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Nov 19 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Scott Hess,)	Docket No. 21-ALJ-30-0132-AP
)	
Appellant,)	
)	ORDER DENYING APPELLANT’S
vs.)	MOTION TO RECONSIDER
)	
South Carolina Criminal Justice Academy,)	
)	
Respondent.)	
_____)	

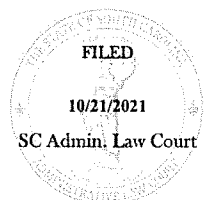
This matter came before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Petition for Judicial Review of the Final Decision of the Law Enforcement Training Counsel of the South Carolina Criminal Justice Academy (Respondent). The Petition was filed on May 3, 2021, on behalf of Scott Hess (Appellant).

The Record on Appeal (ROA) was filed on June 15, 2021. Appellant’s Brief was due within thirty (30) days after the ROA was filed or on or before July 15, 2021. Appellant’s counsel admitted that he realized on July 26, 2021, that the brief had not been filed. He contacted Respondent’s attorney to ask for an extension. Respondent agreed to the request, but Appellant did not contact the Court, nor did Appellant submit any motion to obtain an extension or to allow the brief to be filed beyond the due date. No brief was submitted until September 14, 2021.¹ Respondent filed a Motion to Dismiss on September 13, 2021.

Prior to the Respondent’s motion to dismiss and in response to a status inquiry from the Court, Appellant, on September 3, 2021, informed the Court by email that the brief was ready to be filed. Because he had a child in quarantine, he noted that he was “trying to get downtown today so I can get [the brief] filed ASAP.”

The Court’s law clerk replied that she would “keep an eye out for your filing and [the Criminal Justice Academy] will have the opportunity to respond.” In Appellant’s argument for reconsideration, he questions why the Court would expect a motion to be filed when the Court’s law clerk referred to keeping “an eye out for your filing.” It is unclear why Appellant would assume

¹ Appellant delivered a brief to the ALC offices after 5:00 pm on September 13, 2021. The brief was time-stamped on September 14, 2021, sixty (60) days after it was due.



that his email referring to a motion for extension and his readiness to file the brief should not be considered as a reference to filing both documents.

Respondent's counsel, on September 13, 2021, filed the above-referenced Motion to Dismiss on the ground that Appellant had not filed a brief. Appellant's counsel submitted a brief, received by the Court on September 14, 2021. Neither a motion to extend the time nor a motion to allow late filing was included with the brief. Furthermore, Appellant's counsel did not reply to the Motion to Dismiss.

The Court, hearing nothing further from Appellant, issued an order on September 29, 2021, granting the motion and dismissing the case.

On September 30, 2021, Appellant filed a motion asking the Court to reconsider its dismissal order. Respondent replied in opposition to the request for reconsideration on October 7, 2021.

Appellant's brief was received sixty (60) days after it was due. Although Appellant's counsel was aware of his failure to file the brief within ten (10) days of its being due, he took no steps to rectify the situation. In addition, he has not requested any relief from the Court that would provide an extension of time or allow late filing of the brief.

In opposition to the Court's dismissal order, Appellant relies on *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006). In *McComas*, the trial began at 2:00 P.M., and available witnesses testified. However, the plaintiff, herself, was not present. Her attorney informed the judge that McComas was on the way. The judge recessed the trial for approximately ten minutes until 4:00 P.M. at which time he announced that if she were "not here [he would] dismiss [the case] for lack of prosecution" (second brackets in original). *Id.* at 61, 626 S.E.2d at 903. At 4:16 P.M., on the motion of the defendant, Ross, the judge dismissed the case. "According to McComas and her friend who drove her there, she arrived at the courthouse at approximately 4:18 [P.M.] and learned that her case had been dismissed with prejudice." *Id.* 626 S.E.2d at 904.

The *McComas* court reversed the dismissal on the basis that the attorney was present and put available witnesses on the stand, that McComas had not previously requested continuances nor otherwise delayed the proceedings, nor had counsel demonstrated unreasonable neglect. *Id.* at 64, 626 S.E.2d at 905.

This matter differs from *McComas* in several significant ways. *McComas* was dismissed in the early stage of a trial and denied plaintiff the opportunity to have her case heard.² The cases distinguished in *McComas* involved “repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. *Id.* at 62, 626 S.E.2d at 904 (citing *Small v. Mungo*, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970)). *McComas* also required “a showing of indifference to the rights of the defendant” or denying a witness the opportunity to testify would be “an abuse of discretion without a showing of willful disobedience when exclusion amounted to a judgement of default.” *McComas*, at 63, 626 S.E.2d at 904 (discussing *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996)).

In addition, this case was not dismissed at the trial level but on the appellate level. Appellant had a contested case hearing before a hearing officer from which the Law Enforcement Training Council made factual findings and unanimously concluded that Appellant committed misconduct in his “physical or psychological abuse of [a] member[] of the public or [a] prisoner[.]” (ROA, 13.) Appellant sought review by the ALC and received a copy of the notice of assignment that provided a schedule for service of the ROA and for submission of the parties’ respective briefs.

Appellant’s counsel received the ROA and understood when his brief was due. Further, counsel was aware in July 2021, as he admitted, that he had not submitted the brief on time and knew that he should take appropriate steps that began with his request for additional time from Respondent’s counsel. Although counsel agreed to the request, Appellant’s counsel took no further steps to contact the Court to obtain an extension or to obtain permission to file the brief out of time.

Although Appellant’s counsel contends that his failure to submit a timely brief was inadvertent and that he “sought to keep the Court informed,” the facts show otherwise. Counsel became aware of his omission while on vacation some ten days after the initial due date. When he returned to the office, he took no further steps to rectify his omission until after the Court contacted the parties on September 1, 2021.

The Court emphasizes that even though Appellant ultimately submitted a brief, he has done nothing that would allow the Court to consider this delinquent document.

² The majority in *McComas* concluded that “dismissal . . . was too harsh a sanction for her conduct or the conduct of her counsel. Therefore, we find the trial court abused its discretion in dismissing [the] case.” *Id.*

Where appellant has sufficient time within which to file the brief, or where counsel has not shown due diligence in preparing the brief or applying for an extension of time, no extension of time will be granted.

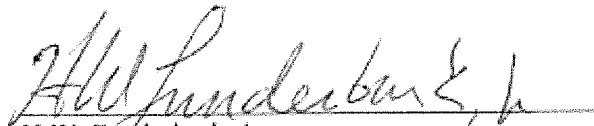
4 C.J.S. Appeal and Error § 744, Westlaw Edge (updated October 2021).

Although Appellant contends that he “sought to keep the Court informed,” he made no effort between July 16, 2021, and September 3, 2021, to apprise the Court of why a brief had not been submitted nor did he request from the Court additional time nor permission for late filing.

Accordingly, Appellant’s Motion for Reconsideration is **DENIED**.

AND IT IS SO ORDERED.

October 21, 2021
Columbia, South Carolina


H.W. Funderburk, Jr.
Administrative Law Judge


CERTIFICATE OF SERVICE

I, Elizabeth A. Perkins, hereby certify that I have this date served this **Order Denying Appellant’s Motion to Reconsider** upon all parties to this cause by depositing a copy hereof by electronic mail to the addresses provided by these parties and/or their attorneys:

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Counsel for Respondent

October 21, 2021
Columbia, South Carolina


Elizabeth A. Perkins
Judicial Law Clerk

