

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-322
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

In the Matter of: Timothy E.
Gordon,
Petitioner

Chatham County
Nos. 98 CRS 3356-58, 98 CRS
3363-65

Appeal by the State from order entered 6 December 2012 by Judge Carl R. Fox in Superior Court, Chatham County. Heard in the Court of Appeals 27 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Joy Strickland, for the State.

Glenn Gerding for Petitioner-Appellee.

McGEE, Judge.

Timothy E. Gordon ("Petitioner") pleaded guilty to four counts of taking indecent liberties and two counts of felony child abuse on 12 July 1999. Petitioner registered as a sexual offender on 21 July 1999. Pursuant to N.C. Gen. Stat. § 14-208.12A, Petitioner filed a Petition for Termination of Sex

Offender Registration on 25 September 2012. The trial court held a hearing on the Petition and granted Petitioner's request to be removed from the registry on 6 December 2012.

The State gave oral notice of appeal in open court at the conclusion of the hearing. The following exchange occurred:

[The Court]. That's the judgment of the Court. All right. And we are in recess.

[The State]. May I? Before you recess, Your Honor, the State does give oral notice of appeal --

[The Court]. Okay.

[The State]. -- based on the fact that the Court has found that the federal guidelines under Number 7 do not apply to a petition to remove from Sex Offender Registry. The State will file written notice of appeal within the ten days pursuant.

The State then filed a document titled "State's Notice of Appeal" on 17 December 2012 in Superior Court, Chatham County. Petitioner filed a motion to dismiss the State's appeal for failing to comply with the North Carolina Rules of Appellate Procedure. The State did not respond to the motion.

I. Notice of Appeal under N.C.R. App. P. 3(d)

Petitioner argues that the State failed to give adequate notice of appeal under N.C.R. App. P. 3. The sex offender registration requirement in Article 27A is "a non-punitive civil regulatory scheme." *State v. Pell*, 211 N.C. App. 376, 377, 712

S.E.2d 189, 190 (2011). Thus, N.C.R. App. P. 3 governs this appeal. See *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010).

The notice of appeal required to be filed and served by subsection (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C.R. App. P. 3(d).

The document titled "State's Notice of Appeal" in this case is quoted below:

Now comes the State of North Carolina, by and through the undersigned Assistant District Attorney for the Prosecutorial District 15B, has given Notice of Appeal in open court to the Courts ruling that the provision of N.C.G.S. 14-208.12A, that the relief requested by petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. sec. 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State does not apply to petitions to terminate in the State of North Carolina. Made in open court on December 6, 2012, Chatham County Superior Court.

The document announces only that the State "has given Notice of Appeal in open court[.]" In this document, the State does not actually give notice of appeal. Rather, the State

alleges that it had already given oral notice of appeal "in open court[.]" Even assuming *arguendo* that this document did give notice of appeal, the document contains other rules violations.

The State does not designate the judgment or order from which appeal is taken, in violation of N.C.R. App. P. 3(d). Also, the State does not designate the court to which appeal is taken, in violation of N.C.R. App. P. 3(d). "[T]his Court has held that a mistake in designating the judgment . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake[.]" *State v. Hammonds*, ___ N.C. App. ___, ___, 720 S.E.2d 820, 823 (2012) (alterations in original) (internal quotation marks omitted). From our review of the record, it does not appear that Petitioner was misled by the State's mistakes.

II. Service of Notice of Appeal under N.C.R. App. P. 3(e)

Petitioner further argues that the State failed to properly serve notice of appeal. Again, N.C.R. App. P. 3 governs. "Service of copies of the notice of appeal may be made as provided in Rule 26." N.C.R. App. P. 3(e). "Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure and may be so made

upon a party or upon its attorney of record." N.C.R. App. P. 26(c).

Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within the rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee.

N.C.R. App. P. 26(c).

N.C. Gen. Stat. § 1A-1, Rule 4 states that the manner of service to a natural person shall be as follows:

a. By delivering a copy . . . to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

b. By delivering a copy . . . to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy . . . registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy . . . addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

e. By mailing a copy . . . by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee.

