

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2015-002614

RECEIVED
MAY 17 2016
SC Court of Appeals

The State of South Carolina Respondent
v.
John Garvin Appellant.

MEMORANDUM OF LAW
IN SUPPORT OF MOTION
TO VACATE AND SET
ASIDE DISMISSAL AND
TO REINSTATE ACTION

This memorandum is submitted in support of appellant's Motion to Vacate and Set Aside Dismissal and to Reinstate Action pursuant to Appellant Practice Rules, Rule – 260 (a), S.C.A.C.R., claiming that Appellant has failed to timely serve the notice of appeal upon the respondent, as required by Rule – 203 (b)(2) of the South Carolina Appellate Court Rules (S.C.A.C.R.).

PROCEDURAL HISTORY

Appellant, John Garvin and his Co-Defendant, Jonathan Perez was arrested on July 17, 2012 and was charged with Trafficking in Heroin (S.C. Code Ann. § 44-53-370(e)). On December 6, 2012, the Spartanburg County Grand Jury indicted Garvin in Indictment No.: 2012-GS-42-5978 and 2012-GS-42-5979. However, at trial, the state elected to proceed only with Indictment No.: 2012-GS-42-5979 and choosing to try the appellant at a later date on Indictment No.: 2012-GS-42-5978.

Appellant was convicted as charged on Indictment No.: 2012-GS-42-5979 after a jury trial that was held on May 21-23, 2013, in Spartanburg County General Session Court and was sentenced on May 23, 2013 to a term of twenty-five (25) years in prison and fined \$200,000.00 (McIntosh, L. at trial and Sentence).

A notice of appeal was timely filed, On June 6, 2013 the court of appeals granted appellant permission to appeal. And on October 10, 2013, Indictment No.: 2012-GS-42-5978 was nolle prosequi. On November 26, 2014 the Court of Appeals affirmed appellant's conviction.

On June 15, 2015, Appellant inadvertently discovered evidence that is actually relevant and relates to his case. On August 25, 2015, appellant filed a motion for new trial, based on after – discovered evidence with supporting affidavit in the Spartanburg County General Sessions Court, which was filed September 2, 2015.

On November 9, 2015, the Honorable R. Lawton McIntosh denied appellant motion for a new trial. On November 20, 2015, appellant filed notice of appeal on this court and with Spartanburg County General Sessions Court. On December 29, 2015 appellant received a letter from the deputy clerk of Court for The South Carolina Court of Appeals dated December 23, 2015, advising appellant of deficiency or deficiencies with his proof of service that are not in compliance with South Carolina Appellate Court Rule in the format shown by Form 7 in Appendix C to the rules.

On January 5, 2016, appellant re-submitted his notice of appeal and a corrected proof of service on the respondent, which involved every party in the appeal. On May 4, 2016, the deputy clerk of Court issued an order of dismissal for failure to timely serve the notice of appeal upon the respondent. Appellant files this motion to reinstate his appeal.

ISSUE PRESENTED

WHETHER CAN AN APPEAL BE REINSTATED FROM AN ORDER OF DISMISSAL ISSUED BY THE CLERK OF THE SOUTH CAROLINA COURT OF APPEALS FOR THE VIOLATION OF RULE - 203(b)(2) OF THE SOUTH CAROLINA APPELLATE COURT RULE.

STANDARD OF REVIEW

In the Appellate Court, “Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of [Appellate Court Rules], the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. See Rule - 260(a), S.C.A.C.R.; Wise v. South Carolina Dept. of Correction, 372 S.C. 173, 174 (2007).

ARGUMENT

REASON FOR GRANTING MOTION TO VACATE AND SET ASIDE DISMISSAL AND TO REINSTATE ACTION

Whenever it appears that an appellant has failed to comply with the requirement of the S.C.A.C.R., an order of dismissal shall be issued. (See Rule – 260(a), S.C.A.C.R.). The Clerk of Court shall remit the case to the lower court in accordance with Rule – 221, S.C.A.C.R., unless a motion to reinstate the appeal has been actually received by the court with fifteen (15) days of filing of the order of dismissal. See Wise v. South Carolina Dept. of Corrections, 372 S.C. 173, 174 (2007).

