

THE SOUTH CAROLINA COURT OF APPEALS

TROY BURKS #160726
APPELLANT,

v.
SOUTH CAROLINA DEPT. OF CORRECTIONS
RESPONDENT.

APPELLATE CASE NO. 2020-001293

NOTICE OF MOTION
FOR RECONSIDERATION

RECEIVED

NOV 24 2020

SC Court of Appeals

PLEASE TAKE NOTICE THAT UPON THE ANNEXED AFFIDAVIT OF TROY BURKS SWORN ON THE 15TH DAY OF NOVEMBER, 2020 AND UPON ALL THE PROCEEDING IN THIS CASE, A MOTION PURSUANT TO F.R.C.P. RULES IS MADE TO THIS COURT FOR AN ORDER REINSTATING THE TIME FOR TAKING AN APPEAL FROM THE ORDER IMPOSED BY THE S.C. APPEAL COURT RENDERED ON THE 4TH DAY OF NOVEMBER, 2020 UPON A RULING APPELLANT'S NOTICE OF APPEAL WAS NOT TIMELY SERVED BUT FILING A TIMELY MOTION FOR RECONSIDERATION DOES NOT TOLL THE RUNNING OF THE STATUTORY APPEAL PERIOD BUT SIMPLY RENDERS THE UNDERLYING ORDER NON FINAL UNTIL THE COURT RULES ON THE MOTION. U.S. v. KHADR, 823 F2d 93; 2016 WL 2941938, DUE TO EXTRA ORDINARY CIRCUMSTANCES HERE AT THE PERRY CORRECTIONAL INSTITUTION TOTAL LOCKDOWN STATUS WHICH HAS NOW BEEN UPGRADED TO PARTIAL LOCKDOWN STATUS, THE APPELLATE IS ON A FINANCIAL INDIGENT STATUS AND PRO SE LITIGANT OFFICIALS FOR ALL OF HIS LEGAL WRITTING MATERIAL AND ACCESS TO LAW BOOKS COULD NOT RESPOND AS REQUIRED DUE TO THE PANDEMIC QUARANTINE RESTRICTIONS.

THE APPELLANT ASKS THE HONORABLE COURT TO APPROACH RESOLUTION OF THE ISSUES UNDER KLAINES v. KERNER 92 S.C. 594 WHERE AS PRO SE PRISONER SHOULD BE HELD TO LESS STRINGENT STANDARDS THAN FORMAL PLEADINGS DRAFTED BY A LAWYER; MUDSPETH v. FIGGINT 584 F3d 1348. WHEN COURT APPRAISING LEGAL SUFFICIENCY OF COMPLAINT MUST BE READ LIBERALLY PRO SE PRISONER UNDER CONDON v. KEKE 574 F2d 1142 APPELLANT SHOULD BE GRANTED RECONSIDERATION TO WAIVER

F. If you did not file a grievance:

1. If there are any reasons why you did not file a grievance, state them here:

2. If you did not file a grievance but you did inform officials of your claim, state who you informed, when and how, and their response, if any:

G. Please set forth any additional information that is relevant to the exhaustion of your administrative remedies.

(Note: You may attach as exhibits to this complaint any documents related to the exhaustion of your administrative remedies.)

VIII. Previous Lawsuits

The "three strikes rule" bars a prisoner from bringing a civil action or an appeal in federal court without paying the filing fee if that prisoner has "on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

To the best of your knowledge, have you had a case dismissed based on this "three-strikes rule"?

Yes

No

COMPLAINT despite failure to STATE how we could cure deficiencies.

ON October 19, 2020 the COURT OF APPEALS NOTIFIED THE APPELLANT THAT HE MUST CORRECT THE DEFICIENCIES OUTLINED IN THE COURT'S LETTER OF SEPTEMBER 29, 2020 AND THEN, ONLY, ANY FAILURE TO COMPLY WITH COURT'S REQUEST WOULD RESULT IN THE DISMISSAL OF THIS APPEAL. THE APPELLANT COMPLIED SUBSTANTIALLY WITH THE SIGNIFICANT REQUIREMENTS, EVEN HAD HE NOT DEMONSTRATED SUBSTANTIAL COMPLIANCE, THE COURT SHOULD HAVE MADE AN EFFORT TO EXPLAIN ANY ADDITIONAL DEFICIENCIES IN HIS SUBMISSION AND AFFORDED HIM AN OPPORTUNITY TO CURE ANY DEFECT.

DUE TO THE COVID-19 VIRUS, I CANNOT MOVE OUT OF MY DORM WITH ACCESS TO THE LAW LIBRARY FOR LEGAL WRITTING MATERIAL OR ANY LEGAL COPIES, ONLY ONE DAY OF THE WEEK. LAST WEEK ON VETERANS DAY ALL ACCESS WAS DENIED. AND WE CAN ONLY HAVE ACCESS WHEN THE SCDC OFFICIALS WISH TO PROMOTE THE ORDER AND MAINTAIN THE SECURITY AND SAFETY OF SCDC BUT THE AGENCY MUST PROVIDE APPROPRIATE REDRESS AND PROCESS PROTECTION IN A CASE SUCH AS THE PRESENT CASE, ON THE GROUNDS SET FORTH IN THE AFFIDAVIT AND FOR SUCH OTHER AND FURTHER RELIEF AS THE COURT MAY SEEM JUST AND PROPER.

