No. 31508 - Frank P. Bush, Jr. & Associates, L.C. v. Robin Hammer

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OF WEST VIRGINIA

Davis, J., concurring:

In this proceeding the majority opinion has reversed the decision of the circuit court, which dismissed the appeal of Mr. Hammer. "I agree with the [majority's] opinion[] holding that the circuit court's ruling should be reversed. . . . However, I do not agree with the reasoning used by the [majority] in reaching its conclusion. For the reasons set forth below, I concur in the judgment of the [majority] opinion, but disagree with its rationale." *Wolfe v. Welton*, 210 W.Va. 563, 577, 558 S.E.2d 363, 377 (2001) (Davis, J., concurring).

Filing Appeal Bond Does Not Satisfy Notice of Appeal Requirement

The majority opinion reversed this case based upon the plurality opinion in *Wolfe v. Welton*, 210 W.Va. 563, 558 S.E.2d 363 (2001).[1] In *Wolfe* the plurality opinion 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." *Wolfe*, 210 W.Va. at 569, 558 S.E.2d at 369. In my concurring opinion in *Wolfe*, I pointed out that the plurality opinion reached the correct result, but for the wrong reasons. I indicated in that case that filing an appeal bond *did not satisfy* the notice of appeal requirement contained in W. Va. Code § 50-5-12 (1994):

[1]In *Wolfe* I wrote a concurring opinion in which Justice Maynard joined. Chief Justice McGraw also wrote a separate concurring opinion.

> The statute clearly mandates the filing of a petition for appeal. The statute leaves no room for discretion. If a party wishes to appeal, that party must file a petition for appeal. Pursuant to *Cable* [*v. Hatfield*, 202 W.Va. 638, 505 S.E.2d 701 (1998)], failure to comply with the statute's mandatory procedure is fatal to an appeal and prevents a circuit court from having jurisdiction to proceed to the merits of the case. This Court has previously held that an "'appellate court does not acquire jurisdiction and cannot entertain an appeal unless the appeal petition is filed within the prescribed appeal period.'" *Asbury v. Mohn*, 162 W.Va. 662, 665, 256 S.E.2d 547, 548-549 (1979) (quoting *State v. Legg*, 151 W.Va. 401, 406, 151 S.E.2d 215, 219 (1967)).

Wolfe, 210 W.Va. at 578, 558 S.E.2d at 378 (Davis, J., concurring).

In the instant case, the majority opinion has reached the correct result, but for the wrong reasons. This case turned upon the fact that Mr. Hammer was not a lawyer. He was acting pro se in this litigation. 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.

> 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).

> Of course, the court must not overlook the rules to the prejudice of any party. The court should strive, however, to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake. Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not.

Blair v. Maynard, 174 W.Va. 247, 253, 324 S.E.2d 391, 396 (1984).

In the instant proceeding, magistrate court personnel advised Mr. Hammer that all he needed to do to perfect an appeal was to file an appeal bond. As a pro se litigant, Mr. Hammer reasonably relied upon this erroneous information.[2] However, there was no prejudice to Mr. Bush as a result of Mr. Hammer's failure to comply with a procedure of which he had no knowledge. Under these facts, I believe the pro se principles of *Dillon* and *Blair* are dispositive as to why this case should be reversed. I do not believe that the unsound reasoning in the *Wolfe* plurality opinion should have been resurrected to "muddy" the waters on this procedural issue.

In view of the foregoing, I concur.

[2]If Mr. Hammer had been an attorney, there would have been no basis for him to rely upon the information provided by the magistrate court personnel.