No. 33599 – *John S. Guido v. Kendra M. Guido (now Gray)*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, dissenting:

I respectfully dissent from the majority opinion. The Appellant's request to reinstate his appeal of the family court's order should have been granted. In denying the motion to reinstate, the circuit court found that the Appellant, acting pro se, had failed to satisfy the requirements of West Virginia Code § 51-2A-11(b) regarding a certificate of service attached to the Petition for Appeal. In this appeal, the Appellant maintains that his failure to complete the certificate of service was the consequence of an honest mistake and did not result in any actual prejudice to any other party. The majority affirms the circuit court's decision, reasoning that the absence of the certificate of service invalidated the petition and deprived the circuit court of its jurisdiction.

This Court frequently encounters claims that technical violations of rules or statutes invalidate claims or deprive appellate courts of jurisdiction. Consistency regarding the evaluations and results of such challenges has been deplorably lacking. This Court has most generally framed the paradigm for evaluation upon whether the violated statute was directive or mandatory in nature. *West Virginia Human Rights Commn. v. Garretson*, 196 W.Va. 118, 468 S.E.2d 733 (1996). However, this Court has repeatedly admitted that there is no "authoritative checklist" for determining whether a statute is directive or mandatory.

Id. at 126, 468 S.E.2d at 741.[1] Thus, the analysis has become cloaked with the troubling aura of subjectivity.

In *Garretson*, this Court analyzed West Virginia Code § 5-11A-13(o)(1) (1992), providing as follows: "If an election is made under subsection (a) of this section, the commission *shall* authorize, and not later than thirty days after the election is made the Attorney General *shall* commence and maintain, a civil action. . . ." (emphasis supplied). This Court found such statute directive rather than mandatory. Thus, the *Garretson* Court found that the violation of the statute did not affect jurisdiction to entertain an underlying housing discrimination claim, as long as the delay was not prejudicial to the rights of a party.[2]

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[1]"While a wide array of factors may be suggestive [in a determination of whether a statute is directive or mandatory], typically no single word in itself necessarily provides the answer. Yet, some facts may be more indicative of whether the legislature intended for a statute to be mandatory." 196 W.Va. at 126, 468 S.E.2d at 741.

[2]The *Garretson* Court noted that "[o]ne very important consideration is whether [the statute] mentions any consequences for the Commission's failure to remove the case timely." 196 W.Va. at 126, 468 S.E.2d at 741. That inquiry is not determinative, however, according to the *Garretson* opinion.

> But even here, we will not take a mechanistic approach and simply declare that any statute that fails to mention the consequences of failure to follow a procedural provision is automatically deemed directory. While the absence of consequences *creates a presumption* that the statute is merely directory, this presumption is not conclusive.

Id. (emphasis supplied).

The Garretson Court also noted that "[t]he purpose of the time limit is to allow the parties an opportunity to gather evidence while facts are still fresh and to motivate parties to diligently pursue their claims." 196 W.Va. at 122 n. 3, 468 S.E.2d at 737 n. 3.

In the present case, the articulation of the statute at issue is very similar to the *Garretson* statute. The statute in this case utilizes the term "must" and, like the *Garretson* statute, also fails to specify a particular consequence of the failure to adhere to the provision, thereby creating a presumption that the statute is directive. *See Garretson*, 196 W.Va. at 126, 468 S.E.2d at 741. Yet, the majority in this case renders an entirely different ultimate conclusion, and the Appellant loses his day in court.

While not relating to the impact of a statutory provision, this Court's decision regarding the nature of a magistrate court rule in *Frank P. Bush, Jr. & Associates, L.C. v. Hammer*, 215 W.Va. 599, 600 S.E.2d 311 (2004), is also instructive. In appealing a magistrate court judgment, a timely filing of an appeal bond on a form prepared by this Court was deemed sufficient to constitute the required "notice of appeal" for purposes of the rule requiring a notice of appeal to be filed. The *Hammer* scenario is also analogous to the present case to the extent that the appellant in that case, acting pro se, relied upon information provided to him by magistrate court personnel that no additional written documents were necessary to file his appeal. The *Hammer* Court relied upon this Court's prior decision in *Wolfe v. Welton*, 210 W.Va. 563, 558 S.E.2d 363 (2001). In that case, this

Court stated that "upon the filing of the bond and payment to the magistrate court of the circuit court filing fee, [an] appeal [is] properly commenced." 210 W.Va. at 569, 558 S.E.2d at 369.

