No. SC96639

In the
Supreme Court of Missouri

GORDON F. GOLDSBY,

Appellant,

v.

GEORGE LOMBARDI, Director of the
Missouri Department of Corrections,

Respondent.

Appeal from the Cole County Circuit Court
The Honorable Daniel Green

RESPONDENT'S SUBSTITUTE BRIEF

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Jurisdictional Statement

This is an appeal from the Cole County Circuit Court's judgment denying a petition for declaratory judgment. This appeal does not address any of the areas reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court. But on November 21, 2017, this Court sustained Goldsby's application to transfer after the Missouri Court of Appeals' opinion in No. WD79982. Mo. Const. art. V, § 10 (as amended 1976).

Goldsby did not file a timely notice of appeal from the circuit court's judgment. As explained in respondent's first point on appeal, there is no appellate court jurisdiction.

Statement of Facts

After a jury trial, Gordon Goldsby stands before the Court guilty of kidnapping, rape, and assault with intent to do great bodily harm with malice for which he received consecutive terms of ten years, life and twenty-five years respectively from the St. Louis County Circuit Court (Legal File–hereinafter LF–17, 34-35). *State v. Goldsby*, 845 S.W.2d 636, 637 (Mo. App. E.D. 1992). Efforts at state court post-conviction relief were unavailing. *Id.*; *State v. Goldsby*, 341 S.W.3d 809 (Mo. App. E.D. 2011); *Goldsby v. Crawford*, 296 S.W.3d 473 (Mo. App. W.D. 2009)(LF 34); *Goldsby v. Hurley*, No. 13PI-CC00059 (LF 40);

Goldsby filed a petition for declaratory judgment in the Cole County Circuit Court (LF 5). Goldsby alleged that the Missouri Department of Corrections "is improperly depriving [Goldsby] of a calculation showing when his sentence will be completed under the 9/12ths law, or his 12/12ths release date" (LF 5). He also complained that the Department applied the new criminal code (1978 code) to calculate his sentence for the 1972 rape (LF 5-7). He alleged that under an 1879 statute, a life sentence really meant a sentence of twenty years with release after serving fifteen years (LF 7). Goldsby prayed for the following declarations:

a.) that section 556-031 RSMo., effective 1-1-1979, does apply here and forbids the DOC from applying new code laws to Petitioner's crimes committed prior to 1-1-1979.

b.) [CONVICTS] the original 9/12ths law and all subsequent additions thereto; does apply to Petitioner's crimes committed on March 17th 1972.

c.) Section 559.260 RSMO., (1969), applies to Petitioner's crime and that said statute does not authorize or show a punishment of life imprisonment, but does show punishment as death or a number of years not less than two years. See attached and marked as Petitioner's exhibit "H."

d.) that *State v. Starks*, 459 S.W.2d 249, directs determinate sentencing is the only sentencing recognized in this state, therefore, the DOC cannot decide that they do not know what a Petitioner's completion date is on his sentence.

e.) that the records officer department has a ministerial duty by law requiring them to calculate Petitioner's Start and Finish dates of his Rape sentence.

LF 8.

Respondent filed an answer to the petition for declaratory judgment (LF 19). Respondent then filed a motion to dismiss (LF 31) because Goldsby

had already challenged the calculation of his sentence twice before (LF 31). Respondent explained that the earlier courts had assured Goldsby that the Department's calculation was correct; thus, the circuit court should dismiss the petition (LF 31-32). The circuit court dismissed the petition on June 27, 2016 (LF 42), and denied the motion to modify judgment on July 22, 2016 (LF 45).

Argument

I. The Court lacks jurisdiction because Goldsby did not file a timely notice of appeal. (Responds to Points I and II).

Goldsby did not timely file a notice of appeal with the Cole County Circuit Court. The circuit court entered judgment on June 27, 2016 (LF 3, 42). Goldsby filed a "Motion to Modify Judgment" on July 19, 2016 (LF 4, 43). The circuit court denied the motion to modify on July 22, 2016 (LF 45). Under Missouri Supreme Court Rule 81.05(a)(2)(B), the June 27, 2016 judgment became final on July 27, 2016, thirty days after judgment, because that day is later than July 22, 2016, the date the circuit court denied the motion to modify. Ten days after finality was August 6, 2016, the due date for the notice of appeal. Mo. S.Ct. R. 81.04(a). But August 6, 2016, was a Saturday. The next business day was Monday August 8, 2016. Goldsby filed his notice of appeal on August 17, 2016, long after the ten days allowed by Rule 81.04(a) (Supp. LF 4, 6).

