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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-784

Filed: 21 July 2020

Wake County, No. 16-CVS-14587

ANTHONY B. FAIRLEY, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Respondent.

Appeal by Petitioner from Order Denying Judicial Review entered 4 October 2017 by Judge A. Graham Shirley, II, in Wake County Superior Court. Heard in the Court of Appeals 14 April 2020.

Anthony B. Fairley, pro se, for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for Respondent-Appellee.

McGEE, Chief Judge.

Anthony B. Fairley (“Petitioner”) appeals the 4 October 2017 Superior Court Order affirming a Final Decision and Order of the North Carolina Human Relations Commission. The North Carolina Department of Transportation (“Respondent”) moves to dismiss Petitioner’s appeal for lack of jurisdiction and substantial violations of the North Carolina Rules of Appellate Procedure.

I. Factual and Procedural History

Petitioner filed suit against Respondent, his former employer, in Wake County Superior Court on 21 August 2009, alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.* Pursuant to 28 U.S.C. §§ 1331 and 1441, Respondent removed Petitioner’s case to the U.S. District Court for the Eastern District of North Carolina, Western Division (“District Court”). Respondent moved for summary judgment, which was granted on 8 April 2011.

Petitioner filed a second discrimination action in federal district court on 21 November 2012. The complaint alleged fourteen charges of discrimination filed with the Equal Employment Opportunity Commission (“EEOC”) between March 2010 and January 2013. Respondent moved to dismiss the case for failure to state a claim. The District Court granted in part and denied in part Respondent’s Motion to Dismiss. Specifically, the District Court dismissed Petitioner’s: (1) EEOC charge numbered 846-2009-15891 because the claim was precluded by Petitioner’s 2009 suit; (2) EEOC charges numbered 433-2010-0296 and 433-2011-01429 because they were untimely filed; and (3) EEOC charges numbered 433-2010-022202, 433-2010-002190, 433-2011-01116, and 433-2011-02008, because the court lacked subject matter jurisdiction over those claims. Seven claims of discrimination survived Respondent’s Motion to Dismiss: EEOC charges numbered 433-2010-01259, 433-210-01725, 433-2011-00260, 433-2011-00994, 433-2011-01190, 433-2011-02851, and 433-2011-03085.

Respondent moved for summary judgment on the remaining seven claims and the District Court granted summary judgment for Respondent on these claims on 27 December 2014. In its order granting summary judgment for Respondent, the District Court concluded:

Mr. Fairley has put forth no evidence to demonstrate that [Respondent's] reasons for any adverse employment action were pretextual. Mr. Fairley merely relies on his prior deposition testimony in which he stated that he felt he was being discriminated against because he was black. His blanket denial that his conduct fell into any of the categories [Respondent] put forth as reasons for termination and discipline does not rise to the level of proof by a preponderance of the evidence. Accordingly, Mr. Fairley fails to establish a prima facie causal link between the protected activity and the adverse employment action.

Petitioner appealed this decision to the Fourth Circuit of the U.S. Court of Appeals on 30 January 2015, but the appeal was dismissed as untimely on 20 August 2015.

Petitioner petitioned the Office of Administrative Hearings on 16 December 2011 for a contested case hearing. The contested case was stayed on 30 March 2012, pending the conclusion of the fourteen charges of discrimination filed with the EEOC. In a 26 July 2016 decision, Administrative Law Judge J. Randolph Ward lifted the order staying the contested case and dismissed the case based on the doctrines of res judicata and collateral estoppel. The State Human Resources Commission (the "Commission") reviewed Judge Ward's decision and issued a final decision on 6 October 2016. In its Final Decision and Order, the Commission ordered as follows:

Pursuant to [N.C.]G.S. § 126-37, the State Human Resources Commission hereby orders that the decision of the Administrative Law Judge [“ALJ”] dismissing the petition filed by the [Petitioner] be adopted and the [Respondent’s] actions with regard to the [Petitioner’s] employment be affirmed.

The Commission adopted both Judge Ward’s findings of fact and conclusions of law in its final decision.

Pursuant to N.C. Gen. Stat. § 150B-45, Petitioner filed a Petition for Judicial Review with the Superior Court of North Carolina on 30 November 2016. In his petition, Petitioner “t[oo]k[] exception to and appeal[ed] the Conclusions of Law” made by Judge Ward and adopted by the Commission and further contended as follows:

Neither the principles of preclusion or res judicata apply in this case because in no forum has any court yet ruled on the substantive issues. The rulings of dismissal have been based on [Petitioner’s] previous attorney’s botched procedures in the Federal setting where the underlying causes of action in this case were not brought or heard.

