

STATE OF SOUTH CAROLINA
In the Court Of Appeals

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
R. Lawton McIntosh, Circuit Court Judge

MAY 26 2016

SC Court of Appeals

Trial Court Case No. 2012-GS-42-05979
Appellate Case No. 2015-002614

THE STATE,

Respondent,

v.

JOHN GARVIN,

Appellant.

**RETURN TO MOTION REQUESTING LEAVE BE GRANTED
BASED UPON AFTER DISCOVERED EVIDENCE**

Initially, for the reasons set for the below, Respondent (the State) submits Appellant's May 13, 2016, *pro se* "Motion to Set Aside Dismissal and to Reinstate Action" is a nullity and that by responding to said motion, the State is NOT acknowledging its legitimacy or the legitimacy of any future *pro se* filings. However, in the interest of judicial economy the State, through undersigned counsel and making Return to the Motion, would respectfully show unto this Court:

1. Appellant was convicted in Spartanburg County on May 23, 2013, and was sentenced to twenty-five (25) years' imprisonment. (Order of the Honorable R. Lawton McIntosh dated November 9, 2015).

2. On August 25, 2015, Appellant filed a motion in the Spartanburg County Court of General Sessions for a new trial pursuant to Rule 29(b), SCRCrimP, based upon newly discovered

evidence. In an Order dated November 9, 2015, Judge McIntosh denied Appellant's motion without the necessity of a hearing as untimely and without merit. (Order of the Honorable R. Lawton McIntosh dated November 9, 2015).

3. On November 20, 2015, Appellant filed a Notice of Appeal from the November 9, 2015, order of dismissal with the Clerk of Court for Spartanburg County and the Clerk of Court for the South Carolina Court of Appeals. (November 20, 2015, Notice of Appeal and November 20, 2015, Certificate of Service). At the time of filing, Appellant did not serve the Notice of Appeal on the State, either by serving the Solicitor or serving the Attorney General's Office.

4. In a letter dated December 8, 2015, and received on December 10, 2015, Appellant mailed copies of his Notice of Appeal and Certificate of Service to Respondent.

5. In a letter dated December 23, 2015, this Court advised Appellant it had received his notice of Appeal and assigned it Appellate Case No. 2015-002614). The same day, this Court issued a deficiency letter advising Appellant his proof of service was not in compliance with the appellate court rules.

6. On January 5, 2016, Appellant submitted a new Notice of Appeal and a Proof of Service to the Court whereby he served the State by mailing copies of the Notice of Appeal to both the solicitor and the Attorney General.

7. In an Order dated May 4, 2016, this Court dismissed the Appeal because Appellant 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.

8. Appellant has now submitted a "Motion to Set Aside Dismissal and to Reinstate Action" dated May 13, 2016, in which he asks that this Court to reinstate his appeal. The Motion was received by the State on May 19, 2016.

9. Pursuant to Rule 203(b)(2), SCACR, in a criminal case an appellant must serve a notice

of appeal on all respondents within ten days after the sentence is imposed, or within ten days after receipt of written notice of entry of the order or judgment. The time period for serving 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.”). State on May 19, 2016.

10. Since no proper notice of appeal was served within ten days of Appellant’s receipt of written notice of entry of Judge McIntosh’s Order of dismissal of his motion before the court of general sessions, this Court has no jurisdiction over Appellant’s case and properly dismissed 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, having made Return, the State opposes Appellant's motion to reinstate and submits it should be denied and dismissed by the Court.


Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

BY:



J. Benjamin Aplin
S.C. Bar No: 8729

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ATTORNEYS FOR RESPONDENT

May 26, 2016

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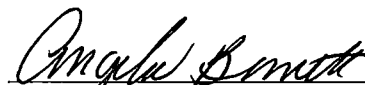
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Motion to Set Aside Dismissal and to Reinstate Action on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to John Garvin, #355509, Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010.

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

This 26th day of May, 2016.



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



ALAN WILSON
ATTORNEY GENERAL

May 26, 2016

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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. John Garvin, #355509

Dear Ms. Kitchings:

Enclosed for filing are the original and six copies of the Respondent's Return to Motion to Set Aside Dismissal and to Reinstate Action in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General

Enclosures

cc: John Garvin, #355509
Victim Services