IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2008 Term

No. 33599

FILED
June 18, 2008
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JOHN S. GUIDO,
Defendant Below, Appellant,

V.

KENDRA M. GUIDO (NOW GRAY),
Plaintiff Below, Appellee.

Appeal from the Circuit Court of Marion County
Honorable David R. Janes, Judge
Case No. 94-D-404

AFFIRMED

Submitted: February 13, 2008
Filed: June 18, 2008

Patrick F. Roche, Esq.
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Attorney for Appellant

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Bureau of Child Support Enforcement
Charleston, West Virginia
Attorney for Appellee

The Opinion of the Court was delivered PER CURIAM.

JUSTICE ALBRIGHT and JUSTICE STARCHER dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

2. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus Point 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

3. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syllabus Point 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

4. "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connotation in which they are used." Syllabus Point 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941).

PER CURIAM:

The instant action is before this Court upon the appeal of John S. Guido [hereinafter "Appellant"] from an April 12, 2007, order entered by the Circuit Court of Marion County denying Appellant's Motion for Reinstatement of Appeal, and in the Alternative, Motion for Reconsideration due to Appellant's failure to serve his petition upon Kendra Guido and the Bureau of Child Support Enforcement ["hereinafter BCSE"] as required by West Virginia Code §51-2A-11(b) (2001). Herein, the Appellant alleges that the circuit court erred in dismissing his petition for appeal because his failure to complete the certificate of service attached to his timely filed petition was the product of an honest mistake and did not result in prejudice to any of the parties involved. The Appellee alleges that because the petition was improperly filed, the circuit court was deprived of jurisdiction and thus, the circuit court did not err in dismissing the appeal. This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. For the reasons expressed below, the April 12, 2007, order of the Circuit Court of Marion County is affirmed.

I.

FACTUAL AND PROCEDURAL HISTORY

On December 20, 2006, the Family Court of Marion County issued a decretal judgment order awarding judgment against the Appellant for arrearages in his obligation to

pay child support to his former wife, Kendra M. Guido (now Gray), in the total amount of $22,767.17.[1] Appellant timely filed a petition for appeal from that order on January 2, 2007, which was referred to the Circuit Court of Marion County. On January 22, 2007, the circuit court entered an order denying Appellant's petition for appeal on the grounds that the certificate of service attached to the Appellant's petition had not been completed and there was no other indication that the Appellant had served his former wife, Kendra Guido (now Gray), or the Bureau of Child Support Enforcement with a copy of the petition as required by West Virginia Code §51-2A-11(b).

On February 5, 2007, Appellant filed "Defendant's Motion for Reinstatement of Appeal, or in the Alternative, Motion for Reconsideration", requesting that the circuit court reinstate his appeal of the family court's final decretal judgment order. Appellant attached sworn affidavits from himself and his mother, Josephine Guido, setting forth the facts regarding the circumstances that had resulted in non-completion of the required certificate of service.[2] A hearing set on the motion was scheduled for April 23, 2007.

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[1] According to the Bureau of Child Support Enforcement, several significant events in the very long history of this case likely had some influence on the determination of the circuit court. Below, the Appellant had been found guilty of false swearing at a child support hearing after he provided false testimony to the court regarding the amount of income he was receiving and it had been determined that he, with his parents' assistance, had been hiding child support monies. Additionally, contempt orders resulting from nonpayment had been entered prior to the decretal judgment order.

[2] The Appellant's affidavit stated the following:

(continued...)

However, on April 12, 2007, prior to the date scheduled for hearing, the circuit court entered an order denying Appellant's motion on the grounds that upon review of the entire court file, the Appellant was not entitled to the relief sought, and thus no hearing was required. It is from that order that Appellant now appeals.

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[2](...continued)

"COMES NOW, JOHN SAMUEL GUIDO, and having been duly sworn and deposed, states as follows:

1. That my name is John Samuel Guido, I am the Defendant in this action, I am eighteen years or older, and the following is based on my own personal knowledge.