Goldsby may contend that he mailed the notice of appeal on July 11, 2016 (Supp. LF 7), or July 28, 2016 (Supp. LF 6 (handwriting under "Filed" stamp)). Missouri does not recognize a "mailbox rule." *Johnson v. Purkett*, 217 S.W.3d 341, 343 (Mo. App. E.D. 2007), *citing* Missouri Supreme Court Rule 81.04(a). The date of mailing is irrelevant.

Even if Goldsby had submitted a notice of appeal to the circuit clerk before August 17, 2016, the clerk properly did not file the notice until August 17, 2016. The notice of appeal shows that Goldsby provided the filing fee to the circuit clerk on August 17, 2016 (Supp. LF 8). For a circuit clerk to file a notice of appeal, the appellant must present to the clerk the fee, a statement showing that no fee is necessary, or a motion to proceed in forma pauperis. Mo. S.Ct. R. 81.04(e). Goldsby only complied with the rule on August 17, 2016. The notice was untimely.

Because Goldsby did not timely file a notice of appeal, the appellate court does not have jurisdiction. *McGee v. Allen*, 929 S.W.2d 278, 280 (Mo. App. S.D. 1996). The Court should dismiss the appeal.

* * *

In his substitute brief before the Court, Goldsby contends that Missouri Supreme Court Rule 81.04 is unconstitutional (Substitute Brief, pp. 15-22). He asserts that regulation of appeals deprives appellants of due process, the right to petition the government, and the right to access the courts (Substitute Brief, pp. 15-16). On the other hand Goldsby recognizes the Court's responsibility to establish rules concerning practice and procedure (Substitute Brief, p. 15, citing Mo. Const. art. V, § 5).

One of the rules this Court adopted concerning the practice and procedure for civil appeals is Missouri Supreme Court Rule 81.04. Rule

81.04(a) allows an appeal when the notice of appeal is filed with the clerk of the trial court not later than ten days from the date the judgment, decree or other order appealed from becomes final. That rule defines the contents of the notice. Rule 81.04(d) states that the appellate court docket fee is $70. The rule requires a trial court clerk to note the date a notice of appeal is received if it is accompanied by the docket fee, or a statement citing specific statutory or other authority demonstrating a docket fee is not required by law, or a motion to prosecute the appeal in forma pauperis. Missouri Supreme Court Rule 81.04(e). Rule 81.04(f) provides that the filing date of the notice is the date the trial court clerk received the notice with the docket fee or with the statement demonstrating that no fee is required. Further, in the scenario where the appellant seeks to proceed in forma pauperis and that motion is granted, then the notice is filed on the date the clerk received the motion. But where the motion is denied and the time for filing the appeal has not expired, then the notice is filed when the appellant presents to the clerk the notice with fee or with a statement that no fee is necessary. Missouri Supreme Court Rule 81.04(f).

This Court's regulations are constitutional. These regulations provide the elements of the notice and define the filing of the notice. After broadly suggesting that the rules violate constitutional rights (Substitute Brief, pp. 15-16), Goldsby does not make any specific argument that an aspect of the

rule violates rights generally or his rights specifically. Nor can he. The terms of Rule 81.04 parallel those of Federal Rules of Appellate Procedure 3 and 4 concerning the elements and filing of the notice in federal court. Goldsby does not demonstrate that the Supreme Court and the Congress's rules on appellate procedure violate the Constitution.

Instead, Goldsby contends that section 512.050, RSMo 2016 provides the method of initiating an appeal, the filing of the notice of appeal, and nothing else can be required (Substitute Brief, pp. 16-17). That contention is not dispositive because section 512.050 does not provide the elements of a notice of appeal or define what constitutes filing a notice of appeal. The Court should read section 512.050 and Rule 81.04 in harmony.