Respondent filed a Motion to Dismiss Petitioner’s request for judicial review by the Superior Court on 21 December 2016, citing Petitioner’s

failure to timely file the Petition for Judicial Review, failure to timely serve all the necessary parties . . . failure to explicitly state any exceptions to the State Personnel Commission’s actual findings of fact and legal conclusions . . . and/or otherwise comply with the dictates of Chapter 150B of the North Carolina General Statutes.

In the alternative, Respondent argued that Judge Ward's "Order of Dismissal and the Commission's [27] October [] 2016 Decision and Order [we]re fully supported by the record and the applicable law and should be upheld."

Petitioner's Petition for Judicial Review was heard during the 13 September 2017 civil session of the Wake County Superior Court. The Superior Court denied Respondent's Motion to Dismiss the Petition for Judicial Review on procedural grounds and applied *de novo* review to the challenged conclusions of law. The Superior Court found that

the Conclusions of Law are consistent in all respects with the applicable law per the dictates of N.C. Gen. Stat. § 150B-51(b) (2011). Specifically, the October 27, 2016 Decision and Order of the North Carolina State Human Relations Commission was not made in violation of constitutional provisions; was not made upon unlawful procedure; and was not affected by other error of law.

Accordingly, the Superior Court affirmed the Commission's Final Decision and Order in an Order filed on 4 October 2017. A Certificate of Service of the Order was filed along with the trial court's Order on 4 October 2017, certifying the Order was served on the attorney for the Petitioner by placing it in the United States mail. Petitioner filed Notice of Appeal on 6 November 2017. Respondent filed a Motion to Dismiss Petitioner's appeal with this Court on 4 December 2019.

II. Analysis

Respondent moves this Court to dismiss Petitioner's appeal under North Carolina Rules of Appellate Procedure 25(b) and 34(b) "for lack of jurisdiction and for

various substantial violations of the Rules of Appellate Procedure.” Specifically, Respondent contends that Petitioner’s appeal was untimely under Rule 3 and deficient under Rules 26 and 28. We agree.

A. Appellate Jurisdiction and Timely Appeals

N.C. Gen. Stat. § 1-279.1 provides as follows:

Any party entitled by law to appeal from a judgment or order rendered by a judge in superior or district court in a civil action or in a special proceeding may take appeal by giving notice of appeal within the time, in the manner, and with the effect provided in the rules of appellate procedure.

N.C. Gen. Stat. § 1-279.1 (2019). Rule 3(a) of the North Carolina Rules of Appellate Procedure states that the appealing party in a civil action may appeal by “filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner within the time directed in subsection (c) of the Rules.” Rule 3(c) directs that the party must file and serve a notice of appeal within thirty days after service of the entry of judgment. N.C. R. App. P. 3(c)(1), (2) (2019). Rule 3(c) further provides that:

In computing the time for filing a notice of appeal, the provision for additional time after service by mail in Rule 27(b) of these rules and Rule 6(e) of the Rules of Civil Procedure shall not apply.

N.C. R. App. P. 3(c)(3). If the requirements of these rules are not met, the appeal must be dismissed for lack of jurisdiction. N.C. R. App. P. 3(c)(1), (2); *see Whitlock v. Triangle Grading Contractors Dev., Inc.*, 205 N.C. App. 444, 446, 696 S.E.2d 543, 545

(2010) (“The requirements of Rule 3 are ‘jurisdictional in nature.’” (citation omitted)); accord *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (“A jurisdictional default [under the appellate rules] . . . precludes the appellate court from acting in any manner other than to dismiss the appeal.” (citations omitted)).

In the present case, the Superior Court’s judgment was entered and served on 4 October 2017. Under Rule 3, Petitioner was required to file his Notice of Appeal on or before 3 November 2017. See N.C. R. App. P. 3(c)(1), (2). However, Petitioner’s Notice of Appeal was not filed and served until 6 November 2017, thirty-three days after the order was served. By the plain language of Rule 3, Petitioner did not timely file his Notice of Appeal, and this Court does not have jurisdiction to hear the appeal. N.C. R. App. P. 3(c); see *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365 (“[A] jurisdictional default brings a purported appeal to an end before it ever begins.”). Accordingly, Petitioner’s appeal must be dismissed.

