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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Administrative Law Court
The Honorable Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2020-001476

KENNETH COLE, #377835.....APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

INITIAL BRIEF OF RESPONDENT

Janell H. Gregory
Legal Counsel
SC Bar No. 103176

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the lower court properly granted Respondent's motion to dismiss because Appellant failed to file his brief within the ninety-day time frame as required by the rules?

STATEMENT OF THE CASE

On April 24, 2020, Respondent (the Department) issued a letter to Appellant informing him that he is ineligible for parole under South Carolina law based on his current conviction for distribution of methamphetamine, third offense, and his criminal history. On May 14, 2020, Respondent issued an amended letter to Appellant further explaining why he is disqualified from parole eligibility due to his criminal history revealing disqualifying or out-of-state drug convictions that rendered him ineligible for parole consideration.¹

On May 1, 2020, Appellant filed an appeal in the Administrative Law Court (ALC) to challenge Respondent's determination that he is ineligible for parole consideration. On May 5, 2020, Appellant's matter was assigned to the Honorable Ralph King Anderson, III, Chief Administrative Law Judge. Thereafter, Respondent filed the record on appeal. Pursuant to the rules of South Carolina Administrative Law Court (SCALC), Appellant's brief was due on or before August 3, 2020. On August 19, 2020, Respondent filed a motion to dismiss Appellant's appeal pursuant to Rule 62 of the South Carolina Rules of Procedures for the Administrative Law Court because Appellant failed to file a brief within the ninety-day time frame set forth by the rules. On September 14, 2020, Judge Anderson issued an order of dismissal granting Respondent's motion to dismiss Appellant's appeal pursuant to SCALC Rule 62. On October 8, 2020, Appellant filed a motion for reconsideration with the Administrative Law Court. However, according to SCALC Rule 65, such motions are not permitted to be considered by an Administrative Law Judge, and was dismissed. On October 27, 2020, Appellant issued this appeal in the South Carolina Court

¹ Respondent included copies of Appellant's indictments, sentencing sheets, and excerpts from his criminal history to further explain how Respondent came to the conclusion he is ineligible for parole consideration.

of Appeals challenging the ALC's dismissal of his appeal based on his failure to file his brief in a timely manner. Respondent's brief follows.

ARGUMENT

The lower court properly granted Respondent's motion to dismiss and rejected Appellant's subsequent motions because Appellant failed to file his brief within the ninety-day time frame as required by the rules.

Appellant argues the ALC erred in granting Respondent's motion to dismiss his appeal. However, Respondent submits the ALC properly granted Respondent's motion to dismiss because Appellant failed to file his brief within the ninety-day statutory time frame. As such, the Administrative Law Court properly dismissed Appellant's appeal.

As an initial matter, Appellant filed his notice of appeal in this Court outside of the statutory time frame set forth in SCACR Rule 203(b)(6), which states in part, "the notice of appeal shall be served on the agency, the administrative law court . . . and all parties within thirty (30) days after receipt of the decision." Here, the ALC issued and filed the final order dismissing Appellant's appeal in the ALC on September 14, 2020. According to the rule, Appellant's notice of appeal would have been due on or before October 14, 2020; however, Appellant did not file his notice of appeal until October 27, 2020, which is thirteen days outside of the statutory deadline for a timely filing.² Appellant's failure to file a timely notice of appeal has divested this Court of subject matter jurisdiction, therefore, this appeal should be dismissed. See USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (quoting Canal Ins. Co. v. Caldwell, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct. App. 1999) ("Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or

² Although Appellant filed a motion to reconsider in the ALC, such a motion does not hold Appellant's deadline for filing an appeal in this Court in abeyance because such a motion is improper in the ALC. The ALC properly dismissed Appellant's motion to reconsider pursuant to Rule 65, SCRALC.

judgment, failure to do so divests this court of subject matter jurisdiction and results in dismissal the appeal.”)

However, if this Court believes Appellant timely filed his appeal in this Court, Respondent submits the ALC properly dismissed Appellant’s appeal as Appellant failed to file a timely brief in the matter. Rule 60 of the South Carolina Rules of Procedures for the Administrative Law Court provides that, “. . . the party first noticing the appeal shall file an original brief within ninety (90) days after the date of assignment.” Here, Appellant filed a timely notice of appeal and his case was assigned on May 5, 2020. According to SCRALC Rule 60, Appellant’s brief was due on or before August 3, 2020. Appellant failed to meet this deadline and Respondent filed a motion to dismiss his appeal.

The ALC has the authority to dismiss an appeal pursuant to SCRALC Rule 62, which states, in part,

Upon motion of any party, or on its own motion, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including failure to comply with any of the time limits . . . If the presiding judge determines that the appeal is frivolous . . . the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

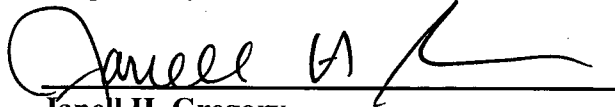
On August 19, 2020, well after Appellant’s deadline, Respondent submitted its motion to dismiss Appellant’s appeal based on his failure to timely file a brief. In its order of dismissal, the ALC noted that Appellant’s delay was well beyond the time period set forth in SCALC Rule 60(A), and properly granted Respondent’s motion to dismiss Appellant’s appeal pursuant to SCALC Rule 62.

As the ALC properly dismissed Appellant’s appeal for failure to timely file his brief as required by the rules, this Court should affirm the decision of the ALC.

CONCLUSION

This Court should dismiss Appellant's appeal as he failed to timely file his appeal in this Court. Further, the ALC was well within its authority to dismiss Appellant's appeal because he failed to file a timely brief as required by SCALC Rule 60. Therefore, if this Court does not dismiss this appeal, it should affirm the ALC's decision.

Respectfully submitted,



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Attorney for the Respondent

Columbia, South Carolina
January 26, 2021

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IN THE COURT OF APPEALS

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The Honorable Ralph King Anderson, III, Administrative Law Judge

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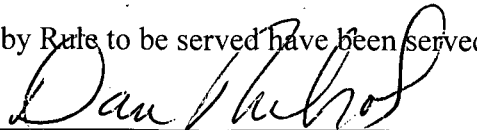
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within
Initial Brief and Designation of Matter, dated January 26, 2021, on Appellant this 26th day of
January, 2021, by depositing a copy of the same in the United States mail, postage prepaid,
addressed to:

Kenneth Cole, #377835
McDougall Correctional Institution
1516 Old Gilliard Road
Ridgeville, S.C. 29472

I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 207
Columbia, South Carolina 29202

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Department of Probation, Parole and Pardon Services

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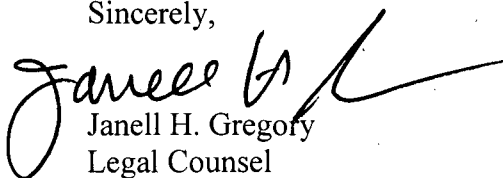
The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: Kenneth Cole v. SCDPPPS
20-001476

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated January 26, 2021, along with proof of service in the above referenced case.

Sincerely,


Janell H. Gregory
Legal Counsel

JHG:dn

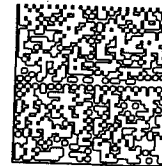
Enclosures

cc: Kenneth Cole, #377835

State of South Carolina

Department of Probation, Parole, and Pardon Services

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