Goldsby contends that section 512.050, RSMo 2016 only requires the filing of the notice of appeal in order to begin the appeal, not the filing of the docket fee, and the failure to submit the fee should not affect the validity of the appeal (Substitute Brief, p. 17). The contention is erroneous. Rule 81.04(f) requires the submission of the fee, or a pauperis order or a statement that no fee is necessary in order for the notice of appeal to be filed. That rule-based requirement is consistent with the statute. Section 512.050's language about the effect an appellant's failure to take steps to secure review expressly concerns the failure of an appellant to take steps to order, pay for and secure a transcript. *Id.* There is similar language in Federal Rule of Appellate

Procedure 3(a)(2). But the statutory language does not give appellants a license to ignore the Court's rules. For example, the statutory language does not prohibit the state appellate courts from enforcing the "wherein and why" requirement as an abridgement of "substantive rights or the right to appeal" when the appellant fails to comply with the reasonable briefing rules from the appellate court.

Goldsby contends that Rule 81.04 changes the substantive right of appeal (Substitute Brief, p. 17). To the contrary, the Rule provides for the elements of a notice and what acts constitute the filing of the notice. The Rule does not expand or contract the substantive right of appeal. Relying on Rule 81.04 and section 512.050, RSMo, the courts of appeals have held that the payment of the docketing fee is part of the filing of the notice of appeal. And without the filing of the notice, the appellate court has no authority to hear the appeal.

> We have a duty to determine our jurisdiction sua sponte. *Sassmann v. Kahle,* 18 S.W.3d 1, 2 (Mo. App. E.D. 2000). The timely filing of an adequate notice of appeal is a jurisdictional requirement. *Application of Holt,* 518 S.W.2d 451, 453 (Mo.App.1975). The Missouri Supreme Court has held that there is no valid filing of a notice of appeal until the docket fee is paid. *Kattering v. Franz,* 360 Mo. 854, 231 S.W.2d 148, 150 (1950). In

> so holding, the Court relied on Section 847.129 Mo. R.S.A., a predecessor to Section 512.050 RSMo. (2000), and Rule 3.28 adopted by the Court to determine what is a valid filing of a notice of appeal, which makes an appeal effective. *Id.* Section 847.129 provided: "The docket fee of $10.00 in the appellate court shall be deposited ... with the clerk of the trial court at the time of filing the notice of appeal." Rule 3.28 provided: "No notice of appeal shall be accepted and filed by the clerk of any trial court unless the appellate court docket fee, required by Section 129, 1943 Act, is deposited therewith."

Moore ex rel. Moore v. Bi-State Development Agency, 87 S.W.3d 279, 294-5 (Mo. App. E.D. 2002) (footnote omitted). This Court adopted that reasoning in a later *Moore* appeal. *Moore ex rel. Moore v. Bi-State Development Agency*, 132 S.W.3d 241, 243 (Mo. banc 2004), citing *Kattering v. Franz*, 231 S.W.2d 148, 150 (Mo. 1950); *see Bussell ex rel. Bussell v. Tri-Counties Humane Soc.*, 125 S.W.3d 348 (Mo. App. E.D. 2004); *Deever v. Karsch & Sons,* 144 S.W.3d 370, 372 (Mo. App. S.D. 2004); *Minze v. Missouri Department of Public Safety*, 2017 WL 6001222, at *6 (Mo. App. W.D. 2017); *Harris v. Wallace,* 524 S.W.3d 88, 89 (Mo. App. W.D. 2017); *State ex rel. Anderson v. Anderson,* 186 S.W.3d 924, 925 (Mo. App. S.D. 2006).

Goldsby contends that these cases are wrong because the 1997 Legislature modified section 512.050 to remove the requirement that he pay the appellate filing fee or have an in forma pauperis order (Substitute Brief, pp. 19-20). Goldsby provides no authority for that proposition. To the contrary, section 512.070.2, RSMo 2016 clearly contemplates that the circuit court clerk forward to the appellate court clerk the docket fee together with the notice of appeal. The Legislature did not remove the requirement of an appellate court docket fee. *See* § 488.012.2(8), RSMo 2016 (appeal fee); §488.020, RSMo 2016 (fees payable before service rendered); § 488.031, RSMo 2016 (supplemental fee). The language was not removed from the statutes; it was relocated from § 512.050, RSMo 1994 to § 483.500, RSMo 2016, where it remains today. The Court properly requires the filing fee as part of its filing requirement.