B. Nonjurisdictional Violations of Appellate Procedure

Even if we found good cause to set Petitioner’s jurisdictional defects aside, this is a rare case where the nonjurisdictional defects alone would warrant dismissal. The failure to follow appellate procedure, “ordinarily forfeit[s a party’s] right to review on the merits.” *Dogwood*, 362 N.C. 191 at 194, 657 S.E.2d at 363. “However, every violation of the rules does not require dismissal of the appeal or the issue, although some other sanction may be appropriate, pursuant to Rule 25(b) or Rule 34 of the

Rules of Appellate Procedure.” *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007).

The Supreme Court of North Carolina has instructed this Court to conduct the following three-step analysis in analyzing dismissal in the context of nonjurisdictional defects:

To summarize, when a party fails to comply with one or more nonjurisdictional appellate rules, the court should first [(1)] determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then [(2)] determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider [(3)] whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

Dogwood, 362 N.C. 191 at 201, 657 S.E.2d at 367. Applying the *Dogwood* test for nonjurisdictional violations of appellate rules, we hold Petitioner’s appeal should be dismissed.

1. *Petitioner’s violations of appellate procedure were substantial*

To determine whether a failure to comply with the appellate rules is substantial so as to warrant sanctions under Rule 25(b), a court must partake in a “fact-specific inquiry into the particular circumstances of each case, mindful of the principle that the appellate rules should be enforced as uniformly as possible.” N.C. R. App. P. 25(b) (2019). Facts relevant to the determination of a violation’s severity include “whether and to what extent the noncompliance impairs the court’s task of

review and whether and to what extent review on the merits would frustrate the adversarial process.” *Dogwood*, 362 N.C. 191 at 200, 657 S.E.2d at 366; *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam). The number of violations may lend support to a substantial violation determination, but “in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review.” *Dogwood*, 362 N.C. 191 at 200, 657 S.E.2d at 367.

In the present case, Respondent contends Petitioner violated Rules 26(g), 28(a) and 28(b). N.C. R. App. P. 26(g), 28(a), 28(b) (2019). Rule 26(g) dictates the stylistic preferences of the court including font, paper size, and line spacing. *See* N.C. R. App. P. 26(g). “Noncompliance with rules of this nature, while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction.” *Dogwood*, 362 N.C. 191 at 198, 657 S.E.2d at 365. However, when combined with violations of Rule 28(b), this Court has dismissed cases without reviewing the merits. *See, e.g., Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299 (1999) (affirming this Court’s dismissal of appeal for failure to double-space brief and to “properly set[] forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment”).

The function of the requirements of Rule 28 is to assure that all briefs presented to the appellate courts clearly present all information needed for the court

to issue a judgment and provide relief. *See* N.C. R. App. P. 28(a). Rule 28(a) limits the scope of review on appeal to the issues presented in a party's brief, as "issues not presented and discussed in a party's brief are deemed abandoned." *Id.* The sections of Rule 28(b) upon which Respondent relies are as follows:

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

....

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

N.C. R. App. P. 28(b). Due to the nature of Rule 28, noncompliance can make it "difficult if not impossible to properly determine the appeal." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299. Such noncompliance would render a violation substantial pursuant to Rule 25(b). *See* N.C. R. App. P. 25(b); *Dogwood*, 362 N.C. 191 at 200, 657 S.E.2d at 367.

Respondent identifies four violations of Rule 28 in Petitioner's brief:

His statement of the case section does not reflect the actual procedural history of his case as is required by Appellate

Procedure Rule 28(b)(3), but instead includes only factual allegations. His statement of the facts section is argumentative and contains no citations to the Record on Appeal in violation of Appellate Procedure Rule 28(b)(5). His argument section violates both Appellate Procedure Rules 28(a) and 28(b)(6), both of which deem issues not argued in an appellate's [(sic.)] brief to be abandoned.

(citations omitted). Petitioner does not contest the above alleged violations; instead, in his response to Respondent's Motion to Dismiss, Petitioner asks this Court to be "mindful" of the fact that Petitioner is unrepresented whereas Respondent has "a team of lawyers." This Court is mindful that Petitioner is acting *pro se* and we recognize the difficulty appellants in this position face. However, our Court stated in *Strauss v. Hunt*, "we emphasize that even pro se appellants must adhere strictly to the Rules of Appellate Procedure [] or risk sanctions." 140 N.C. App. 345, 348–49, 536 S.E.2d 636, 639 (2000).