2. That on January 2, 2007, based on the information that I gave her, my mother's friend, Karen Gribbean, typed up the original of my Petition for Appeal of Family Court Judge David P. Born's Final Order. After Mrs. Gribbean had finished typing my Petition for Appeal, and all the necessary copies of the Petition for Appeal had been made, I went with my mother, Josephine Guido, to file my Appeal in the Clerk of the Circuit Court's office at the Marion County Courthouse.

3. That when my mother and I got to the Clerk's office, we spoke to the Circuit Clerk, Monica Sollars, who asked me to verify my Petition for Appeal and then notarized my signature. Sollars also asked for Kendra Gray's address and told me that she would fax a copy of my Petition for Appeal to the Supreme Court.

4. That from talking to Ms. Sollars, I believed that I did not have to take any further action for my Appeal to be official. And, I also believed that the Clerk's office would make sure that all the Defendants got a copy of my Petition and that either Ms. Sollars or another official was going to fill out Certificate of Service on the Petition.

5. That had I believed otherwise, I would have completed the Certificate of Service myself and made sure that Kendra Gray and Mr. Sellaro of Bureau of Child Support Enforcement got copies.

. . ."

II.

STANDARD OF REVIEW

Our resolution of the case *sub judice* turns upon our interpretation and application of West Virginia Code §51-2A-11(b). When faced with a question of statutory interpretation, we apply a plenary review. In other words, "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Crystal R.M. v. Charlie* AL., 194 W. Va. 138, 459 S.E.2d 415 (1995). Mindful of this standard, we proceed to consider the arguments of the parties.

III.

DISCUSSION

West Virginia Code §51-2A-11(a) provides that any party may file a petition for appeal of a final order of a family court judge with the circuit court within thirty days following the entry of the final order. West Virginia Code §51-2A-11(b) then provides that "[a] petition for appeal of a final order of a family court shall be filed in the office of the Clerk of the Circuit Court. At the time of filing the petition, a copy of the petition for appeal **must** be served on all parties to the proceeding in the same manner as pleadings subsequent to an original complaint are served under Rule 5 of the Rules of Civil Procedure."[3] (Emphasis

[3] Rule 5(a) of the West Virginia Rules of Civil Procedure states:

(continued...)

added).

In requesting relief, Appellant first contends that his failure to serve the parties with a copy of the petition for appeal equated to a mere failure to comply with the requirements of Rule 5(a) of the West Virginia Rules of Civil Procedure, and thus, noncompliance with a rule of civil procedure cannot, by itself, act to deprive a court of jurisdiction under *Alan's Dept. Store v. Cainito*, 162 W. Va. 893, 898, 253 S.E.2d 522, 526 (1979). As support for his argument, Appellant cites to *Bias v. Workers' Compensation Commissioner*, 181 W. Va. 188, 381 S.E.2d 743 (1989), and *Talkington v. Barnhart*, 164 W. Va. 488, 264 S.E.2d 450 (1980), contending that a party should not be denied adjudication of his claim for a mere technical violation of a rule because, to do so, would be contrary to the interests of justice. We find both of these cases, which concern technical

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[3](...continued)

> Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. For purposes of this rule, guardians ad litem are considered parties. No service need be made on parties in default for failure to appear except the pleadings asserting new or additional claims for relief against them shall be served upon them in a manner provided for service of summons in Rule 4.

W. Va. R.C.P. 5(a)(2007).

violations of Rules of Civil Procedure, to be wholly distinguishable and inapplicable to the facts of the instant case.

