

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
D. Garrison Hill, Circuit Court Judge
Appellate Case No. 2014-001853

RECEIVED
JUN 30 2016
SC Court of Appeals

The State, Respondent,
vs.
Donna Boyd, Appellant.

Petition for Rehearing

J. Falkner Wilkes, 12893
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Counsel for Appellant

June 29, 2016.

PETITION

The Appellant respectfully submits that the Court's decision in this case overlooked or misapprehended points that are essential to the determination of issues, and moves for a rehearing based on the following:

Boyd's case involves the circuit court's dismissal of an appeal from the magistrate court based on Boyd's failure to appear at the circuit court appeal hearing. This Court's opinion is based primarily on Rule 41(b) of the South Carolina Rules of Civil Procedure. The record fails to support the Court's decision.

Procedurally, Rule 41(b) provides that the plaintiff may make a motion for failure to dismiss. A review of the record shows clearly that the solicitor did not make a motion to dismiss. (R. p. 9-10). Rule 41(b) further provides that once a motion by the plaintiff has been made, "The court as trier of the facts *may then* determine them and render judgment against the plaintiff..." Rule 41(b) SCRCPP *emphasis added*. Here, no motion was made by the opposing party. A *sua sponte* dismissal by the court was therefore improper as a procedural matter under the rules. If not improper, it was certainly unnecessary in light of the facts as well as the procedure applicable where the circuit court is sitting as an appellate court.

As a factual matter the record fails to support a finding that Boyd did not

properly prosecute her case. The record shows a clear intent on the part of Boyd to have the circuit court rule on the merits. Boyd simply sought not to have to appear at the hearing. (R. p. 13-14). This Court's decision fails to consider the matter of Boyd's intent as a necessary part of a finding as to failure to prosecute.

Prior to the hearing the Appellant requested the court to have the matter addressed without a hearing. Boyd indicated that she was attending to personal matters. R. p. 13-14. In a responsive email, the judge's law clerk instructed the Appellant to resend the email copying the solicitor. There is no evidence that Boyd's request was ever denied or responded to further by the circuit court or the solicitor. Boyd was apparently never informed that she was required to appear. (R. 13, 15, Supp. R. 1). This Court's decision overlooks the fact that the Appellant's request to have the matter decided without her personal appearance at the hearing, or that she was never told that she was required to attend the hearing.

As a practical matter, once the case was properly submitted and briefed through Boyd's filing and the magistrate return, there was nothing else that she was required to do to present the facts and issues for the circuit court's determination. Although afforded an opportunity to give oral argument on appeal, there is no rule requiring a party to do so. A party on appeal can presumably waive a reply or even an opening argument, which in essence, is all Boyd did. An appeal

to the circuit court does not allow for the introduction of any evidence. It is therefore essentially complete once the required filings have been made. The record in this case shows that Boyd filed the appropriate pleadings to place the issues before the court. As an appellate court, the circuit court then had all of the evidence and issues before it that it could consider. Boyd's absence at the hearing could not therefore rise to the level of failing to prosecute her case.

This Court's decision further fails to address the overly harsh result in light of all of the facts. Every person convicted before a magistrate may appeal the sentence to the Court of Common Pleas for the county. S.C. Code Ann. 18-3-10 (2014). Boyd therefore had a statutory right to have her appeal heard. Dismissal constitutes an abuse of discretion when the sanction is too harsh when compared to the conduct at issue. See McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct.App. 2006). The only conduct which appears to have triggered the dismissal was the Appellant's failure to appear for the hearing. There is no evidence that Boyd intended to cause undue delay of the process, or that she had delayed the process in the past, or that there was a pattern of not appearing for court on prior occasions. Absent a pattern of egregious behavior, dismissal that terminates the action is far too harsh an action in light of Boyd's conduct. In granting a dismissal for failure to prosecute, there must be some showing of indifference to the rights

of the defendant. See Bond v. Corbin, 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904); See also McComas, *supra*. This Court's decision fails to address this issue entirely.

In McComas this Court held that without evidence of an established pattern of behavior, such as a history of requesting continuances, or abusing court rules, or evidence a clear record of delay and contemptuous conduct, dismissal of a case with prejudice constitutes an abuse of discretion. In McComas the court found the requirements to support dismissal under state law to be the same as required by the federal cases involving dismissal. In McComas the court equated the analysis for unreasonable neglect, as required by the South Carolina case law, to the federal analysis for dismissals for lack of prosecution. Under McComas, a dismissal with prejudice, absent a pattern of egregious conduct, is sufficient to establish a clear showing of an abuse of discretion. McComas, *citing Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970).