In this case, as in *Steingress*, "it is clear that [Petitioner's] brief is not in the form prescribed by Rule 26(g) and further does not comport to Rule 28(b)." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299. We note that: Petitioner's procedural history is inaccurate; he completely fails to cite to the record on appeal in presenting the facts of his case; and Petitioner's brief is single-spaced, rather than double-spaced as required by Rule 26(g). Although Petitioner lists two issues presented for appeal, he without applying those elements to the facts of his claim. While Petitioner does advance various arguments in his proposed issues on appeal, attached as an "appendix" to his brief, these arguments do not present discernable issues, are not

completely fails to address those issues in his brief;¹ instead, in his argument section, Petitioner merely cites the elements of a race discrimination claim under Title VII presented in a clear manner, and are not directly raised in Petitioner's brief. Accordingly, we find Petitioner's violations of Rule 26(g) and Rules 28(b)(3), (5), and (6) are substantial.

2. *Petitioner's violations of appellate procedure warrant dismissal*

Once a substantial violation is identified, this Court is tasked with "fashioning a remedy to encourage better compliance with the rules." *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365. In the interest of justice, this Court prefers to address the merits of a case whenever possible. *Id.* ("We stress that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal."). Thus, dismissal of an appeal is reserved for the most egregious of violations. *Id.*; see also *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984) ("[T]his extreme sanction [of dismissal] is to be applied only when the trial court determines that less drastic sanctions will not suffice."). In other words, the severity of the sanction must reflect the severity of the violation. See *Hart*, 361 N.C. at 312, 644 S.E.2d at 203 (acknowledging that dismissal may not be warranted when noncompliance does not "impede comprehension of the issues on appeal or frustrate the appellate process").

¹ We further note that Petitioner's second proposed issue on appeal, "did the trial court err in judgment by concluding the Petitioner's claims listed in the contents of the appendix when denied the issues in conclusion," is not intelligible.

In the present case, Petitioner's brief inaccurately states the procedural history and fails to cite to the record on appeal in his fact section, making the appeal more difficult for this Court to review. In addition, Petitioner's brief contains no arguments in support of the issues he presented on appeal. Instead, Petitioner merely states the elements of a cause of action under Title VII. Since Petitioner presents issues "in support of which no reason or argument is stated, [the issues presented] will be taken as abandoned." N.C. R. App. P. 28(b)(6); *see also* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Together, these violations render Petitioner's appeal impossible for this Court to adequately review. *Cf. Pers. Earth Movers, Inc. v. Thomas*, 182 N.C. App. 329, 333, 641 S.E.2d 751, 754 (2007) ("To address this issue, this Court would be required to reconstruct the case and articulate an argument for defendant."). The nature and severity of Petitioner's appellate rule violations make dismissal appropriate.

3. *The circumstances of the case do not justify invoking Rule 2*

Rule 2 is a discretionary tool an appellate court may use to suspend the Rules of Appellate Procedure in order to review a case on its merits. *See* N.C. R. App. P. 2 (2019); *see also Steingress*, 350 N.C. at 66, 511 S.E.2d at 299 ("[W]e reaffirm that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance."). Rule 2 states:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by

these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. However, the residual power vested in our appellate courts has limits. The Supreme Court explained in *Viar v. North Carolina Department of Transportation* that an appellate court's use of Rule 2 is limited to the issues "raised and argued by the plaintiff." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361; *see id.* ("[I]t is not the role of the appellate courts . . . to create an appeal for an appellant."). Under Rules 28(a) and 28(b)(6), Petitioner has abandoned his issues on appeal and left nothing for this Court to review. *See* N.C. R. App. P. 28; *Viar*, 359 N.C. at 402, 610 S.E.2d at 361 (dismissing an appeal because the plaintiff failed to present an argument in support of a presented issue in violation of Rule 28(b)(6)). We are mindful of the difficulties a *pro se* party faces in navigating our appellate courts. However, as our Supreme Court noted in *Viar*, "the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Id.* at 402, 610 S.E.2d at 361 (citation omitted). Therefore, we dismiss Petitioner's appeal.

III. Conclusion

For the reasons discussed above, we hold that Petitioner failed to timely serve notice of appeal and his appeal should be dismissed for lack of jurisdiction. We

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further hold that Petitioner made multiple substantial violations of the Rules of Appellate Procedure, rendering Petitioner's appeal appropriate for dismissal. Accordingly, Respondent's Motion to Dismiss is hereby granted, and Petitioner's appeal is dismissed.

DISMISSED.

Judges MURPHY and BROOK concur.

Report per Rule 30(e).