

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAY 24 2019

SC Court of Appeals

Appeal from RICHLAND COUNTY

Deandrea G. Benjamin, Circuit Court Judge

Court of Common Pleas

Case No. 2018-0002167

Estate of Johnnie Mae Muller Newton, Respondent

v.

Isaac Smith, Jr., Appellant

INITIAL BRIEF OF APPELLANT

Heather M. Cairns, Esquire
Cairns Law Firm, LLC
2537 Gervais Street
Columbia, SC 29204
Telephone: (803) 771-5797
Attorney for Respondent

Isaac Smith, Jr, Pro Se
2918 W. Vernon Avenue
Los Angeles, CA 90008
Telephone 323-295-9510

TABLE OF CONTENTS

Table of Authoritiesii

Statement of Issues on Appeal 1

Statement of the Case..... 1

Facts..... 1

Arguments:

1. BECAUSE APPELLANT FOLLOWED ALL THE REQUIRMENTS OF
RULE 203 (SCACR), THE COURT ERRED IN GRANTING RESPOND-
ENTS MOTION DISMISING APPELANT’S PROBATE COURT APPEAL
..... 2

2. BECAUSE THE APPELLANT SERVED ALL PARTIES AS AUTHORIZED
BY S.C. CODE ANN. SECTION 62-1-308(G) THE COURT ERRED IN
GRANTING RESPONDENTS MOTION DISMISING APPELANT’S PRO-
BATE COUIRT APPEAL FORECLOURE SALE..... 2

Conclusion..... 6

CASES

Eastern Savings Bank, FSB v. Albert J. Sanders, Jr. Opinion No. 4234..... 3

Green v. Green, 320 S.C. 347, 465 S.E.2d 130 (Ct. App. 1995)
.....4

Renwick D. Mose, v. State of South Carolina, Opinion No. 27732 Submitted
February 9, 2017 – Filed August 16, 2017
.....4

Rosen v. United States, 245 U.S. 467 (1918)..... 4

STATEMENT OF THE CASE

Appellant, Isaac Smith, Jr., filed an appeal from the Probate Court of Richland County. The appeal was timely filed despite the appellant being incarcerated by the probate court for contempt of court. All parties were served within ten (10) as the statute requires. There were multiple heirs to the estate and all interested parties were served by placing a copy of the notice of intent to appeal in the U. S. Mail. All parties, including the attorney for the personal representative were served in that matter. The attorney for respondent, personal representative filed a motion to dismiss claiming her notice was mailed outside the ten (10) day required. She made reference to a one day past post mark that was not under control of the appellant. On November 15, 2018, the judge granted the respondent's motion despite knowing the appellant was incarcerated in the Richland County Detention Center.

FACTS

Appellant, Isaac Smith, Jr., was the devisee of the Will of Johnnie Mae Muller Newton. He admitted the will to the Richland County Probate Court and he was appointed personal representative of the Estate of Johnnie Mae Muller Newton as stated in the will.

Subsequently, a clerk in the probate court said the will was a copy and not the original. The probate process continued with the appellant retaining his appointment as personal representative. As prescribed by the Probate Court, the appellant served all heirs by either registered mail or publication.

Later a hearing was held where some of the heirs were represented, but the appellant represented himself, even though he has retained an attorney. His attorney felt it was not necessary for an attorney to be present at the hearing because the attorney was confident the Judge would admit the copy to probate.

Despite binding South Carolina Case law, the Judge would not accept the will ruled the Estate Johnnie Mae Muller Newton would be probated according to the laws of intestate succession. Appellant was Johnnie Mae Muller Newton's biological nephew was not an heir because his mother, Johnnie Mae Muller Newton's biological sister is still alive.

The court allowed the appellant to remain as personal representative, however until a dispute concerning estate funds. The court ordered respondent to pay back estate funds and held a hearing and when the respondent did not have the funds to pay back the estate he was held in contempt and held at the Richland County Detention Center. The judge openly stated she would not send the respondent to jail if he would agree to give up his legal right to appeal. He refused and was sent the Alvin S. Glenn Detention Center where he remained for over two (2) weeks.

Despite his incarceration he was able to timely file the notice of intent to appeal with the Richland County Clerk of Court. He served all parties concerned, which include all the heirs and the attorney for the Personal Representative, Heater M. Cairns. Only Ms. Cairns says she was not served within the ten (10) days specified in the statute.

