

STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM SUMTER COUNTY
Roger M. Young, Sr., Circuit Court Judge

Trial Court Case No. 2012-GS-43-00947
Appellate Case No. 2016-001264

RECEIVED

OCT 14 2016

SC Court of Appeals
Respondent,

THE STATE,

v.

LARRY DURANT,

Appellant.

**RETURN TO MOTION TO REINSTATE AND
MOTION TO BE RELIEVED**

Initially, for the reasons set forth below, Respondent (the State) submits Appellant's August 31, 2016, "Motion to Reinstate and Motion to be Relieved" is a nullity and that by responding to said motion, the State is not acknowledging its legitimacy or the legitimacy of any future filings until a timely and ripe appeal has been properly perfected. 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. On May 26, 2016, Appellant was convicted in Sumter County of second-degree criminal sexual conduct with a minor and was sentenced to twenty (20) years' imprisonment. (Defendant's "Rule 59 Motion and Request for Emergency Hearing" dated May 27, 2016).

2. On May 27, 2016, Appellant filed a written motion in the Sumter County Court of General Sessions captioned: "Defendant's Rule 59 Motion and Request for Emergency Hearing" in which he requested a new trial due to an alleged Brady/Rule 5 violation. (Defendant's "Rule 59 Motion and Request for Emergency Hearing" dated May 27, 2016).

3. Upon information and belief, on June 8, 2016, the trial judge held a hearing on Appellant's motion and verbally denied his request for a new trial; however, no written order was issued. (Appellant's Motion to Reinstate dated August 31, 2016).

4. On June 8, 2016, Appellant filed a Notice of Intent to Appeal from the May 26, 2016, conviction. (June 8, 2016, Notice of Appeal and Certificate of Service). At the time of filing, Appellant served the Notice of Appeal on the State.

5. In a letter dated July 6, 2016, this Court advised Appellant it had received his notice of Appeal and assigned it Appellate Case No. 2016-001264.

6. In a letter dated August 22, 2016, this Court advised counsel for Appellant, Shaun Courtney Kent, Esquire, that the time for ordering the transcript had expired.

7. In an Order filed August 25, 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 Reinstate and Motion to be Relieved" dated August 31, 2016, in which he asks that this Court to reinstate his appeal. The Motion was received by the State on September 2, 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, when a timely post-trial motion is made under Rule 29(a), SCRCrimP, within ten days after receipt of written

notice of entry of the order granting or denying such motion. 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. Here, it appears either the appeal was properly dismissed due to lack of jurisdiction, or it is premature because Appellant has not received written notice of entry of an order denying his post-trial motion.

11. To the extent Appellant is attempting to pursue an appeal directly from the sentence imposed on May 26, 2016, his June 8, 2016, notice of appeal is untimely and this Court properly dismissed the appeal pursuant to Rule 203(b)(2), SCACR. 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.”).

12. To the extent Appellant is attempting to appeal Judge Young's verbal denial of his timely motion for a new trial as well as the sentence imposed on May 26, 2016, his notice of appeal is premature because the trial court has not yet issued or entered a written order denying that motion. See Rule 203(b)(2), SCACR ("When a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion."). Accordingly, the premature notice of appeal filed by Appellant was improper, the Court's August 25, 2016, Order should be withdrawn, and this appeal should instead be dismissed without prejudice. See Majstorich v. Gardner, 361 S.C. 513, 518, n. 3, 604 S.E.2d 728, 730 (Ct. App. 2004) (noting a notice of appeal was dismissed without prejudice because it was prematurely filed); see also Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 20, n. 2, 602 S.E.2d 772, 778 (2004) (noting that it is the responsibility of the party to determine whether the filing of a notice or appeal or post-trial motion is appropriate based on the facts of a particular case and instructing that one or the other may be inappropriate if filed at the same time).

13. In regard to Appellant's counsel's motion to be relieved, the State submits it is likewise premature as Mr. Kent must continue to serve as counsel of record in the lower court until such time as the trial judge has issued a written order addressing Appellant's post-trial motion. As to whether counsel should be relieved once a notice of appeal is properly filed and accepted by this Court, the State submits any such motion must be resubmitted and would be governed by Rule 602(e), SCACR, which provide as follows:

(e)(1) Trial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal, except as hereinafter provided.

(2) During the trial stage, trial counsel may be relieved only for good cause upon written petition to and by written order of the trial judge. In all cases where relief

from representation is sought by trial counsel, a copy of the petition shall be served on the accused and the prosecuting attorney. The Public Defender also shall be served when relief is sought by retained or appointed counsel. If trial counsel is relieved for good cause, the trial court shall immediately appoint substitute counsel.

(3) After conviction of an accused who has been represented by appointed counsel or Public Defender, the Office of Appellate Defense shall represent the accused until final judgment. After serving and filing a Notice of Appeal for an accused who desires to appeal, appointed counsel and Public Defenders shall be automatically relieved as appellate counsel for the accused, without obtaining leave to withdraw as provided in Rule 264, SCACR. However, the Public Defender or appointed counsel shall assist in representing the accused in any manner necessary to properly perfect the appeal or as otherwise requested by the Office of Appellate Defense.

(4) When an accused who desires to appeal claims to be indigent at the conclusion of the trial, his retained counsel must first serve and file a Notice of Appeal as required by Rule 203, SCACR. The accused shall then request a determination of his indigency status from the Office of Appellate Defense. If the Office of Appellate Defense determines that the accused is not indigent, retained counsel shall continue representation of the accused during the appeal, unless granted leave to withdraw under Rule 264, SCACR.

Rule 602(e), SCACR. The State takes no position on whether counsel should be relieved for purposes of the appeal and submits it is a decision in the sound discretion of this Court based on Rule 602, SCACR.


WHEREFORE, having made Return, the State: opposes Appellant's motion to reinstate and submits the appeal either (1) was properly dismissed for a lack of jurisdiction or (2) should be dismissed without prejudice as premature; submits Appellant's counsel's motion to be relieved should be dismissed without prejudice as premature; and requests such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

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

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ATTORNEYS FOR RESPONDENT

October 14, 2016

STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Motion to Reinstate and Motion to be Relieved on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to Shaun C. Kent, Esquire, 19 South Mill Street, Post Office Box 117, Manning, SC 29102.

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

This 14th day of October, 2016.



ANGELA BENNETT
Administrative Assistant
Office of Attorney General
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(803) 734-3727



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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

October 14, 2016

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Larry Durant
Appellate Case No. 2016-001264

Dear Ms. Kitchings:

Enclosed for filing are the original and six copies of the Respondent's Return to Motion to Reinstate and Motion to be Relieved in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General

Enclosures

cc: Shaun C. Kent, Esquire
Trisha Allen, Victim Services