

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM SUMTER COUNTY
Court of General Sessions

JAN 22 2016

The Honorable Maite Murphy, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2015-002437

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WILBERT J. FRANKLIN,

APPELLANT.

**MOTION TO DISMISS APPEAL FOR
FAILURE TO CORRECT DEFICIENCIES
AND LACK OF JURISDICTION**

Respondent (“the State”), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

Appellant was indicted in Sumter County for armed robbery (2015-GS-43-0714) and he was later tried before the Honorable Maite Murphy and a jury. Appellant was represented by Stephen Russell Story, Jr., Esquire. The jury found Appellant guilty of the lesser included offense of common law robbery and on November 12, 2015, Judge Murphy sentenced him to fifteen years’ imprisonment.

II.

Appellant, acting pro se, subsequently submitted documents to this Court including a “Notice of Appeal,” a “Certificate of Service,” a “Motion for Reconsideration Pursuant to SCRCrimp. 29,” and an “Affidavit” in support of his motion. The documents were dated November 13, 2015, and were received by the Court on November 23, 2015. On December 1, 2015, the Court wrote trial counsel Story to advise it had received his client’s Notice of Appeal. The Court also wrote a second letter advising Story of deficiencies in the appeal which “must be corrected within ten (10) days of the date” of the letter. Specifically, the Court noted: (1) the caption/title does not comply with Rule 267(a), SCACR, because it fails to list all parties involved on the notice of appeal and (2) the notice of appeal was not accompanied by a copy of the order and/or sentencing sheets challenged on appeal.

III.

In a letter dated December 21, 2015, this Court wrote directly to Appellant, with a copy to trial counsel Story, acknowledging receipt of an “amended notice of appeal” but returning the document to Appellant because he is represented by counsel and there is no right to hybrid representation that is partially pro se and partially by counsel.

IV.

Pursuant to Rule 203(b)(2), SCACR, an appellant must serve a notice of appeal on all respondents within ten days after the sentence is imposed in a criminal case. The time period for filing a notice of appeal cannot be extended or shortened by an appellate court. See Rule 263(b), SCACR (“The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rule 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof.”); see also Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206,

207 (1985) (“Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served.”).

V.

In Appellant’s case, there was no proper notice of appeal within ten days after the conviction. Appellant was still represented by counsel at the time he submitted the November 13, 2015, documents to this Court. Under Miller, these documents were improper *pro se* filings that should not have been - and properly were not – accepted by the Court; they are a nullity. Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010); see also Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (“There is no constitutional right to hybrid representation either at trial or on appeal.”); Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (ordering the Clerk of Court to return a substantive *pro se* document filed while the petitioner was represented by counsel). Therefore, the documents submitted by Appellant could not operate as a notice of appeal which would comply with the time period for serving and filing of the appeal.

VI.

Since no proper notice of appeal was served and filed within ten days of Appellant’s conviction, this Court has no jurisdiction over Appellant’s case and must dismiss his appeal. See Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) (“The service of a notice of appeal is a **jurisdictional requirement**, and the time for service may not be extended by this Court.”); Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 24 S.E.2d 416, 418 (Ct. App. 1999) (in a civil case, pointing out that Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of jurisdiction “and results in dismissal of

the appeal”); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (“[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.”).


WHEREFORE, the State respectfully requests that this Court dismiss Appellant’s appeal for lack of jurisdiction.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Interim Senior Assistant Deputy Attorney General

BY:



J. Benjamin Aplin
S.C. Bar #8729

Office of the Attorney General
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ATTORNEYS FOR RESPONDENT

January 22, 2016

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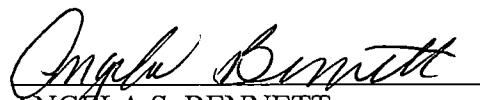
WILBERT J. FRANKLIN,

APPELLANT.

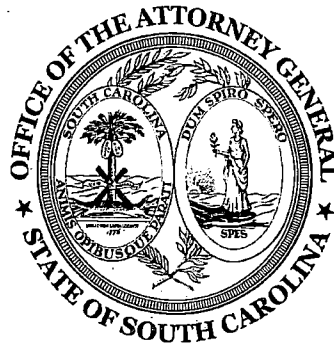
PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within Motion to Dismiss on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to Stephen Russell Story, Jr., Esquire, Sumter County Courthouse, 215 N. Harvin St. Rm #151, Sumter, SC 29150 and Robert M. Dudek, Esquire, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 22nd day of January, 2016.


ANGELA S. BENNETT
Legal Assistant

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(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

January 22, 2016

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JAN 22 2016
SC Court of Appeals

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

RE: State v. Wilbert J. Franklin – Appellate Case No. 2015-002437

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Motion to Dismiss, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

J. Benjamin Aplin
Interim Senior Assistant Deputy Attorney General
Bar Number 8729

JBA/ab
Enclosures

cc: Stephen Russell Story, Esquire
Robert M. Dudek, Esquire
Victim Services