ARGUMENT

Appellant appeals a decision of the Circuit Court dismissing Appellants appeal of a probate court order. Probate appeals are governed according to the following statutory provision:

SECTION 62-1-308. Appeals.

Except as provided in subsection (1), appeals from the probate court must be to the circuit court and are governed by the following rules:

(a) A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303. The notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties not in default within ten days after receipt of written notice of the appealed from order, sentence, or decree of the probate court.

Additionally the procedure is governed according to SCRCP 203 which is as follows:

RULE 203 NOTICE OF APPEAL

authorities, slow mail, or late stamp by the court clerk. *Id.* Addressing concerns over uncertainty, the Supreme Court stressed that prison authorities maintain records of outgoing inmates' mail, and could readily address inmates' assertions that mail was submitted to prison authorities on a different date. *Id.* at 276. Furthermore, the Court stated, "[r]elying on the date of receipt, by contrast, raises such difficult to resolve questions as whether delays by the United States Postal Service constituted excusable neglect and whether a notice stamped 'filed' on one date was actually received earlier." *Id.* at 275. Ultimately, the Supreme Court emphasized that, unlike most litigants, inmates' control over the processing of documents ceases upon delivery to prison authorities, not receipt by the clerk. *Id.* Having considered the rationale articulated in *Houston v. Lack*, we conclude that the unique conditions of incarceration require a holding that the statute of limitations should be tolled if the circumstances warrant. Our decision in no way eliminates the rule created in *Gary* or absolves inmates from complying with the one-year statute of limitations. In fact, we expressly decline to adopt a rule that automatically deems a PCR application "filed" on the date an applicant claims it was delivered to prison authorities. Instead, if a PCR applicant relies on the defense of equitable

The court used the mailbox rule to evoke the concept of equitable tolling whereby the statute of limitation is tolled in the interest of fairness. There is no better case for the mailbox rule use than this case. The appellant will lose his constitutional right to appeal for a service of the notice being post-marked one day late whereas the appellant was incarcerated and made a good faith effort to serve the respondent within the required time.

As to the one day late postmark the court has addressed cited *Green v. Green*, 320 S.C. 347, 465 S.E.2d 130 (Ct. App. 1995) (noting the postal service is not infallible and the postmark date on an envelope is not dispositive evidence of timely service). In (noting the postal service is not infallible and the postmark date on an envelope is not dispositive evidence of timely service).

Any designated mail depository box, whether in a building or along a mail route, constitutes a depository authorized for the receipt and delivery of

(5) Appeals From Probate Court. When a direct appeal is authorized by S.C. Code Ann. § 62-1-308(g), the notice of appeal shall be served in the same manner as provided by Rule 203(b)(1).

Respondent argues that Appellant did not make a timely served of the Notice of Intent to appeal to her. She makes reference to a post mark that she say was outside the ten (10). Respondent concedes the notice of intent to appeal was timely filed, the postmark date on her mailing was a day late.

The respondent made no mention of the Prison Mailbox Rule at the hearing. *Renwick D. Mose, v. State of South Carolina*, Opinion No. 27732 Submitted February 9, 2017 – Filed August 16, 2017 the court fully adopted the mailbox rule. Appellant was incarcerated during the entire period

C. "Prison Mailbox Rule" In *Houston*, petitioner (acting pro se) drafted a notice of appeal from the dismissal of his habeas corpus petition. *Houston v. Lack*, 487 U.S. 266, 268 (1988). Twenty-seven days after the judgment was entered, petitioner submitted the notice to prison authorities for mailing to the district court. *Id.* The date of submission was noted in the prison log for outgoing mail. *Id.* Although there was no evidence of when the clerk of the district court received the notice, the notice was stamped "filed" by the district court clerk thirty-one days after the adverse judgment was entered— one day after the thirty-day filing period set forth in Rule 4(a)(1)(A), Federal Rules of Appellate Procedure (providing that a notice of appeal must be filed within thirty days after a judgment is rendered). *Id.* at 268-69. Without suggesting the notice of appeal was untimely, the District Court issued a certificate of probable cause to establish federal appellate jurisdiction. *Id.* at 269. Thereafter, the United States Court of Appeals for the Sixth Circuit dismissed the appeal as untimely. *Id.* The United States Supreme Court reversed, holding the notice was filed at the time petitioner delivered it to prison authorities for mailing. *Id.* at 276. *Houston* established a bright-line rule premised on equal treatment, and sought to ensure inmates were not adversely affected by delays other litigants might readily overcome. *Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 735 (4th Cir. 1991). In *Houston*, the Supreme Court sympathized with inmates' lack of choice in submitting court documents, as well as inmates' inability to monitor the process of the mail. *Houston*, 487 U.S. at 271. Moreover, the Supreme Court noted the unlikeliness, due to inmates' confinement, of proving whether the delay is attributable to prison

