

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas
The Honorable DeAndrea G. Benjamin, Circuit Judge

Appellate Case No. 2018-002167

Isaac Smith, Jr.,

Appellant,

v.

Johnnie Mae Muller Newton

Respondent.

Initial Brief of Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court Correctly Dismissed Appellant's Appeal as Untimely.
- II. Appellant did not Argue the "Prison Mailbox Rule" Below and Failed to Preserve any Argument for Review on Appeal.

STATEMENT OF THE CASE

Johnnie Mae Muller Newton died on January 8, 2016. Thereafter, Appellant Isaac Smith, Jr. brought an action seeking probate of a copy of a purported Last Will and Testament of Ms. Newton and appointment of himself as personal representative. Ultimately, the Probate Court denied probate of the alleged Will but initially appointed Appellant as Personal Representative of the estate on December 19, 2016.

On June 26, 2017, Appellant filed a motion to set aside the December 19, 2016 order pursuant to Rule 60, *SCRCP*. Before that motion was heard, the Probate Court removed Appellant as Personal Representative and ordered that he repay certain funds to the estate.

On January 11, 2018, the Probate Court held a hearing on Appellant's June 26, 2017 motion, as well as a Rule to Show Cause related to Appellant's failure to repay funds to the estate. On February 7, 2018, the Probate Court issued its order denying Appellant's June 26, 2017 motion and holding him in contempt for failing to repay funds to the estate. Appellant was personally served with the February 7 order in the Probate Court on February 12, 2018.

On February 16, 2018, Appellant filed his Notice of Intent to Appeal the Probate Court's orders in the Circuit Court. On February 28, 2018, Respondent received a copy of the Notice of Appeal in an envelope postmarked February 27, 2018.

Respondent moved to dismiss the Circuit Court appeal based on untimely service of the Notice. A hearing was held on May 11, 2018, and the Circuit Court issued its order dismissing the appeal as untimely on June 26, 2018. Respondent then moved the Circuit Court to reconsider the dismissal, but the Circuit Court denied that motion by order dated November 15, 2018.

Appellant now appeals the Circuit Court's orders to this Court.

STATEMENT OF FACTS

Although the litigation regarding Ms. Newton's estate has been lengthy and rather complicated, the facts relevant to this appeal are not.¹ This is an appeal from two Circuit Court orders dismissing Appellant's appeal to that Court as untimely served and denying his motion to reconsider because it was not properly filed and served pursuant to Rule 59, *SCRPC*.

Appellant was served with the Probate Court's order denying his June 26, 2017 motion and holding him in contempt on February 12, 2018. (Acceptance of Service, dtd. 2/12/18) He filed his Notice of Appeal on February 16, 2018, but did not file a Proof of Service until February 27, 2018. Therein, he certified that he had served the Notice of Appeal on Respondent's counsel on "January 19, 2017," more than a year before his appeal was filed. (Proof of Service, filed 2/27/18)

Respondent's counsel received the Notice via United States Mail on February 28, 2018 in an envelope postmarked on February 27th. (Motion to Dismiss, dtd. 3/1/18)

At the hearing on Respondent's motion to dismiss, Appellant appeared through counsel, who appeared to argue that Appellant was under a legal disability due to his incarceration at the time the Notice of Appeal was filed and, alternatively, that the Circuit Court should not strictly enforce the Rules of Civil Procedure or the Probate Code against Appellant because the Probate Court sits in equity. (Transcript, 5/11/18 hearing)

¹ Appellant includes a number of alleged facts in his brief which are irrelevant to this appeal and, further, are outside the record which was before the Circuit Court. Because the bulk of his statement of facts is irrelevant to the sole issue before this Court, Respondent does not undertake to respond directly to the bulk of Appellant's "facts."

Respondent presented a copy of the postmarked envelope in which she received the Notice of Appeal and argued that the Code required service no later than February 23, 2018. Appellant presented no evidence that the document was deposited in the United States Mail prior to February 27, 2018. (Transcript)

The Circuit Court subsequently dismissed the appeal as untimely. (Order dtd. 6/26/18) Appellant filed a motion to reconsider but failed to serve the presiding Judge with a copy pursuant to Rule 59(g). The Circuit Court therefore denied the motion by Order dated November 15, 2018.

ARGUMENT

I. The Circuit Court Correctly Dismissed Appellant's Appeal as Untimely.

Appeals from the Probate Court are governed by S.C. Code Ann. §62-3-308, which provides in pertinent part:

- (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.

Appellant's receipt of the Probate Court's order on February 12, 2018 required his Notice of Appeal to be filed *and served* by February 23, 2018. The only evidence before the Circuit Court relating to the date of service was the postmarked envelope presented by Respondent's counsel, which shows the date of mailing to be February 27, 2018. Appellant's own Proof of Service sheds no light on the purported date of service, since it indicates that a document filed on February 16, 2018 was served on January 19, 2017.

