

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of General Sessions  
D. Garrison Hill, Circuit Court Judge

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**OCT 13 2016**

Opinion No. 2016-UP-299 (S.C. Ct. App. filed June 15, 2016)

S.C. SUPREME COURT

Appellate Case No: 2016-001942

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The State, ..... Respondent,

v.

Donna Boyd, ..... Petitioner.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

J. BENJAMIN APLIN  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 8729

Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3727

W. WALTER WILKINS, III  
Solicitor, Thirteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

Other Counsel of Record:

J. Falkner Wilkes, Esquire  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292  
Attorney for Petitioner

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The Court of Appeals properly affirmed the circuit court’s dismissal of Petitioner’s appeal of her magistrate court conviction due to Petitioner’s “failure to prosecute” where there was no objection to the alleged errors by the circuit court either when the appeal was dismissed or in a petition for rehearing and, therefore, those alleged errors were not preserved for appellate review. Alternatively, the Court of Appeals properly affirmed the dismissal where Petitioner had notice of the hearing and chose not to appear to prosecute the appeal she initiated....	4
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## QUESTION PRESENTED

1. Whether the Court of Appeals properly affirmed the circuit court's dismissal of Petitioner's appeal of her magistrate court conviction due to Petitioner's "failure to prosecute" where there was no objection to the alleged errors by the circuit court either when the appeal was dismissed or in a petition for rehearing and, therefore, those alleged errors were not preserved for appellate review. Alternatively, whether the Court of Appeals properly affirmed the dismissal where Petitioner had notice of the hearing and chose not to appear to prosecute the appeal she initiated.

## STATEMENT OF THE CASE

Donna Boyd (Petitioner) was charged with filing a false police report in Greenville County. On June 25, 2014, she proceeded to trial *pro se* before the Honorable Dean E. Ford, magistrate judge, and a jury. (App.p.64). At the conclusion of trial, the jury returned a guilty verdict and on July 7, 2014, Petitioner filed a notice of appeal to the Greenville County Court of Common Pleas. (App.p.62-p.64). A hearing regarding Petitioner's appeal was convened on August 12, 2014; however, Petitioner did not appear. (App.p.67-p.70). On August 14, 2014, the Honorable D. Garrison Hill issued an order dismissing Petitioner's appeal for failure to prosecute. (App.p.61). Following the dismissal, on August 27, 2014, Petitioner filed a *pro se* notice of appeal. Petitioner then filed a *pro se* initial brief and designation of matter; however, she subsequently retained J. Falkner Wilkes, Esquire, to represent her in this appeal. By Order filed May 21, 2015, this Court granted Mr. Wilkes' motion to "allow counsel to engage in the representation of the Appellant" who has previously proceeded *pro se* and granted his request to withdraw Petitioner's *pro se* initial brief and accept an amended initial brief and designation of matter. Mr. Wilkes subsequently filed a brief in support of Petitioner's appeal and the Respondent (the State) filed a brief in response. (App.p.18-p.57). On June 15, 2016, the Court of Appeals affirmed the circuit court's dismissal of Petitioner's appeal as well as her conviction in an unpublished opinion. State v. Boyd, Op. No. 2016-UP-299 (S.C. Ct. App. Filed June 15, 2016). (App.p.2-p.3). Petitioner submitted a timely Petition for Rehearing and by Order filed August 18, 2016, the Petition was denied. (App.p.1; p.4-p.17). On May 19, 2016, Petitioner submitted a Petition for a Writ of Certiorari to this Court and now this Return on behalf of the State follows.

## CERTIORARI

Petitioner argues this Court should grant certiorari to review the Court of Appeals' decision because she contends it raises a novel question of law or is in conflict with the prior decisions of this Court. (Petition, p.2). Specifically she continues to advance the argument she raised to the Court of Appeals: that the circuit court's action in dismissing her appeal for failure to prosecute was an abuse of discretion because it was too harsh a sanction when compared to the conduct at issue. (Petition, p.2). Petitioner; however, does not address the central ruling by the Court of Appeals, that her argument was not preserved for appellate review, and why that ruling would merit review by this Court. Nevertheless, Petitioner contends this Court should grant certiorari, reverse, and remand to the circuit court to hear her appeal.

The State disagrees and submits the Court of Appeals properly affirmed the circuit court's dismissal of Petitioner's appeal of her magistrate court conviction for the reasons set forth in its opinion, and for the reasons argued in the Final Brief of Respondent (App.p.39-p.57), which is hereby incorporated by reference. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Indeed, the Court of Appeals decision was a straightforward exercise of applying existing precedent regarding issue preservation to the procedural facts and circumstances of Petitioner's case and does not merit further review. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

## ARGUMENT

**The Court of Appeals properly affirmed the circuit court's dismissal of Petitioner's appeal of her magistrate court conviction due to Petitioner's "failure to prosecute" where there was no objection to the alleged errors by the circuit court either when the appeal was dismissed or in a petition for rehearing and, therefore, those alleged errors were not preserved for appellate review. Alternatively, the Court of Appeals properly affirmed the dismissal where Petitioner had notice of the hearing and chose not to appear to prosecute the appeal she initiated.**

On appeal to the Court of Appeals, Petitioner argued the circuit court erred in dismissing her appeal for failure to prosecute under the facts and circumstances of her case because there was no evidence she abandoned her case or neglected in moving it along, and because nothing she did would have injured or prejudiced the rights of the State in the appeal. She argued the sanction of dismissal was far too harsh when compared to the conduct at issue and therefore constituted an abuse of discretion. She continues to advance this argument in her petition for a writ of certiorari. The State submits Petitioner's argument should be denied and that the Court of Appeals properly affirmed the circuit court's dismissal of Petitioner's appeal due to Petitioner's "failure to prosecute" because she made no objection to the alleged errors by the circuit court either at the time the appeal was dismissed or in a petition for rehearing and, therefore, those alleged errors were not preserved for appellate review in the Court of Appeals. The State further submits the Court of Appeals also properly affirmed the dismissal where Petitioner had notice of the hearing and chose not to appear to prosecute the appeal she initiated.