N.C.G.S. § 1A-1, Rule 4(j)(1).

The record in the present case contains two certificates of service. The first certifies that the State

has this date served this document in the above captioned action upon the Chatham County Clerk of Court, and defendant's attorney, Ken Richardson, by placing a copy in the box in the Chatham County Courthouse designated for the public defender and the Chatham County Clerk of Court and by email. This the 17 day of December, 2012.

Service by electronic mail is appropriate under N.C.R. App. P. 26(c) only when "a document is filed electronically to the official web site[.]" The record does not indicate that the notice of appeal was filed electronically with the Chatham County Clerk of Court. Neither N.C.R. App. P. 26(c) nor N.C.R. Civ. P. 4(j)(1) permits service by placing a copy in "the box" in a courthouse "designated for the public defender and the Chatham County Clerk of Court[.]"

The second certificate of service asserts that

a copy of the State's Notice of Appeal was served on the Petitioner's Attorney, Mr. Ken Richardson on December 17, 2013 by personal service by the undersigned. This the 14 day of March, 2013.

We assume the State meant that service was effected 17 December 2012. This certificate bears no file stamp or other proof that it was filed with the Chatham County Clerk of Superior Court, in violation of N.C.R. App. P. 9(b)(3).

"The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). However, "the manner of proper service of that notice is not a matter of subject matter jurisdiction, but rather a matter of personal jurisdiction which may be waived by a party." *MNC Holdings, LLC v. Town of Matthews*, ___ N.C. App. ___, ___, 735 S.E.2d 364, 366 (2012) (citing *Hale v. Afro-American Arts International*, 335 N.C. 231, 436 S.E.2d 588 (1993)).

In *Hale*, the appellant failed to include in the record a certificate of service of the notice of appeal. This Court dismissed the appeal due to the defect. "Judge Wynn, dissenting, concluded that failure to serve the notice of appeal was a defect in the record analogous to failure to serve process." *Hale*, 335 N.C. at 232, 436 S.E.2d at 589 (per curiam). "Therefore, a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating

without objection in the appeal[.]” *Id.* Our Supreme Court reversed the decision of the Court of Appeals for the reasons stated in Judge Wynn’s dissenting opinion.

“In *Lee v. Winget Rd., LLC*, [204 N.C. App. 96, 693 S.E.2d 684 (2010),] this Court held in light of *Hale* and *Dogwood* that proper service of a notice of appeal is a non-jurisdictional requirement.” *MNC Holdings*, ___ N.C. App. at ___, 735 S.E.2d at 366. Two of the parties in *Lee* were never informed of the appeal, and this Court held that the error justified dismissal of the appeal. *Lee*, 204 N.C. App. at 103-04, 693 S.E.2d at 690. By contrast, this Court in *MNC Holdings* did not dismiss the appeal because all parties were present and submitted well-researched briefs. *MNC Holdings*, ___ N.C. App. at ___, 735 S.E.2d at 367.

Although both parties submitted briefs, Petitioner did not waive the issue of jurisdiction in this case. Petitioner filed a motion to dismiss on the basis of the rules violations discussed in this opinion, to which the State filed no response. Furthermore, Petitioner referenced his motion to dismiss in his appellee brief. We cannot conclude that Petitioner has participated in this appeal without objection.

III. Conclusion

Due to the nature of the violations in this case, we dismiss this appeal. Even assuming *arguendo* that the written notice indeed operated as a notice of appeal, we conclude under these circumstances that the State's noncompliance with our appellate rules is "substantial or gross" under the standards set forth in *Dogwood* and its progeny. Given that the State gave oral notice of appeal and referenced a time period in which it would give written notice of appeal, it appears that the State operated under the misapprehension that its appeal was governed by the rule of appellate procedure regarding criminal appeals, N.C.R. App. P. 4. However, N.C.R. App. P. 3 governs this appeal, and we are required to apply the rules of appellate procedure equally to the State, as appellant, as we apply to defendants who appeal. See *Brooks*, 204 N.C. App. at 194-95, 693 S.E.2d at 206.

Dismissed.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).