheless, the circuit court is restricted regarding which issues it may entertain in determining whether a judgment should be affirmed or reversed, either in whole or in

part. The circuit court, acting as an appellate court in a case heard by the magistrate, cannot consider questions that have not been presented to the magistrate."). She also supports her arguments with facts not properly before this Court because they were not presented or established below. It is Appellant's burden to present a sufficient record to this Court to establish the alleged error in dismissal of her appeal by the circuit court as the only matter ruled upon below. See McElveen v. McElveen, 332 S.C. 583, 506 S.E.2d 1 (Ct. App. 1998). This Court may not consider facts that do not properly appear in the record. Windham v. Honeycutt, 290 S.C. 60, 348 S.E.2d 185 (Ct. App. 1986).

The circuit court properly exercised its discretion to dismiss Appellant's appeal and the order should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment of the lower court be affirmed.

Respectfully submitted,

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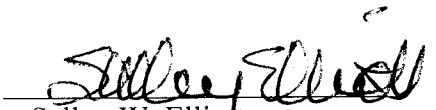
BY: 
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Columbia, South Carolina
January 28, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-001853

THE STATE, ...RESPONDENT

v.

DONNA BOYD,.....APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated January 28, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Donna Boyd
P.O. Box 1168
Mauldin, South Carolina 29662

I further certified that all parties required by Rule to be served have been served. This 28th day of January, 2015.

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ALAN WILSON
ATTORNEY GENERAL

January 28, 2015

Donna Boyd
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Re: The State v. Donna Boyd
Appellate Case No. 2014-001853

Dear Ms. Boyd:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

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

SWE/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services