In *Bias*, our decision concerned a dismissal of a claimant's appeal where counsel failed to file a brief with an accompanying certificate of service as required by Rule 4 of the Workers Compensation Appeal Board. 181 W. Va. 188, 381 S.E.2d 743. Additionally, in *Talkington*, our decision concerned a dismissal due to a failure to comply with Rule 80(c) of the West Virginia Rules of Civil Procedure, requiring notification to the parties that the trial transcript had been made a part of the record. 164 W. Va. 488, 264 S.E.2d 450. In the case *sub judice*, Appellant failed to comply with a statutory mandate, the result of which was not a mere technical violation. Qualitatively, that which is required to perfect an appeal is more legally significant than what may be required with respect to the service of a brief or the giving of notice of the filing of a transcript, as in *Bias* and *Talkington*. The failure to serve a party with a petition for appeal prejudicially affects the substantive rights of the opposing party and prohibits them from knowing that such pleading has been filed and from presenting their defenses.

Seemingly admitting that the above-noted authority concerns only technical violations of our Rules of Civil Procedure, Appellant then urges us, in the alternative, to apply the analysis utilized in *West Virginia Human Rights Commission v. Garretson*, 196 W. Va. 118, 468 S.E.2d 733 (1996), wherein we considered the appeal of the dismissal of a

Fair Housing Act claim which was timely filed, but untimely removed to circuit court. In *Garretson*, the lower court held that the failure to timely remove the case deprived it of jurisdiction. On appeal, this Court held that the outcome turned on whether the statute at issue, West Virginia Code §5-11A-13(o)(1), was directory or mandatory in nature. *Id*. at 740. Ultimately, this Court reversed the dismissal, concluding that because the statute was directory in nature, and no prejudice resulted to the parties, dismissal was inappropriate. *Id*. Applying that analysis herein, Appellant alleges that the statute at issue before us is directory, and not mandatory, in nature, and thus, because no prejudice as resulted to the parties, dismissal was in error. We simply disagree. The statute at issue before us, West Virginia Code §51-2A-11(b), is unquestionably mandatory in nature.[4]

"The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). We look next to the specific language used in the statute. *State ex rel. McGraw v. Combs Servs.*, 206 W. Va. 512, 518, 526 S.E.2d 34, 40 (1999). "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). Additionally, we accord words used

[4] The fact that the Appellant appeared *pro se* in this matter is of no moment. According to the record, the parties have been engaged in litigation for over a decade, and most, if not all, of the pleadings were filed by the Appellant himself. Accordingly, Appellant should have sufficient experience to know that pleadings must be served upon the parties.

in a legislative enactment their common, ordinary meaning. "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connotation in which they are used." Syl. Pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941)(overruled on other grounds by *Lee-Norse Company v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982)).

West Virginia Code §51-2A-11(b) specifically uses the word "must" with respect to the act of service of a petition for appeal. "Typically, the word 'must' is afforded a mandatory connotation." *Ashby v. City of Fairmont*, 216 W. Va. 527, 532, 607 S.E.2d 856, 861 (2004)(*citing McMicken v. Provence*, 141 W. Va. 273, 284, 90 S.E.2d 348, 355 (1958), construing "must" as a mandatory word). Use of the word "must" does not imply an element of discretion. *Motto v. CSX Transportation*, 220 W. Va. 412, 418, 647 S.E.2d 848, 854 (2007). Thus, when a statute contains a mandatory term such as "must", we construe that word as requiring the specified action to be taken. *See, e.g., State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999).

Applying the clear and unambiguous language of West Virginia Code §51-2A-11(b) to the facts on record before us, is it evident that the Appellant did not comply with the requirements of the statute because service of a copy of the Appellant's petition for appeal on Kendra Guido (now Gray) and the BCSE was mandatory. Failure to comply with the

statute's mandatory procedure is fatal to an appeal and deprives the circuit court of jurisdiction. Accordingly, because the circuit court was without jurisdiction to proceed to the merits of the case, we find that his petition for appeal was properly denied.

IV.

CONCLUSION

For these reasons, the Circuit Court of Marion County did not err in denying the Appellant's petition for appeal. Accordingly, the circuit court's order of April 12, 2007, is hereby affirmed.

Affirmed.