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.

FINAL 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 and arguments advanced on appeal were 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?

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. p.4 [Magistrate's Return, p. 1]). She was convicted as charged and sentenced by Judge Ford. (R.p.4 [Magistrate's Return p. 1]; (R. p.2-3 [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. p.2-3 [Appellant's Notice of Appeal to the Court of Common Pleas]). A hearing regarding Appellant's appeal was convened on August 12, 2014. (R. p. 7-10 [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. p.1 [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 and arguments advanced on appeal were 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.

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 she was required to do. (R. p. 2-3 [July 7, 2014 Notice of Appeal]); See S.C. Code Ann. § 18-3-30. The magistrate prepared and filed his return on July 23, 2014. (R. p. 4-6 [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 at 10:00 a.m. on August 12, 2014. See S.C. Code Ann. Section 18-3-60 (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 appeal she initiated.

The hearing regarding Appellant's appeal in circuit court was convened on the date for which Appellant received notice but Appellant failed to appear. (R. p. 9). The bailiff called for Appellant three times in the hallway and received no response. (R. p. 9). Counsel for Respondent was present and ready to proceed. (R. p. 9). 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. p. 9 – 10). 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 or to reopen the matter were made. (R. p.2-3 [Notice of Appeal to Court of Appeals]).

Appellant argues that the circuit court erred in dismissing her circuit court appeal contending that the sanction of dismissal was unwarranted and too harsh because the facts and circumstances do not support unreasonable neglect by Appellant in proceeding with the appeal she initiated. She states there is no evidence she abandoned the appeal or neglected in moving it along, that the circuit court failed to apply a proper analysis, and should have imposed a less severe sanction.

First, Respondent submits that Appellant failed to properly preserve the arguments she makes for consideration by this Court on appeal. The arguments in support of the issue Appellant advances, including the alleged improper dismissal of the appeal, were never presented to the circuit court by objection or motion to restore, reconsider, or to alter or amend. 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, that the prosecutor was not prejudiced, or that she was under the impression that the court granted her request to dismiss the conviction 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. 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); 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 circuit court was not provided with the opportunity to consider and rule upon the arguments, law and facts now advanced by Appellant in support of her claim that the circuit court abused its discretion in dismissing her appeal, appellate review of the issue and arguments is precluded. See City of Columbia v. Ervin, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998)(stating the Court of Appeals should not have addressed the merits of an issue because the issue was not raised by exception to the intermediate appellate court and could not be raised for the first time in the Supreme Court or Court of Appeals). This Court must decline to consider the issue and arguments advanced on appeal because they were not properly preserved by

first presenting the claims to and obtaining a ruling from the circuit court. It is axiomatic that the issue and arguments offered by Appellant may not be presented for the first time to this Court on appeal. The circuit court order must be affirmed.

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

An appeal from a magistrate's court conviction is made to the circuit court. S.C. Code Ann. § 18-3-10. The circuit court acts as an appellate court and reviews issues of preserved error raised by a proper exception. See S.C. Code Ann. §§ 18-3-10 & 18-3-70; State v. Bailey, 368 S.C. 39, 626 S.E.2d 898 (Ct. App. 2006). On appellate review of the circuit court's decisions on appeal from cases arising in magistrate's court, this Court may only review for errors of law. State v. Branham, 392 S.C. 225, 708 S.E.2d 806 (2011); State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct.App. 2001).

When a notice of appeal in a criminal case from magistrate's court is initiated, S.C. Code Ann. § 18-3-60 requires the clerk of court to place the appeal on the motion calendar of the court of common pleas. 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 74, SCRCP, provides that priority must be given in the circuit court to the hearing and disposition of such appeals.

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); see also Small v. Mungo, 245 S.C. 438, 175 S.E.2d 802 (1970) (stating that the arrangement of the roster and times set are binding on litigants and the trial court has authority to enforce compliance. It is contemplated that the rule will be applied reasonably so as to accomplish the purpose of expediting the disposition of cases).

Broad discretion is provided to our judges in the scheduling and calling of cases for disposition. 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. 58, 60, 301 S.E.2d 757, 758 (1983). "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); see also Joyner v. Glimcher Properties, 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002)(stating circuit court properly dismissed appeal for appellant's failure to prosecute); Charleston Gypsum Dealers & Supply, Inc., v. Miller Development Corp., 312 S.C. 343, 440 S.E.2d 386 (Ct. App. 1994) (stating appeal pending before the Court of Appeals would be dismissed for the appellant's failure to appear for oral argument and no attempt

to contact the Court about appellant's failure to appear before the argument); Bank of Marion v. Everett et al., 40 S.C. 549, 18 S.E. 891 (1893) (stating appeal was properly dismissed when appellant failed to appear at the call of the case). 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).