“The South Carolina Appellate Court Rules are not mere technicalities but provide [] parties and this court with an orderly mechanism through which to guide appeals in this state.” See Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 794 (1992).

In Henning v. Kaye, the respondent moved to dismiss the appeal on grounds that appellant failed to comply with Appellate Court rules. But South Carolina Supreme Court held that failure to comply with appellate court rules with regard to initial brief did not require dismissal, but rather, appellant was required to serve and file initial brief complying with court rules.

Here, in Appellants case the Deputy Clerk dismissed his case for failure to timely serve the notice of appeal upon the respondent, as required by Rule – 203 (b)(2), S.C.A.C.R., (See Exhibit – B). His action was commenced on November 20, 2015, by the filing of a notice to appeal a denial of a motion for a new trial order, issued by the Honorable R. Lawton McIntosh on November 9, 2015. Whereas, the written notice of entry of the order was received on November 10, 2015. (See Exhibit – C & D).

On December 29, 2015, Appellant received a letter from the Deputy Clerk of Court for The South Carolina Court of Appeals dated December 23, 2015, advising appellant of deficiency or deficiencies with his proof of Service that are not in compliance with South Carolina Appellant Court Rule in the format shown by Form 7 in Appendix C to the rules. (See Exhibit – E). On January 5, 2016, Appellant re-submitted his notice of appeal and a corrected proof of service on the respondent, which involves every party in the appeal. (See Exhibit – F).

On May 11, 2016, Appellant signed and received his legal mail from Lee Correctional Institution by via U.S. Mail from the Deputy Clerk of Court for The South Carolina Court of Appeals, whereas an order of dismissal was issued for failure to timely serve the notice of appeal upon the respondent. Appellant has served a copy of his notice of appeal with corrected proof of service on the respondents as required by appellant court rules on January 5, 2016, to the South Carolina State's Attorney General's Office, address to Alan M. Wilson. (See Exhibit – F)(Proof of service).

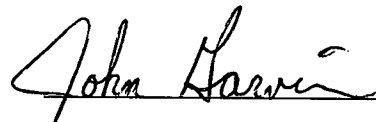
Appellant re-asserts that he has complied with the South Carolina Appellate Court Rules and has served the notice of appeal to every party involved in the appeal on January 5, 2016. (See Exhibit – G)(S.C.D.C. Form 10-14 Inmate Debit Account, whereas, a total of \$4.77 was deducted from his account for one (1) being sent certified mail to the court of appeals clerk for \$3.67 and the other five (5) was sent regular mail with additional postage for 0.22¢ a piece to every party involved in the appeal for a total of \$1.10). The exhibit in this affidavits contradicts the clerks claim that respondent has failed to follow South Carolina Appellant Court Rules.

This memorandum having shown that appellant has complied with South Carolina Appellate Court Rules, as set forth in Henning, Supra., is applicable and should be used as the basis for granting this motion. This court should adhere to Henning, Supra., and Rule – 260(a), S.C.A.C.R., because failure to comply with rules of appellate procedure does not require the dismissal of a valid and meritorious cause of action.

CONCLUSION

For the reasons set out above, appellant respectfully requests that this Honorable Court grants this Motion to Vacate and Set Aside Dismissal and Reinstate Action.

