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S.C. SUPREME COURT

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,

vs.

Donna Boyd, ... Petitioner.

PETITION FOR WRIT OF CERTIORARI (PCR)

J. Falkner Wilkes, 12893
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Greenville, SC 29601
(864) 282-1292

Counsel for Petitioner

STATEMENT OF QUESTIONS PRESENTED

1) Did the circuit court err in dismissing the appeal based on the ground of failure to prosecute?

2) Does the decision of the court of appeals conflict with prior cases of this Court?

PROCEDURAL STATEMENT

The Petitioner, Donna Boyd, was charged by warrant in Greenville County on November 16, 2012, for the offense of filing a false police report. On June 25, 2014, Boyd appeared *pro se* for a jury trial in the Greenville Magistrate Court, the Hon. Dean E. Ford presiding. At the conclusion of the trial the jury returned a verdict of guilty and a sentence was imposed. Boyd filed a timely notice of appeal to the circuit court.

The circuit court held a hearing regarding the appeal on August 12, 2014, the Hon. D. Garrison Hill presiding. On August 14, 2014, an Order was entered dismissing the Petitioner's appeal. Petitioner timely served and filed notice of appeal from the circuit court's order of dismissal. The case was briefed in the court of appeals. The court of appeals affirmed the circuit court by unpublished opinion No. 2016-UP-299. Petitioner requested a rehearing. The court of appeals denied the petition for rehearing. This petition follows.

PETITION

Standard of Review

This Court will consider cases where there are novel question of law or the decision of the court of appeals is in conflict with the prior decisions of this Court. Rule 242(b)(1) & (b)(3). When reviewing a motion to dismiss for failure to prosecute pursuant to Rule 41(b), SCRCP, an appellate court may reverse the trial court's decision upon an abuse of discretion. *In Re* Miller, 393 S.C. 248 (2011); McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct.App. 2006). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Kiriakides v. Sch. Dist. of Greenville County, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). 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 (Ct.App. 2006).

I. THE CIRCUIT COURT ERRED IN DISMISSING BOYD'S APPEAL UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

The facts and circumstances of this case fail to support the circuit court's dismissal of Boyd's appeal. Boyd's case involves a criminal appeal from the magistrate court. The record shows that Boyd fully briefed her case through filings with the circuit court. (A. pp. 62-63). A hearing on the appeal was scheduled only forty eight days after the trial, and twenty two days after the return of the magistrate. The case had therefore been pending in the circuit court for only a very short period of time.[1] Prior to the hearing the Petitioner requested permission of the court to have the matter addressed without her appearance and indicating that she had to attend to some undisclosed personal matters. In a responsive email, the judge's law clerk instructed the Petitioner to resend the email copying the solicitor but did not otherwise indicate or instruct Boyd that she was required to appear unless otherwise instructed. (A. p. 73; 75). The record therefore shows an attempt of the Petitioner to prosecute the matter without her personal appearance at the hearing. There is no evidence that Boyd abandoned her case, or neglected in moving it along. Nothing Boyd did would have injured the rights of the state in the appeal. Boyd clearly sought to have her case decided.

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[1]The charge remained pending in the magistrate's court for approximately one and a half years before a trial was held.

The sanction of dismissal is far to harsh under the circumstances of this case. Here, the court of appeals failed to address the impact of the dismissal. 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 Petitioner'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*. Here the facts fail to show a basis for the circuit court's dismissal of the Boyd's fully briefed appeal.

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. Here, the circuit court failed to apply the proper legal analysis in its decision to dismiss Boyd's case.

The court of appeal's has overlooked cases interpreting the court's ability to dismiss for want of prosecution which have uniformly hold that it cannot be automatically or mechanically applied. 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 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 this 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 frown 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)."

The court of appeals further failed to consider that the State did not move

for the dismissal. 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) SCRCP *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.

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).

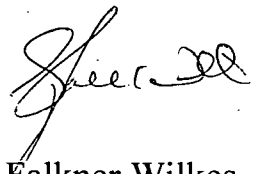
In Boyd's case, dismissal terminated her action and prevents further hearing on the merits of her appeal from the magistrate's court. Even Judge Anderson's dissent in McComas discussing the court's inherent power to dismiss for failure to prosecute recognizes that such dismissal should be without prejudice.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

The appropriate remedy in this case is to remand the case to the circuit court. Procedurally, a remand is the appropriate as it would allow Boyd the opportunity to move to settle the record prior to the circuit court's reaching the merits on the record. This procedure would not be available to Boyd if this Court were to immediately address the merits on the present record.

CONCLUSION

Based on the foregoing the decision of the circuit court should be reversed and the case remanded for further proceedings on the merits of the appeal from the magistrate's court.

Respectfully submitted,



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September 16, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 15th day of September, 2016, I served a copy of the Petitioner's Motion, the Petitioner's Amended Initial Brief and Amended Designation of Matter and Certificates 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:

John Benjamin Aplin, Assistant Attorney General
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Respectfully submitted,

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CERTIFICATE

I certify that on September 16, 2016, I served the ~~Appellant~~ Petitioner's PETITION FOR WRIT OF CERTIORARI and APPENDIX on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, as indicated below:

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RULE 242(d)(1) CERTIFICATE

I certify that a petition for rehearing was made and finally ruled on by the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COUNSEL AS TO REDACTION

I certify that the Appendix has been redacted in accordance with Order 2014-04-15-02.

Respectfully submitted,

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