McComas specifically held: "Though Rule 41(b) does not require the defendant prove unreasonable neglect by the plaintiff to be granted a motion to dismiss for failure to prosecute, we find a reasonableness standard should apply in cases of this kind, *as illustrated by the federal cases on point*. See McComas, *supra*, FN 3, *emphasis added*."

In applying the reasonableness standard McComas recognized that federal cases are clear in consistently holding that dismissal is only appropriate under the most extreme circumstances:

Our Fourth Circuit Court of Appeals has also addressed this issue. The court in McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976) held that dismissal is a harsh sanction, which "should be resorted to only in extreme cases." Dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff. *Id.* The discretion should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal. *Id.*; Bush v. U.S. Postal Serv., 496 F.2d 42, 44 (4th Cir. 1974). The Fourth Circuit has said the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. Hillig v. Comm'r of Internal Revenue, 916 F.2d 171, 174 (4th Cir. 1990). *See also* Herbert v. Saffell, 877 F.2d 267, 270 (4th Cir. 1989); McCargo, 545 F.2d at 396; Chandler Leasing Corp. v. Lopez, 669 F.2d 919, 920 (4th Cir. 1982).

McComas v. Ross, 368 S.C. 59, at 63, 626 S.E.2d 902 (Ct.App. 2006)

The federal circuits have consistently held that a district court may dismiss an action for lack of prosecution, either upon motion by a defendant pursuant to Federal Rule of Civil Procedure 41(b) or on its own motion. Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974). But because dismissal is such a harsh sanction, however, it "should be resorted to only in extreme cases." McCargo v. Hedrick,

545 F.2d 393 (4th Cir. 1976) *citing* Dyotherm Corp. v. Turbo Machine Co., 392 F.2d 146, 149 (3d Cir. 1968). In this case, the record fails to show how the facts in Boyd's case present the rare and extreme circumstances that would justify the dismissal of the action.

Under McComas, dismissal is only appropriate where the record shows that the party had a "history of requesting continuances or abusing court rules to evidence a clear record of delay and contemptuous conduct, as required by the federal cases involving dismissal, or unreasonable neglect, as required by the South Carolina case law." McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct.App. 2006). None of those conditions were found to be present in Boyd's case. There was therefore, no factual basis supporting the circuit's dismissal of the case.

Under the required analysis in McComas the circuit court was required to consider conflicting policies: "[a]gainst the power to prevent delays must be weighed the sound public policy of deciding cases on their merits." McComas *quoting* Reizakis, 490 F.2d at 1135. This Court's decision fails to apply McComas to the facts in record.

This Court's decision overlooks numerous cases holding that dismissal for the failure to prosecute cannot be automatically or mechanically applied, as it was by the circuit court in this case. Against the power to prevent delays must be

weighed the sound public policy of deciding cases on their merits. *See generally, Wright & Miller, Federal Practice and Procedure: Civil* §§ 2369, 2370 (1971). Bush v. United States Postal Service, 496 F.2d 42 (4th Cir. 1974) Consequently, dismissal “must be tempered by a careful exercise of judicial discretion.” Durgin v. Graham, 372 F.2d 130, 131 (5th Cir. 1967).

While noting that dismissal is a discretionary matter, federal courts applying the same rule have generally upheld dismissal only in the face of a clear record of delay or contumacious conduct by the plaintiff. Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 368 (5th Cir. 1967). Such a record simply does not exist in this case. Additionally, appellate courts frequently have found abuse of discretion when trial courts, as in Boyd’s case, failed to apply sanctions less severe than dismissal. *See, e. g., Richman v. General Motors Corp.*, 437 F.2d 196, 199 (1st Cir. 1971); Flaksa v. Little River Marine Construction Co., 389 F.2d 885, 887 (5th Cir. 1968); Dyotherm Corp. v. Turbo Machine Co., 392 F.2d 146,148 (3d Cir. 1968). Here, despite a lack of any exceptional circumstances, the circuit court has applied the most severe sanction possible.

Unlike cases that have upheld dismissals, Boyd’s record shows no prejudice to the opposing party by Boyd’s actions. Although generally the lack of prejudice alone to the defendant is not a bar to dismissal, it is a factor that must be

considered in determining whether the trial court exercised sound discretion.

Pearson v. Dennison, 353 F.2d 24, 28 (9th Cir. 1965). Reizakas v. Loy, 490 F.2d 1132 (4th Cir. 1974).

Under McComas, the circuit court should have taken at least four factors into account in deciding whether dismissal was appropriate as a sanction in

Boyd's case:

- (1) the degree of personal responsibility of the plaintiff,
- (2) the amount of prejudice caused the defendant,
- (3) the existence of a 'drawn out history of deliberately proceeding in a dilatory fashion', and
- (4) the existence of sanctions less drastic than dismissal.