Dated: May 13, 2016



John Garvin, # 355509, Pro-se
Lee Correction Institution
990 Wisacky Highway
Bishopville, S.C. 29010

RECEIVED

John Garvin
Lee Correction Institution
990 Wisacky Highway
Bishopville, S.C. 29010

MAY 17 2016
SC Court of Appeals

ATTN: Ms. V. Claire Allen, Deputy Clerk
% Jenny A. Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, S.C. 29201

RE: State v. Garvin, (Motion to Set Aside Dismissal and to Reinstate Action)
Case No.: 2012-GS-42-5979; Appellate Case No.: 2015-002614

Dear Ms. Allen,

MOTION

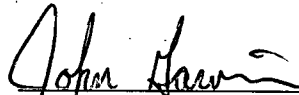
J.G.

Enclosed for filing is a ~~NOTICE~~ TO SET ASIDE DISMISSAL AND TO REINSTATE ACTION in the above case. Also enclosed are the following:

- (1) A Notice of Motion to Vacate and Set Aside Dismissal and to Reinstate Action to respondents.
- (2) An affidavit in support of Motion
- (3) A Memorandum of Law in Support of Motion.
- (4) A PROOF OF SERVICE of the MOTION on the respondent, in the format shown by Form 7 in Appendix C to part II of the S.C.A.C.R., which involves every party in the appeal.
- (5) A copy of the order dismissing the appeal.

Date: May 13, 2016

Respectfully,

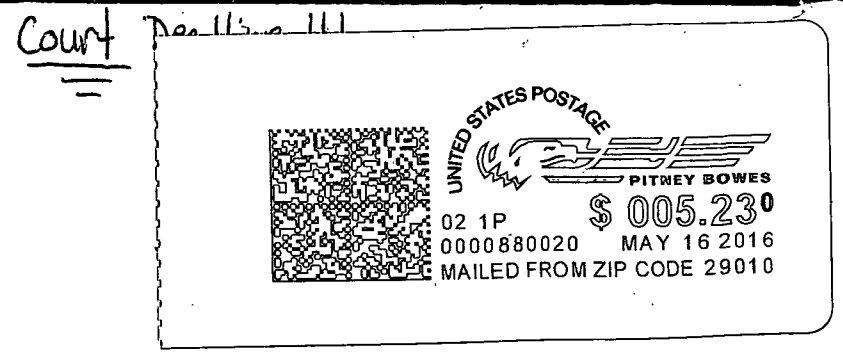
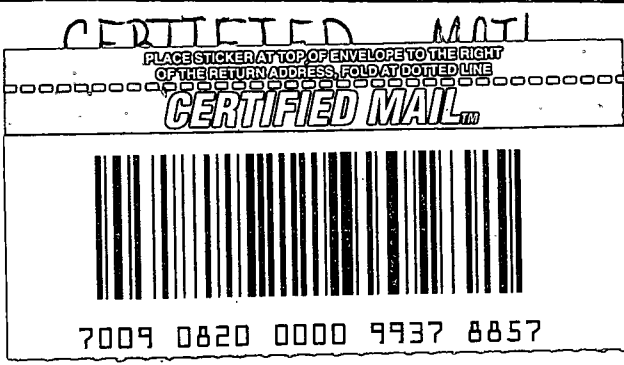


John Garvin, # 355509, Pro-se

Enclosures

cc: Alan M. Wilson, Esquire
John B. Aplin, Esquire
Robert M. Dudek, Esquire
James E. Hunter, Esquire

John Garvin - #355509
Lee Correctional Institution
990 Wisacky Hwy.
Bishopville, S.C. 29010

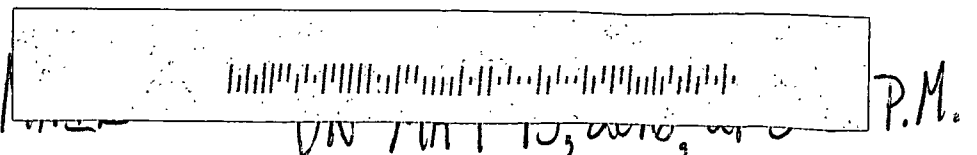


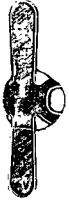
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