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STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Case No. 16-ALJ-15-0012-IJ
Appellate Case No.: 2016-002100

BASIL W. AKBAR, #065498.....APPELLANT

v.

S.C. DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,.....RESPONDENT

RETURN TO APPELLANT'S PETITION FOR REHEARING

Comes now, Tommy Evans, Jr. Assistant General Counsel for the South Carolina Department of Probation, Parole and Pardon Services on behalf of the Respondent, hereby makes this return to this petition for rehearing filed by the Appellant on August 7, 2018.

The Respondent submits that this court properly affirmed the Administrative Law Court's decision to dismiss the Appellant's appeal. The Appellant failed to file the notice of appeal within the time limits imposed under the rules. The Respondent respectfully requests that this petition be denied.

Statement of the case

On December 23, 1970, the Appellant along with his co-defendants entered a cab with the intent to rob the driver. The cab driver only had in her possession eight dollars and fifty cents (\$8.50). After submitting to the Defendant's demands offering all the money she had in her possession, the Appellant shot the victim in the neck and head. The victim immediately died due to those gunshot wounds. After a lengthy investigation by the Richland County Sheriff's Department, the Appellant along with his co-defendant's were arrested and charged with the offenses of armed robbery and murder.

On September 8, 1971, the Appellant appeared before the Court of General Sessions to answer to these charges. Upon the conclusion of this appearance the Appellant was sentenced to a period of incarceration for the remainder of his natural life for murder. At the time the Appellant committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of ten years. The Appellant made his initial appearance before the Board on April 8, 1981. Upon the conclusion of this hearing the Board granted the Appellant an opportunity to be released on parole.

While on parole the Appellant violated and appeared before the Board on September 1, 1985. His parole was revoked due to his failure to refrain from the unlawful use of narcotic drugs; failing to avoid injurious habits; failing to refrain from associating with persons of a bad reputation or harmful character; failing to conduct himself honorable and work diligently at a lawful occupation; being found guilty in the Richland County Court of General Sessions on numerous drug offenses;¹ and, failing to carry out all instructions of his parole agent. Since this revocation, the Appellant has appeared before the Board numerous times each resulting in a denial of parole.

¹ While on parole the Appellant was convicted of trafficking cocaine, trafficking marijuana, and possession of marijuana.

One such appearance occurred on September 23, 2015. At the conclusion of this hearing, parole was denied due to: 1) a prior criminal record indicating poor community adjustment; and, 2) a failure to successfully complete a community supervision program. Upon being notified of this denial of parole the Appellant delivered a request for an appeal to the Director. On November 17, 2015, General Counsel Matthew C. Buchanan informed the Appellant that there exist no appeal for a routine denial of parole. The Appellant then twice notified the Director requesting a copy of the statute that requires a risk and needs assessment; and information regarding the COMPAS risk assessment program.

The Appellant later filed a notice of appeal before the Administrative Law Court (ALC). Within this notice the Appellant argued that he was denied due process; that he was not notified of the new criteria regarding the risk assessment; and he was denied the right to seek a rehearing.

Before the ALC the Respondent argued that the Appellant failed to file his notice of appeal within the time limit found within the rules. On September 23, 2016, the Honorable Ralph King Anderson, III, Chief Administrative Law Court Judge, issued an order dismissing this appeal. Within his order Judge Anderson determined that the Appellant did fail to file his brief within the thirty day time limit imposed under the rules. This made this case subject to dismissal pursuant to the rules, so it was properly dismissed by the lower court. Upon receiving the ALC's order the Appellant decided to file a notice of appeal before this Court. On July 18, 2018, this court decided to affirm the decision of the lower court. The Appellant now request a rehearing. The Respondent files this return requesting this petition be subject to dismissal. The Respondent argues that this decision did not misapprehend the Appellant's appeal. The ALC lawfully dismissed, and this court lawfully affirmed this appeal. This occurred due to the Appellant's failure to file his notice of

appeal within the time limits imposed under the rules. The Respondent arguments supporting this dismissal follows.

Argument

According to the South Carolina Appellate Court rules, "A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the Court." Rule 221(a)SCACR. The Appellant raised issues that he believes overlooked by the court. Since the lower court rightfully ruled that the Appellant failed to file the notice of appeal within the time allotted pursuant to the rules, the court is not obligated to address any other matter raised by the Appellant. The appellant court need not address remaining issues when disposition of prior issue is dispositive. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999). Therefore, these matters were not overlooked, but not considered due to the non-validity of this appeal.