Herbert v. Saffell, 877 F.2d 267 (4th Cir. 1989).

Applying the appropriate considerations, the record fails to establish a basis for the extreme sanction of dismissal in Boyd's case. (1) The record shows that Boyd never intended to abandon or neglect her case. She fully briefed her issues through the filings with the circuit court. Her intent was not to merely delay the case. On the contrary, even in her email indicating that she could not attend the hearing, she nevertheless clearly sought to have the case ruled upon. (2) There is no showing of prejudice to the state from Boyd's not appearing at the hearing. As it was not an evidentiary hearing, there was no lost testimony, no evidentiary problems, or other prejudice to the state's position on the appeal. At worst, it was

merely a matter of rescheduling a hearing. (3) There is no record of any prior behavior that would constitute a drawn out history of deliberately being dilatory. (4) The court could have admonished Boyd or taken numerous other actions short of ending the case without reaching the merits. The facts and circumstances fail to support the harsh sanction of dismissal in Boyd's case.

Although our supreme court has affirmed cases involving the dismissal of actions based on a failure to prosecute, those dismissals were imposed to maintain the orderly disposition of cases *in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. See Small v. Mungo*, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970). In Boyd's case, there is no evidence of such repeated warnings, multiple opportunities to proceed, or any intentionally offensive or disrespectful behavior on Boyd's part. Despite this lack of a factual basis, the circuit court applied the harshest sanction possible. A sanction completely out of proportion to Boyd's actions. Absent the most egregious behavior, dismissal is simply too harsh a punishment where it acts as a permanent procedural bar to further litigation on the merits.

Regardless of the particulars of the analysis, looking at the general rule disfavoring dismissal, ending Boyd's appeal and preventing her from reaching the

merits of her appeal is unsupported. “Terminating a party’s right to reach the merits by dismissal on procedural grounds absent some egregious pattern of behavior has been frowned upon by our courts. *E.g.*, Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of willful disobedience when exclusion amounted to a judgment of default or dismissal).”

Termination of Boyd’s right to reach the merits of the case is not appropriate where her action was neither egregious nor resulted in any prejudice to the rights of the state. Where the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party. Baughman v. AT & T Co., 306 S.C. 101, at 108-109, 410 S.E.2d 537 (1991) (*citing* 4A *Moore's Federal Practice* 37.03 (2d. Ed. 1990); and Campbell v. Johnson, 101 F. Supp. 705 (S.D.N.Y. 1951)). Orlando v. Boyd, 320 S.C. 509 (1996).

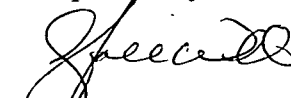
In Boyd's case, dismissal terminated her action and prevents further hearing on the merits of her appeal from the magistrate’s court. Even Judge Anderson's dissent in McComas discussing the court's inherent power to dismiss for failure to prosecute recognizes that such dismissal should be without prejudice. Here, the

circuit court's dismissal of Boyd's appeal ends the case without a hearing on the merits of the issues that she had properly presented to the circuit court through the detailed notice of appeal. The record shows that Boyd sent an email to the court requesting not to have to appear at the hearing. She received a response but was not told that she had to appear. Her subsequent failure to appear does not constitute a willful disrespect for either the court or the rights of the state in the case. The record fails to establish Boyd's acts constitute unreasonable neglect warranting the harshest sanction possible. Even if some sanction were warranted, an order of dismissal with prejudice under the present facts was not justified and constitutes an abuse of discretion. This Court's decision fails to apply the relevant law to the facts in this case.

CONCLUSION

Based on the foregoing the Appellant moves this Court to reconsider its decision and grant a rehearing in the case.

Respectfully submitted,



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June 29, 2016

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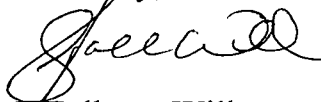
via facsimile also to: (803) 734-1839

Re: State of South Carolina, Respondent v. Donna Boyd, Appellant,
Case No.: 2014-001853

Dear Ms. Kitchens,

Enclosed please find the Appellant's Petition for Rehearing and certificate for service of same.

Sincerely,



J. Falkner Wilkes
Counsel for the Appellant

c.

Alan Wilson, Attorney General
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CERTIFICATE OF SERVICE

I certify that on the 29th day of June, 2016, I served a copy of the Appellant's Petition for Rehearing on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as indicated below, and others, and by facsimile if indicated:

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Respectfully submitted,


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