The second point on appeal is difficult to decipher. Goldsby appears to contend that he mailed his notice of appeal and requested the Missouri Department of Corrections to send a check as payment on July 28, 2016 (Substitute Brief, p. 24). Even under Goldsby's scenario, the appeal is untimely.

Goldsby contends that he mailed a notice of appeal on July 28, 2016 and requested the Department of Corrections to send a payment on July 28, 2016; thus, the Court should treat the efforts as constituting a notice of

appeal before the August 8, 2016 deadline (Substitute Brief, p. 28). Goldsby presents no authority to support that conclusion. Unlike the federal system, Federal Rule of Appellate Procedure 4(c), there is no similar provision in Missouri Supreme Court Rule 81. *See also* Mo. S.Ct. R. 24.035(b) and 29.15(b). Because there is no "mailbox rule" for filing a notice of appeal in Missouri, Goldsby's theory is meritless. *Hammerschmidt v. Hardman*, 534 S.W.3d 918, 920 (Mo. App. W.D. 2017).

Recognizing the lack of a "mailbox rule," Goldsby invites the Court to create and apply a mailbox rule in this case (Substitute Brief, p. 27). The Court should decline that invitation. Whether a "mailbox rule" is the correct social policy for the State is a question for the Legislature with its statutes or for the Court with its rules. The "mailbox rule" has been part of the federal court practice for almost thirty years. *See Houston v. Lack*, 487 U.S. 266 (1988). The Court's unwillingness to adopt a mailbox rule for a notice of appeal as a matter of social policy should not be undermined by the Court's adoption of such a rule in an individual case.

Finally, respondent notes that Goldsby is not actually advocating for the adoption of a mailbox rule, because this Court requires an appellant to submit a notice of appeal with the docket fee, or a statement citing specific authority that no fee is required by law or a motion to proceed in forma pauperis, a motion that is eventually granted. Mo. S.Ct. R. 81.04(e) and (f).

While Goldsby suggests that the record supports the notion that he mailed the notice to the circuit court clerk on July 28, 2016, he fails to point out or certify when the Department mailed the filing fee to the Clerk (Substitute Brief, pp. 23-28).

Goldsby may reply that he does not really want a "mailbox rule" for the mailing of the filing fee. Instead, he may want an "I-asked-the-Department" rule because he contends he asked the Department for it to issue a check to the circuit clerk for the filing fee on July 28, 2016 (Substitute Brief, pp. 24, 28). Goldsby points to no authority for such a rule.

Goldsby suggests that the Department did not timely process the fee payment. The Department's policy allow for timely issuance of payment. The procedures concerning withdrawal of funds allow the caseworker two days to review the request for withdrawal. If approved, the request is forwarded to the Superintendent for review. The Superintendent has two days to review. If the request is approved, it is then forwarded to the business office for processing. Missouri Department of Corrections Department Procedure Manual, Offender Accounts, D3-5.1, III. E. 4. e. (1) (B)-(D) (a copy of the Procedure is in Respondent's Appendix). If Goldsby made the request for funds on Thursday, July 28, 2016, the caseworkers could have approved the request on Monday, August 1, and the Superintendent could have approved the request on Wednesday August 3,

with the check issued on August 4. Goldsby shows no misconduct by the Department.

Goldsby may suggest that this Court's rules are too difficult to follow because there are circumstances beyond his control (Substitute Brief, p. 24). The Court's understanding that these situations happen is manifested in Missouri Supreme Court 81.07(a) (providing for appeals by special order). *See Berger v. Cameron Mut. Ins. Co.*, 173 S.W.3d 639 (Mo. banc 2005). This Court has noted its willingness to allow appeals by special order when the untimeliness is caused by inadvertance or oversight. *Kattering v. Franz*, 231 S.W.2d at 858.

Goldsby may contend that he tried to file an appeal by special order. He did. *Gordon Goldsby v. George Lombardi*, No. WD80873. But the motion itself was untimely (No. WD80873, Motion p. 3). In the motion Goldsby attempted to blame the circuit court and appellate court for his failure to file a timely motion (Motion, p. 3), but the court of appeals denied his motion on June 30, 2017. *Goldsby v. Lombardi*, No. WD80873.