The Appellant failed to file his notice of appeal before the thirty day deadline imposed under the rules of the ALC. The notice of appeal from the final decision to be heard by the Administrative Law Court shall be filed with the court and a copy served on each party including the agency, within thirty (30) days of receipt of the decision from which the appeal is taken. Rule 59 SCRALC. The Appellant had only thirty days upon the final decision of the Department to file his appeal, he failed to file within that time limit missing it dramatically so the decision of the ALC was correct. This court lawfully affirmed the decision of the ALC, so this case should not be reheard.

The Appellant was denied parole on September 24, 2015, after this denial he requested a reconsideration. On November 17, 2015, the Respondent decided to deny his request for reconsideration. The ALC decided that is the date he received the final decision. The ALC

rightfully decided that the Appellant failed to file his notice of appeal within the thirty day time limit. The notice of appeal should be filed within thirty days “after receipt of the final decision from which the appeal is taken.” Rule 59 SCRALC. The final decision was made on November 17, 2015, so the notice of appeal should have been filed on December 17, however, according to the ALC it was not filed until April 19, 2016.²

The ALC properly made the decision to dismiss the appeal due to the Appellant’s failing to file his notice of appeal within the thirty day time limit. Therefore, this failure to follow the rules cannot be remedied by this court. “The requirement of filing and 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 filing and services of the notice.” *Wells Fargo Bank, N.A. v. Fallon Props. S.C. LLC.*, 413 S.C. 642, 413 S.E.2d 575, 578 (Ct. App. 2015), quoting, *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008). This court only has the ability to reverse decisions when there is an error in law regarding the decision of the lower court. It was obvious in reviewing the record the Appellant filed his appeal at the earliest on February 22, 2016, well beyond the thirty day time limit imposed by the rules. Pursuant to the rules, the notice of appeal should have been filed by December 17, 2015.

Due to the Appellant failure to file his notice of appeal within the thirty day time limit, the ALC was correct in dismissing this appeal. Upon motion of any party, or on its own motion, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending

² Appellant attempted to file a document entitled “notice of appeal” on which the date was February 22, 2016. This notice of appeal did not comply with Rules 57 and 59 of the rules of the Administrative Law Court which requires the notice of appeal be filed on the proper form proscribed by the court pursuant to rule 57 so the ALC determined the appeal not filed. The notice of appeal was return with notification that it must be filed on the proper form, the Appellant did not file the proper form until April 19, 2016.

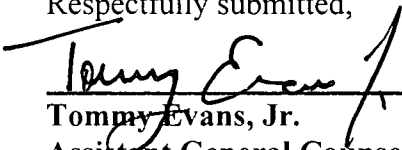
party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section. Rule 62 SCRALC. Since the ALC was proper in dismissing this appeal this court was correct in affirming this decision. This court did not misconstrue this decision this petition should be subject to dismissal.

It is clear in reviewing the record the Appellant failed to file his notice of appeal within the time limit established under the rules. Since this was shown, the ALC was well within their duty to dismiss this appeal. This court was correct in affirming this decision. The Appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the record on appeal. Rule 220(c) SCACR.

Conclusion

The Court of Appeals can only reverse a decision of the lower court upon an error of law. The decision of the Court was proper and should not be revisited upon the Appellant's request. Therefore, the Respondent respectfully requests this Honorable Court to deny the Appellant's petition for rehearing.

Respectfully submitted,



Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
August 15, 2018

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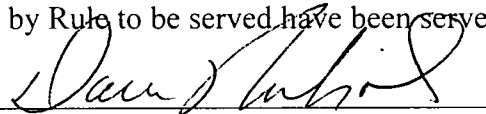
S.C. DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, certify that I have served the within Return to *Petition for Rehearing*, dated August 15, 2018, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, this 15th day of August, 2018, addressed to:

Basil Akbar, #65498
Lee Correctional Institution
900 Wisacky Highway
Bishopville, S.C. 29010

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



Dawn K. Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
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State of South Carolina
Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor



JERRY B. ADGER
Director

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The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

RE: Basil Akbar v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the *Return to Petition for Rehearing*, dated August 15, 2018, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

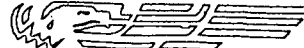
A handwritten signature in cursive script that reads "Tommy Evans, Jr.".

Tommy Evans, Jr.
Assistant General Counsel

Enclosures

cc: Basil Akbar



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