November 15, 2020

DATE

Troy Burk

Troy Burk
APPELLANT

TO: Jenny A. Kitching, Clerk

APPELLATE DIVISION

P.O. Box 11629

COLUMBIA, SC 29211

If no, did you file a grievance about the events described in this complaint-at any other jail, prison, or other correctional facility?

Yes

No

E. If you did file a grievance:

1. Where did you file the grievance?

2. What did you claim in your grievance?

3. What was the result, if any?

4. What steps, if any, did you take to appeal that decision? Is the grievance process completed? If not, explain why not. *(Describe all efforts to appeal to the highest level of the grievance process.)*



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
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October 19, 2020

Troy Burks, #160726
Perry Correctional Institution
430 Oaklawn Road
Pelzer SC 29669

Re: Troy Burks, #160726 v. SCDC
Appellate Case No. 2020-001293

Dear Mr. Burks:

The Court is in receipt of your documents that is presumed to be in response to the Court's deficiency letter dated September 29, 2020. The deficiencies outlined in the Court's letter of September 29, 2020 must be corrected in its entirety. A proof of service of the notice of appeal showing service on the respondent must be filed. This is the Court's second request for this correction. Failure to comply with the Court's request will result in the dismissal of this appeal.

Very truly yours,


CLERK

cc: Christina Catoe Bigelow, Esquire

The South Carolina Court of Appeals

Troy Burks, #160726, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2020-001293

ORDER

This appeal arises out of an order of the Administrative Law Court dismissing Appellant's appeal on July 15, 2020. Appellant received notice of the order on August 4, 2020. The proof of service provided with the notice of appeal shows service on October 28, 2020. Because the notice of appeal was not timely served, the appeal is dismissed. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004) (noting timely service of the notice of appeal is a jurisdictional requirement); Rule 203(b)(6), SCACR ("When a statute allows a decision of the administrative law court or agency (administrative tribunal) to be appealed directly to the Supreme Court or the Court of Appeals, the notice of appeal shall be served on the agency, the administrative law court (if it has been involved in the case) and all parties of record within thirty (30) days after receipt of the decision."). The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.


FOR THE COURT

Columbia, South Carolina

cc:

Troy Burks, 160726
Christina Catoe Bigelow, Esquire

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possessed. *Id.* He claims that in so convicting him, Defendants have violated his constitutional rights. *Id.*

II. Discussion

A. Standard of Review

Plaintiff filed his complaint pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss a case upon a finding that the action fails to state a claim on which relief may be granted or is frivolous or malicious. 28 U.S.C. § 1915(e)(2)(B)(i), (ii). A finding of frivolity can be made where the complaint lacks an arguable basis either in law or in fact. *Denton v. Hernandez*, 504 U.S. 25, 31 (1992). A claim based on a meritless legal theory may be dismissed sua sponte under 28 U.S.C. § 1915(e)(2)(B). *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Pro se complaints are held to a less stringent standard than those drafted by attorneys. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). In evaluating a pro se complaint, the plaintiff's allegations are assumed to be true. *Fine v. City of N.Y.*, 529 F.2d 70, 74 (2d Cir. 1975). The mandated liberal construction afforded to pro se pleadings means that if the court can reasonably read the

Per Curiam

established only if its contours are sufficiently clear that "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U. S. 635, 640 (1987). In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U. S., at ___ (slip op., at 9). This doctrine "gives government officials breathing room to make reasonable but mistaken judgments," and "protects all but the plainly incompetent or those who knowingly violate the law." *Id.*, at ___ (slip op., at 12) (quoting *Malley v. Briggs*, 475 U. S. 335, 341 (1986)).

Here the Third Circuit cited only a single case to support its decision that Carroll was not entitled to qualified immunity—*Estate of Smith v. Marasco*, 318 F.3d 497 (CA3 2003). Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances, see *Reichle v. Howards*, 566 U. S. ___, ___ (2012) (slip op., at 7), *Marasco* does not clearly establish that Carroll violated the Carman's Fourth Amendment rights.

In *Marasco*, two police officers went to Robert Smith's house and knocked on the front door. When Smith did not respond, the officers went into the backyard, and at least one entered the garage. 318 F.3d, at 519. The court acknowledged that the officers' "entry into the curtilage after not receiving an answer at the front door might be reasonable." *Id.*, at 520. It held, however, that the District Court had not made the factual findings needed to decide that issue. *Id.*, at 521. For example, the Third Circuit noted that the record "did not discuss the layout of the property or the position of the officers on that property," and that "there [was] no indication of whether the officers followed a path or other apparently open route that would be suggestive of reasonableness." *Ibid.* The court therefore remanded the case for further proceedings.

In concluding that Officer Carroll violated clearly estab-

MR Troy Burk 160721
PERDU CORRECTIONAL INSTITUTION
430 DAKLAWA RD.
KEIZER, SC 29669

S.C. COURT OF APPEALS
JENNY A. KITCHINGAS, CLERK

P.O. BOX 11639

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NOV 19 2020

P.C.I. MAILROOM

RECEIVED

NOV 24 2020

SC Court of Appeals

LEGAL MAIL