

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
APR 24 2018
SC Court of Appeals

Appeal from Dorchester County
Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case Tracking No. 2017-000061

The State,

Respondent,

vs.

Phillip Marion Turner,

Appellant.

MOTION TO DISMISS

Respondent, through its undersigned counsel, would respectfully show unto this Court as follows:

I.

According to Appellant's original Notice of Appeal filed with the South Carolina Supreme Court and transferred to this Court, he received the December 28, 2016 Order denying his Rule 29(B) motion on January 3, 2017. After this Court requested he file a Proof of Service, Appellant indicated he served the State on January 31, 2017. The State will acknowledge receipt of an Order from the South Carolina Supreme Court on January 18, 2017, transferring this case to the Court of Appeals. The Order was dated January 17, 2017; however, neither the Notice of Appeal nor any other documentation was attached. Therefore, it appears the first time the State was served with the Notice of Appeal was when it was served by Appellant on or around January 31, 2017.

II.

"The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or

discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” State v. Devore, 416 S.C. 115, 119, 784 S.E.2d 690, 692 (Ct. App. 2016) (quoting USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008)). “[The South Carolina Supreme] Court has consistently stated that service of the Notice of Appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the Notice of Appeal must be served.” Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000) (citing Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985)).

The Appellate Court Rules provide:

Appeals From the Court of General Sessions. After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed. In all other cases, a notice of appeal shall be served on all respondents **within ten (10) days after receipt of written notice of entry of the order or judgment.**

Rule 203(b)(2), SCACR (emphasis added). Nothing in the Rule changes the ten day requirement based on a filing of a Rule 29(b) motion for a new trial. See State v. Hinson, 303 S.C. 92, 94, 399 S.E.2d 422, 422 (1990) (“since appellant failed to serve a notice of intent to appeal within ten days of receipt of the order denying him a new trial, this Court is without jurisdiction to consider the merits of that order.”).

While it appears Appellant timely filed the appeal with the South Carolina Supreme Court on January 9, 2017, he failed to timely serve the appeal on the State of South Carolina. Appellant’s Proof of Service filed with this Court indicates the State was not properly served until January 31, 2017. Even if this Court considers service at the time of the Order from the Supreme Court transferring jurisdiction of the case to the Court of Appeals, it still occurred fourteen days after Appellant acknowledges receipt of the Order denying his motion for a new

trial. Appellant was required to serve the Notice of Appeal on the State within ten days, or no later than January 13, 2017.

III.

Accordingly, this Court is without jurisdiction to consider Appellant's appeal and should dismiss the appeal.

WHEREFORE, Respondent prays that the Court hold this matter in abeyance until ruling on this motion, and dismiss this appeal; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: 

William M. Blitch, Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 24, 2018

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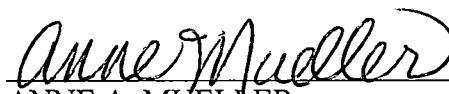
PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the Motion to Dismiss on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

Phillip M. Turner, SCDC # 288680
Allendale Correctional Institution
Bamberg A 62
1057 Revolutionary Trail
Post Office Box 1151
Fairfax, South Carolina 29827

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

This 24th day of April, 2018.



ANNE A. MUELLER
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

April 24, 2018

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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. Phillip M. Turner
Appellate Case Tracking No. 2017-000061

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Motion to Dismiss along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

Enclosures

cc: Phillip M. Turner, SCDC # 288680
Victim Advocacy Division