

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUN 30 2015

Appeal from Spartanburg County
The Honorable J. Derham Cole, Resident Judge

SC Court of Appeals

Appellate Case No: 2015-001240

THE STATE,

Respondent,

vs.

JOHN WILLIE MACK,

Appellant.

MOTION TO DISMISS APPEAL

Respondent, through its undersigned counsel, would respectfully show unto this Court as follows:

I.

Appellant proceeded to a jury trial on February 22 - 23, 2011, with the Honorable J. Derham Cole presiding. Appellant was found guilty of first degree burglary and grand larceny and was sentenced to life without parole for first degree burglary based upon a prior first degree burglary conviction. (See Order denying DNA testing, p. 2). Appellant appealed, and this Court affirmed the convictions and sentence. State v. Mack, Op. No. 2013-UP-161(S.C.Ct.App. filed April 17, 2013).

II.

Appellant filed a *pro se* Application for Post-Conviction DNA Testing in the Spartanburg County Court of General Sessions under the original indictment numbers for the burglary and grand larceny convictions pursuant to S.C. Code Ann. § 17-28-10, et seq. (2014). The general sessions' post-conviction DNA application was heard by the Honorable J. Derham Cole on October 31, 2014. Appellant was represented by Leah Moody, Esquire, and the State was represented by Assistant Solicitor Anthony Leibert. The application was denied by order dated May 18, 2015, and filed on May 19, 2015.

Appellant also initiated a post-conviction relief action in the Spartanburg County Court of Common Pleas which was pending at the time of the Post-Conviction DNA Testing application was heard and the order resolving the DNA Testing application was issued. (See Order denying DNA testing, p. 3).

III.

Counsel for Appellant indicates that she received written notice of entry of the order denying Appellant's Post-Conviction DNA Testing application on May 20, 2015. Appellant served notice of appeal from that order on June 3, 2015.

IV.

Post-Conviction DNA Testing applications are filed and heard in the court of general sessions under the original indictment numbers for the criminal case. Pursuant to our appellate court rules, notice of appeal from an order concerning a Post-Conviction DNA Testing application must be served within ten (10) days after receipt of written notice of entry of the order the appealing party wishes to appeal. See Rules 247(b) and 262 (b), SCACR; see also Rule

203(b) (2), SCACR; S.C. Code Ann. § 17-28-40 (2014). The timely service of notice of appeal is a jurisdictional requirement and the time within which the notice of appeal must be served may not be extended or expanded. 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). Our appellate courts have also determined that the State may not consent to appellate jurisdiction if the appealing party fails to serve the notice of appeal in a timely manner because parties may not consent to jurisdiction if it is not properly acquired. Tatnall v. Gardner, 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002); Hunter v. Boyd, 203 S.C. 518, 525, 28 S.E.2d 412, 416 (1943).

V.

Appellant's notice of appeal should have been served upon Respondent on or before June 1, 2015. The notice of appeal was not served until June 3, 2015. The failure of Appellant to timely serve written notice of appeal upon Respondent deprives this Court of jurisdiction over this appeal and entitles Respondent to a dismissal of the appeal, regardless of the reasons for the failure to timely serve the notice.

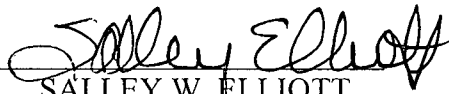
WHEREFORE, Respondent respectfully prays that this Court dismiss the appeal; that the time limits for this appeal be held in abeyance until this Court's disposition of this motion; and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

BARRY BARNETTE
Solicitor, Seventh Judicial Circuit

BY: 
SALLEY W. ELLIOTT
S.C. Bar No: 1871

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 30, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Presiding Judge

RECEIVED

JUN 30 2015

Appellate Case No: 2015-001240

SC Court of Appeals

THE STATE,

Respondent,

vs.

JOHN WILLE MACK,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Motion to Dismiss Appeal on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

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

This 30th day of June, 2015.



ANGELA BENNETT
Administrative Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



RECEIVED

JUN 30 2015

SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

June 30, 2015

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: The State v. John Willie Mack
Appellate Case No: 2015-001240

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Motion to Dismiss Appeal 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: Robert M. Dudek, Esquire
Ms. Trisha Allen