The record before this Court reflects that on July 7, 2014, Petitioner 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. (App.p.62-p.63); See S.C. Code Ann. § 18-3-30. The magistrate prepared and filed his return on July 23, 2014. (App.p.64-p.66). 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, SCRCF. Petitioner 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 Petitioner's appeal in circuit court was convened on the date for which Petitioner received notice but Petitioner failed to appear. The bailiff called for Petitioner three times in the hallway and received no response. Counsel for the State was present and ready to proceed. (App.p.69). At the hearing, the circuit court judge made a factual finding that Petitioner failed to appear to proceed with the appeal she initiated and dismissed the appeal for Petitioner's failure to prosecute. (App.p.69-p.70). Petitioner 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. (App.p.62-p.63).

Petitioner continues to argue 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 Petitioner 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, the State submits that Petitioner failed to properly preserve the arguments she made for consideration by the Court of Appeals on appeal. The arguments in support of the issue Petitioner 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. Petitioner 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 the Court of Appeals on appeal were not properly raised to and ruled upon by the circuit court, the arguments and issues were properly not considered by the Court of Appeals, and 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 advanced by Petitioner in support of her claim that the circuit court abused its discretion in dismissing her appeal, appellate review of the issue and arguments was and continues to be 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). The Court of Appeals properly declined 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. This Court should similarly decline review. It is axiomatic that the issue and arguments offered by Petitioner may not be presented for the first time to the Court of Appeals or this Court on appeal. The circuit court order was properly affirmed by the Court of Appeals, and this Court should likewise affirm.

Alternatively, and assuming *arguendo* the issue respecting dismissal of the appeal was preserved for appellate review, the Court of Appeals properly affirmed the circuit court correctly exercising its discretion to dismiss Petitioner’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, the Court of Appeals 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), SCRPC, 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, SCRPC, provides that priority must be given in the circuit court to the hearing and disposition of such appeals.

Rule 41(b), SCRPC, 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, Petitioner 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 Petitioner 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 Petitioner **after the hearing** at 2:50 p.m. and 3:00 p.m. reveal that, the day before the hearing, Petitioner engaged in an *ex parte* email communication with the circuit court to advise that she would not appear for the hearing because she was planning 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. (App.p.73-74). 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 Petitioner to send her email again to both the judge and the prosecutor. The circuit court provided Petitioner with the prosecutor's contact information. (App.p.75-76). Petitioner forwarded the email to the prosecutor but waited to do so until after the hearing was convened on August 12 as scheduled, and after Petitioner's appeal had been dismissed for Petitioner's failure to prosecute. Petitioner's emails establish that Petitioner 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."

(App.p.73-74). Nothing in the judge's response indicated the judge was considering or had granted Petitioner's request to dismiss Petitioner's "charge" without a hearing or that Petitioner was permitted to absent herself from the hearing. The circuit court's response merely directed Petitioner as to the proper procedure for communication with the court and opposing counsel. Petitioner failed to timely follow the circuit court's instruction.

Because there is no evidence justifying Petitioner's absence from the hearing, the circuit court's dismissal of Petitioner's appeal for failure to prosecute was a proper exercise of discretion. The only evidence before the circuit court was that Petitioner 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. Petitioner ignored the processes of the court. Moreover, even if the *ex parte* email to the circuit court could be considered, Petitioner indicated a clear intention not to appear because she chose to take care of other unspecified personal matters rather than appear. Petitioner's communication did not provide a compelling reason for her intentional failure to appear and indifference to the appeal she initiated. Petitioner never requested a continuance or a less severe sanction. Instead, Petitioner 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. Petitioner 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 Petitioner's arguments for the additional reason that Petitioner relies in part 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), SCRPC, does not include the requirement of unreasonable neglect. Petitioner'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. Petitioner 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 Petitioner'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. Petitioner'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 hijack our circuit court's ability to schedule and dispose of appeals.

The circuit court properly exercised its discretion to dismiss Petitioner's appeal. Accordingly, the Court of Appeals properly affirmed that dismissal on the basis of Petitioner's failure to preserve her objections to dismissal for appellate review, and alternatively on the merits. Thus, the State submits the Court of Appeals decision affirming the dismissal of Petitioner's appeal and affirming Petitioner's conviction should be affirmed.

## CONCLUSION

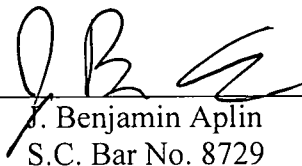
Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the circuit court's dismissal of Petitioner's appeal for failure to prosecute. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

J. BENJAMIN APLIN  
Senior Assistant Deputy Attorney General

W. WALTER WILKINS, III  
Solicitor, Thirteenth Judicial Circuit

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

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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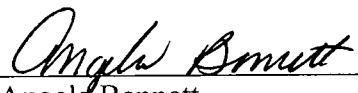
Donna Boyd, ..... Petitioner.

**PROOF OF SERVICE**

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated October 13, 2016, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

J. Falkner Wilkes, Esquire  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292

I further certified that all parties required by Rule to be served have been served.  
This 13<sup>th</sup> day of October, 2016.

  
\_\_\_\_\_  
Angela Bennett  
Administrative Assistant  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3727