With regard to the precise technical violation in this case, it is interesting to note that the circuit court order denying the Appellant's petition for appeal was entered twenty days after the Appellant filed his petition for appeal. The Appellant was not provided with any opportunity to correct the defect, and his motion for reinstatement was denied. Even within the context of the filing of a complaint, Rule 4(k) of the West Virginia Rules of Civil Procedure provides a litigant with a period of 120 days in which to serve the summons and complaint. In this case, the Appellant's failure to serve a petition for appeal within 20 days was deemed proper cause for complete denial of his right to appeal an adverse judgment.

The lack of precision with regard to the evaluation of challenges to technical deficiencies has long plagued this Court. In *Gaines v. Hawkins,* 153 W.Va. 471, 170 S.E.2d 676 (1969), the majority held that held that the litigant's failure to provide a bond to the clerk of the Common Pleas Court within the statutory time frame deprived the court of jurisdiction even though the litigant had provided the bond to the clerk of the Circuit Court as required by the order granting the appeal. Ironically, the clerk of the Circuit Court was also the clerk of the Common Pleas Court. It is the dissent to that decision that provides the most

illuminating insight. Judge Calhoun disagreed with the majority's holding of the deprivation of jurisdiction and opined that the majority had "sacrificed substance, justice and reason for the sake of a slavish adherence to empty technicality." 153 W.Va. at 476, 170 S.E.2d at 679 (Calhoun, J., dissenting). Recognizing that some statutory time periods are indeed non-negotiable prerequisites to appellate jurisdiction, Judge Calhoun explained that the majority had "placed a mere procedural irregularity in the same harsh category. In making this decision, the Court has not paused to consider whether the procedural irregularities involved in this case were matters of substance or whether the rights of a party have been prejudiced thereby." *Id*. at 478-79, 170 S.E.2d at 680.

Likewise, the majority in the present case has failed to pause to properly consider, and the rights prejudiced by this decision are those of the Appellant. Ultimately, the majority's conclusion in this case is flawed. The consequence is the unfair denial of a litigant's opportunity to address the merits of his case. The majority is utilizing the existence of a technical violation to deny these rights based upon the supposition that the Appellant's children were denied support. Yet, the Appellant has attempted to forward claims of error in the family court litigation, and those attempts have been thwarted by this ill-conceived majority decision.

The majority's error in this case is compounded by the fact that the circuit clerk was actually assisting this pro se litigant, and the absence of formal rigid compliance with

the certificate of service process was the result of this litigant's reliance upon that advice. In this vein, the majority asserts that the Appellant's status as a pro se litigant is of no moment, allegedly due to the Appellant's extensive experience in litigation of this matter. That conclusion hardly comports with this Court's longstanding approach to the rights of pro se litigants. "This Court has long held that non-lawyer, pro se litigants generally should not be held accountable for all of the procedural nuances of the law." *Hammer*, 215 W.Va. at 603, 600 S.E.2d at 315 (Davis, J., concurring).

> When a litigant chooses to represent himself, it is the duty of the trial court to insure fairness, allowing reasonable accommodations for the pro se litigant so long as no harm is done an adverse party. . . . Most importantly, the trial court must strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules.

State ex rel. Dillon v. Egnor, 188 W.Va. 221, 227, 423 S.E.2d 624, 630 (1992) (internal quotations and citations omitted).

Based upon the foregoing, I respectfully dissent.

I am authorized to state that Justice Starcher joins in this separate opinion.