(a) Notice. A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 262.

(b) Time for Service.

(1) Appeals From the Court of Common Pleas. A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

(2) 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. 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. In those cases in which the State is allowed to appeal a pre-trial order or ruling, the notice of appeal must be served within ten (10) days of receiving actual notice of the ruling or order; provided, however, that the notice of appeal must be served before the jury is sworn or, if tried without a jury, before the State begins the presentation of its case in chief.

(3) Appeals From the Family Court. A notice of appeal in a domestic relations action shall be served in the same manner provided by Rule 203(b)(1). A notice of appeal in a juvenile action shall be served in the same manner as provided by Rule 203(b)(2).

(4) Appeals From Masters and Special Referees. The notice of appeal from an order or judgment issued by a master or special referee shall be served in the same manner as provided by Rule 203(b)(1).

mail. *Rosen v. United States*, 245 U.S. 467 (1918). Although the postmark date on an envelope is compelling evidence in cases where timely service through the mail is at issue, we are unaware of any authority, and the wife cites none, indicating the postmark date is dispositive. See William B. Johnson, Annot., *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476 (1986). Such would assume the infallibility of the U.S. Postal Service, an illogical assumption given the volume of letters and packages constantly being processed and the number of human hands any one envelope may pass through. We find no abuse of discretion in the trial court's finding that the motion was timely served by mail.

Respondent cites the cases as authority, rather than the fact that those were arguments made in the case on appeal. The unidentified cases cited by the respondent on record are distinguishable from the facts in this case. In the case cited by the Respondent, the notice of appeal was not filed within the ten (10) days. The timely ness of the service of the notice of appeal was not in question, because the notice of appeal was not timely filed.

CONCLUSION

The Court erred in granting respondent's motion dismissing appellant's probate court appeal because the appellant complied with all the requirements of Rule 203 (SCACR) and S.C. Code Ann. Section 62-1-308(g).

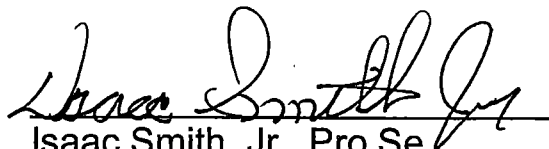
Certificate of Counsel

The undersigned hereby certifies that the Initial Briefing complies with Rule 211(b), SCACR.

RECEIVED

MAY 24 2019

SC Court of Appeals

A handwritten signature in black ink, appearing to read "Isaac Smith Jr.", written over a horizontal line.

Isaac Smith, Jr., Pro Se
2918 W. Vernon Avenue
Los Angeles, CA 90008
Telephone 323-295-9510

April 24, 2019

FORM 7

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from RICHLAND COUNTY

Deandrea G. Benjamin, Circuit Court Judge

Court of Common Pleas

RECEIVED
MAY 24 2019
SC Court of Appeals

Case No. 2018-0002167

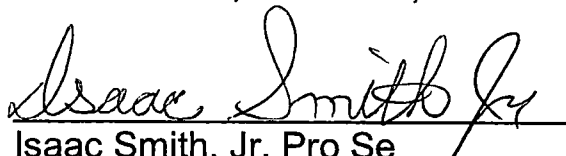
Estate of Johnnie Mae Muller Newton, Respondent

v.

Isaac Smith, Jr., Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief by depositing a copy of it in the United States Mail, postage prepaid, on May 24, 2019, addressed to the attorney of record, Heather Cairns, Cairns Law Firm, LLC, 2537 Gervais Street, Columbia, SC 29204



Isaac Smith, Jr, Pro Se
2918 W. Vernon Avenue
Los Angeles, CA 90008
Telephone 323-295-9500

May 24, 2019