

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Appeal from RICHLAND COUNTY

Apr 27 2020

Deandrea G. Benjamin, Circuit Court Judge **SC Court of Appeals**

Court of Common Pleas

Case No. 2018-002167

Isaac Smith, Jr., Appellant

v.

Johnnie Mae Muller Newton, Respondent

FINAL BRIEF OF APPELLANT

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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.

The respondents 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.

The appellant timely filed an appeal to the South Carolina Court of Appeals. All filings were timely and the appellant timely requested a transcript of the motion hearing that he is appealing.

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, failed 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.

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 had 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 that 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, but was not an heir because his mother, Carrie Muller Lewis, Johnnie Mae Muller Newton's biological sister is still alive.

The Probate 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 to agree to give up his constitutional right to and appeal 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 Presentative, 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

(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).

(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. Respondent does not mention the multiple heirs who were timely served. Neither does she acknowledge the well established principal that the intent to serve is sufficient for a timely filing. The circumstances shows the Appellant intended to timely file the notice.

The respondent made no mention of the Prison Mailbox Rule at the hearing. *Rerwick 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, The Prison Mailbox rule is established South Carolina Precedent.

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 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. Lacet*, 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 ruled 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 then this case. The appellant will lose his constructional right to appeal for a service of the notice being postmarked one day late whereas the appellant was incarcerated and made a good faith effort to serve the respondent within the required time. If the postmark date is one (1) day past the ten (10) days, that demonstrates the appellant made a good faith attempt to serve the respondent within the required time.

As to the one day late postmark the court has addressed cited *Green v. Green*, 321 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 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 timeliness of the service of the notice of appeal was not in question, because the notice of appeal was not timely filed.

ARGUMENT # II

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 filed. (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.

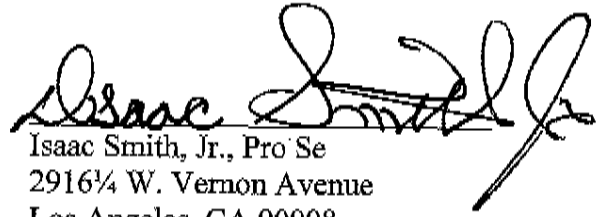
Respondent has attempted to submit evidence in the form of a postmarked envelope to the court of appeals. That evidence should be submitted to the lower court, apparently, the respondent wants to re-litigate lower court issues in the court of appeals. Respondent seem to agree with the appellant that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

CONCLUSION

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

Certificate of Counsel

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



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