An appellant's failure to appear and proceed with his or her appeal is an approved ground for dismissal of an appeal. State v. Adams, at 323, 137 S.E.2d at 100; see also Joyner v. Glimcher Properties, 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002)(stating circuit court properly dismissed appeal for appellant's failure to prosecute); Charleston Gypsum Dealers & Supply, Inc., v. Miller Development Corp., 312 S.C. 343, 440 S.E.2d 386 (Ct. App. 1994) (stating appeal pending before the Court of Appeals would be dismissed for the appellant's failure to appear for oral argument and no attempt to contact the Court about appellant's failure to appear before the argument); Bank of Marion v. Everett et al., 40 S.C. 549, 18 S.E. 891 (1893) (stating appeal was properly dismissed when appellant failed to appear at the call of the case); Varn v. Williams, 30 S.C. 608, 10 S.E. 390 (1888).

On appeal, Appellant relies upon an email she forwarded to the circuit court judge as justification for her failure to appear. She claims that she asked the circuit court to dismiss her conviction without her appearance and blames the circuit court for her absence because the court did not tell her that she must attend the hearing. However, the record reflects that Appellant was provided notice that her appeal would be heard at

10:00 a.m. on August 12, 2014. The August 12, 2014, emails received by the prosecutor from Appellant **after the hearing** 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 to advise that she would not appear for the hearing because she was planned to use her time tending to other matters and requested dismissal of her charge without a hearing or notice to and participation by the State on the grounds the magistrate could not produce a copy of the trial transcript due to equipment malfunction, that other evidence was missing at trial, the prosecution lacked probable cause, and she was the subject of harassment. (R. p.13-14 [August 12, 2014 email sent 2:49 p.m.]). The record also reflects that the circuit court received the *ex parte* email communication requesting summary dismissal of the magistrate's court conviction on August 11, 2014 and simply directed Appellant to send her email again to both the judge and the prosecutor. The circuit court provided Appellant with the prosecutor's contact information. (R. p.15-16 [August 12, 2014 email sent at 3:00 p.m.]). Appellant forwarded the email to the prosecutor but waited to do so until after the hearing was convened on August 12 as scheduled and after Appellant's appeal had been dismissed for Appellant's failure to prosecute. Appellant's 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. p.13-14 [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 that Appellant was permitted to absent herself from the hearing. The circuit court's response merely directed Appellant as to the proper

procedure for communication with the court and opposing counsel. Appellant failed to timely 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 a proper exercise of discretion. 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 so that the request could be considered. Appellant ignored the processes of the court. Moreover, even if the *ex parte* email to the circuit court could be considered, Appellant indicated a clear intention not to appear because she chose to take care of other unspecified personal matters rather than appear. Appellant's communication did not provide a compelling reason for her intentional failure to appear and indifference to the appeal she initiated. Appellant never requested a continuance or a less severe sanction. Instead, Appellant made it clear that she would not attend the hearing because it was not convenient for her to do so. 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. This appeal does not present a situation where a plaintiff failed to comply with discovery or other rules for processing a multifaceted civil action through pretrial matters and litigation. Appellant intentionally failed to appear when she was required to present her case to the court to determine the ultimate issue respecting the propriety of her conviction. See Joyner, 356 S.C. 460, 589 S.E.2d 762.

While the lack of unreasonable neglect and harshness of the sanction were not properly preserved for appellate review, Respondent submits that this Court need not

consider Appellant's arguments for the additional reason that Appellant 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."). This case presents a situation where the appealing party attempted to manipulate the court's schedule to suit her personal agenda.

Nevertheless and as set forth herein, unreasonable neglect is established by the record. Appellant clearly engaged in unreasonable neglect by failing to timely follow the instructions of the circuit court about her communication and by deliberately electing not to appear at the hearing on the appeal she initiated. She intentionally and improperly attempted to usurp the court's process and procedure. It is Appellant's burden to prosecute her cause and she deliberately failed to do so. Don Shevey & Spires v. American Motors Realty Corp., 279 S.C. at 60, 301 S.E.2d at 758. Appellant's unreasonable neglect may be inferred. Small v. Mungo, at 443, 175 S.E.2d at 804. 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). Moreover, reversal of the order of dismissal would create precedent allowing litigants to highjack our circuit court's ability to schedule and dispose of appeals.

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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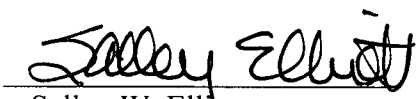
BY: 
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Columbia, South Carolina
September 1, 2015

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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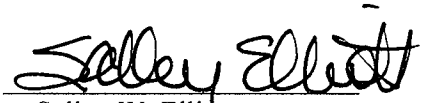
BY: 
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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated September 1, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certified that all parties required by Rule to be served have been served. This 1st day of September, 2015.

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