Appellant did not offer any affidavit or other evidence that he attempted to serve the Notice of Appeal prior to February 27, 2018. In fact, Appellant has never directly asserted – including in his brief herein – that he *did* timely serve the Notice of Appeal. At the hearing on Respondent’s motion to dismiss the appeal, Appellant’s counsel stated that Appellant’s son was acting as his “jailhouse lawyer in the ten days they missed.” (Transcript, p. 6, l. 25 – p. 7, l. 2)

Our appellate Courts have repeatedly found that an untimely Notice of Appeal deprives the Court of jurisdiction. In *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985), the Supreme Court held:

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.²

Accordingly, the Circuit Court had no jurisdiction to hear Appellant’s appeal after he failed to timely serve the Notice. The Circuit Court therefore properly dismissed the appeal where there was *no evidence* of timely service. This Court should affirm the Circuit Court’s orders.

II. Appellant did not Argue the “Prison Mailbox Rule” Below and Failed to Preserve any Argument for Review on Appeal.

In his brief, Appellant argues solely that the “prison mailbox rule” should have allowed for the late postmark on the service envelope for the Notice of Appeal. Although Appellant cites several cases confirming that the Courts have allowed for a delay between

² Although *Mears* deals with a matter governed by the *South Carolina Appellate Court Rules*, our caselaw confirms the same jurisdictional issue exists with appeals under the Probate Code. See *Witzig v. Witzig*, 325 S.C. 363, 479 S.E.2d 297 (Ct. App. 1996) and *In re Estate of Cretzmeyer*, 365 S.C. 12, 615 S.E.2d 116 (2005).

the time that an incarcerated individual delivers documents for mailing and the time that prison personnel actually mail the documents, every case cited is distinguishable from this one in at least two ways.

First, the record reflects that Appellant did not mail the Notice of Appeal from the facility where he was incarcerated. Instead, his own lawyer indicates that Appellant's son was handling the documents while Appellant was incarcerated. (Transcript, p. 6, l. 25 – p. 7, l. 2)

Second, all of the cases cited by Appellant indicate that *evidence* of some sort that the Appellant had mailed or attempted to mail the documents. Here, Appellant has submitted no affidavit or other evidence that he *did* mail or attempt to mail the Notice of Appeal prior to February 27, 2018.

Appellant never specifically raised the “prison mailbox rule” to the Circuit Court and should not be allowed to raise it for the first time on appeal. It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000).

Even if the colloquial mention of prison mail delays at the hearing (despite Appellant's concession that the documents were *not* mailed from a prison) were sufficient to have put that issue before the Circuit Court, the resulting order did not refer to or discuss the “prison mailbox rule.” Appellant's Rule 59(e) motion does not refer to this issue, instead arguing that the time for appeal should have been “stayed” as a result of Appellant's incarceration. If Appellant wished to preserve the “prison mailbox rule” for appeal, he was required to ask the Circuit Court to make a ruling on that issue by way of his

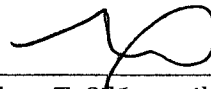
motion to reconsider. *See l'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

Notably, although petitioner noticed his appeal of the Circuit Court's order denying his Rule 59(e) motion, he fails to make a single mention of that order in his brief and offers no argument to support its reversal. Where a matter is not argued in the Appellant's brief, it is considered abandoned. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 620 S.E.2d 326 (2005). Respondent submits that Appellant's abandonment of his appeal of the November 15, 2018 order denying his motion to reconsider as untimely should be dispositive of this entire appeal, as Appellant has failed to preserve any argument. *See Smith v. Fedor*, 422 S.C. 118, 809 S.E.2d 612 (Ct. App. 2017) (Where the lower court properly denied a Rule 59(e) motion for failure to comply with Rule 59(g), no issue presented in the motion is preserved for review.)

CONCLUSION

The Circuit Court correctly found that Appellant's Notice of Appeal was untimely served and dismissed the appeal. Appellant has further failed to preserve any issue for review by this Court, and Respondent respectfully submits that this Court should affirm the Circuit Courts orders in their entirety and bring this matter to an end.

Respectfully submitted,



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Proof of Service

The undersigned hereby certifies that on the date shown below, he has served a copy of the Initial Brief of Respondent on Appellant by depositing a copy of the same into the United States Mail, first-class postage prepaid, addressed as follows:

Isaac Smith, Jr.
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July 26, 2019

Law Office of
ADAM T. SILVERNAIL
LLC

July 26, 2109

By Hand-delivery:
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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Re: *Smith v. Newton*
Appellate Case No. 2018-002167

Dear Ms. Kitchings:

In connection with the above-referenced appeal, I enclose the original and one copy of each of the following:

1. Notice of Appearance of Additional Counsel for Respondent, with Proof of Service;
2. Motion to File Initial Brief and Designation of Matter out of time, with Proof of Service;
3. Initial Brief of Respondent, with Proof of Service; and
4. Respondent's Designation of Matter to be Included in the Record on Appeal, with Proof of Service.

Also enclosed is my firm's check for \$50.00 to cover the filing fee for the motion.

I would appreciate your filing the originals and returning the file-stamped copy to me. By copy of this letter, I am serving these documents on the Appellant.

Kind thanks for your assistance with this matter.

Sincerely,



Adam T. Silvernail

Enclosures

Cc: Mr. Isaac Smith, Jr.
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