

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from RICHLAND COUNTY

Deandrea G. Benjamin, Circuit Court Judge
Court of Common Pleas

Case No. 2018-0002167

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SC Court of Appeals

Estate of Johnnie Mae Muller Newton, Respondent

v.

Isaac Smith, Jr., Appellant

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Respondent filed respondent initial brief past time. The brief was file simultaneously with Respondent's motion to file initial brief past time. The court of appeals granted the Respondents motion to file initial brief and designation of matters past time. There is an inconsistency in that the respondent who violated Rule 208(a)(1) SCACR by not filing the initial brief within the time required by the rule is seeking to have the defendants filing dismissed by the lower court because the lower court ruled the service of process was untimely fails to file the initial brief on time. Even more puzzling is the reason the brief was not file on time was because the respondent counsel was on vacation.

Appellant, Isaac Smith, Jr., filed an appeal form the Probate Court of Rich land 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 Rich land County Detention Center.

FACTS

Appellant, Isaac Smith, Jr., was the devise of the Will of Johnnie Mae Muller Newton. He admitted the will to the Rich land 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 the 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 secession. 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 Rich land 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

Respondent argues that the mailbox rule was not preserved for appeal at the circuit court hearing by Attorney Mosley. The record reflects that it was acknowledged that the Appellant, Rev. Isaac Smith was incarcerated at the time the probate court appeal was filled. (Transcript Page 7.) The mailbox rule was applicable and the circuit court was aware of the incarceration of the appellant and therefore erred in the ruling the service was untimely.

Respondent, despite arguing the mailbox does not apply because it was not preserved for appeal by Attorney Moseley at the circuit hearing. Respondent argues Mr. Moseley did not make reference to the mailbox rule in his argument before the circuit court. It was acknowledged at the hearing before the circuit court that the appellant was incarcerated. (Transcript page 7).

Respondent further contends the mail box rule should not apply because Appellant son mailed the notice. The respondent incorrectly cites the record. It was an erroneous citation to the record. As per the record Mr. Moseley states that

Rev. Smith's son was appellant's jailhouse lawyer. That statement by Mr. Moseley in no way says that Respondent, Isaac Smith did not send the notice of appeal from the Richland County Detention Center. Mr. Moseley did not say the mailing was by the appellant's son.

Appellant appeals a decision of the Circuit Court dismissing Appellants appeal of a probate court order. Respondent argues the denial of appellant's appeal of the Probate court's order should be upheld because of untimely service of notice of appeals by the incarcerated Appellant and is seeking to file a brief not timely filed because respondent attorney was on vacation.

Respondent has attempted to submit evidence in the form of a postmarked enveloped to the court of appeals. That evidence should be submitted to the lower court, apparently, the respondent wants to re-litigate lower court issues in the court of appeals. Respondent seem to agree with the appellant that this case should be remanded to the lower court.

CONCLUSION

The Court erred in granting respondent's motion to file initial brief past time in violation of Rule 208(a) (1). The rule is as follows:

RULE 208 INITIAL BRIEFS

(a) Time for Serving and Filing Initial Briefs.

(1) Brief of Appellant. Within thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the appellate court one copy of the brief with proof of service.

(2) Brief of Respondent. Within thirty (30) days after service of appellant's brief, respondent shall serve one copy of his brief on all parties to the appeal and file with the clerk of the appellate court one copy of the brief with proof of service.

(3) Reply Brief. An appellant may file and serve a brief in reply to the brief of respondent. If a reply brief is prepared, appellant shall, within ten (10) days after service of respondent's brief, serve one copy of the reply brief on all parties to the appeal and file with the clerk of the appellate court one copy of the reply brief with proof of service.

(4) Failure to File. Upon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall sign an order

dismissing the appeal, and the appeal shall not be reinstated except as provided by Rule 260. Upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper.

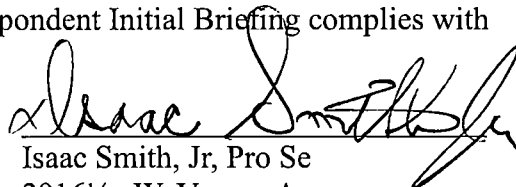
Respondent argues the dismissal of the appellant's probate court appeal because the appellant complied with all the requirements of Rule 203 (SCACR) and S.C. Code Ann. Section 62-1-308(g) was correct even the respondent acknowledges receipt of the notice of intent to appeal. Respondent only contest the timeliness of the service because of the postmark which is covered by the mailbox rule.

Respondent argued the rule were violated in the circuit court appeal and the case should be dismissed and on appeal asked the court not to adhere to the rule [Rule 208(a) (1)] on appeal.

In the interest of fundamental fairness the court should remand the case to the circuit court so that the appellant can receive his constitutional right of due process and be allowed to appeal the probate court ruling.

Certificate of Counsel

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



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September 9, 2019

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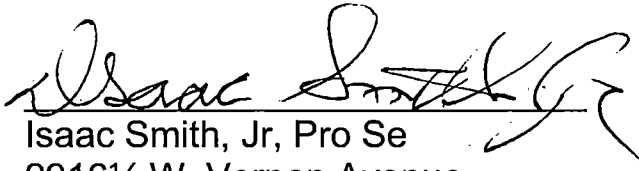
Isaac Smith, Jr., Appellant

PROOF OF SERVICE

I certify that I have served a copy of the Reply to the Respondent's Initial Brief filed out of Time, by depositing a copy of it in the United States Mail, by depositing a copy of the same into the United States Mail, first-class postage prepaid, addressed as follows:

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