II. The Court should affirm the circuit court's decision because Goldsby litigated his claim previously, and the earlier courts properly assured him that the Department had correctly calculated his sentence (Responds to Point III).

Introduction

Before the circuit court, Goldsby filed a petition for declaratory judgment and complained that the Department of Corrections was not calculating his sentences correctly (LF 5). Invoking principles of res judicata and collateral estoppel, respondent filed an answer (LF 19) and a motion to dismiss (LF 31). The motion showed that Goldsby had previously litigated these issues, and the courts informed Goldsby and the Department that the Department had correctly calculated the sentences (LF 31-41). The circuit court agreed (LF 42).

On appeal, Goldsby changes his legal theory and claims that the Department of Corrections has not calculated the date that his life will end and that his life sentence will end (Substitute Brief, p. 31). But Goldsby did not present his appellate claim in his petition for declaratory judgment (LF 5) for the understandable reason that Goldsby's theory before the circuit court was that the Department had actually calculated the sentence incorrectly, not that the Department had failed to calculate it (LF 7, para. 5). Lastly, the

Missouri Department of Corrections "face sheet" Goldsby attached to the petition showed that the Department recorded and understood that Goldsby had a life sentence (LF 17). The Department calculated that the life sentence began on June 26, 1997 (LF 17). Because it is a life sentence, it will end upon Goldsby's death. The Department reflected this fact by noting that the maximum release date is "99/99/9999" (LF 17). In the petition, Goldsby agreed with the fact that the Department calculated a life sentence as life, when he argued that the Department should somehow treat a life sentence as something other than life (LF 7).

Under these circumstances, the Court should affirm the circuit court order.

Procedural History

Goldsby filed a petition for declaratory judgment in the Cole County Circuit Court (LF 5). Goldsby alleged that the Missouri Department of Corrections "is improperly depriving [Goldsby] of a calculation showing when his sentence will be completed under the 9/12ths law or his 12/12ths release date" (LF 5). He also complained that the Department applied the new criminal code (1978 code) to calculate his sentence for the 1972 rape (LF 5-7). He alleged that under an 1879 statute, a life sentence really meant a sentence of twenty years with release after serving fifteen years (LF 7). Goldsby prayed for the following declarations:

a.) that section 556-031 RSMo., effective 1-1-1979, does apply here and forbids the DOC from applying new code laws to Petitioner's crimes committed prior to 1-1-1979.

b.) [CONVICTS] the original 9/12ths law and all subsequent additions thereto; does apply to Petitioner's crimes committed on March 17th 1972.

c.) Section 559.260 RSMO., (1969), applies to Petitioner's crime and that said statute does not authorize or show a punishment of life imprisonment, but does show punishment as death or a number of years not less than two years. See attached and marked as Petitioner's exhibit "H".

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e.) that the records officer department has a ministerial duty by law requiring them to calculate Petitioner's Start and Finish dates of his Rape sentence.

LF 8.

Respondent filed an answer to the petition for declaratory judgment (LF 19). Respondent then filed a motion to dismiss (LF 31) because Goldsby

had already challenged the calculation of his sentence twice (LF 31). Respondent explained that the earlier courts had assured Goldsby that the Department's calculation was correct; thus, the circuit court should dismiss the petition (LF 31-32). The circuit court dismissed the petition on June 27, 2016 (LF 42), and denied the motion to modify judgment on July 22, 2016 (LF 45).

Discussion

As the facts show, respondent accurately demonstrated to the circuit court's satisfaction that principles of res judicata and collateral estoppel required dismissal of the petition for declaratory judgment. Goldsby merely repeated claims presented in two earlier litigations, claims that the courts had rejected. And in his substitute brief in this Court, Goldsby does not argue that the circuit court erred in rejecting his claims, just that it should have been on a dispositive motion, not a motion to dismiss. (Substitute Brief p. 32).

So Goldsby changes tactics. Instead of arguing that the Department miscalculated his life sentence, he argues that the Department "failed to calculate" his life sentence (Substitute Brief, p. 32). The Court should affirm the circuit court decision for multiple reasons.

First, as noted, Goldsby did not present the substantive appellate issue to the circuit court for review. The failure to present the claim to the circuit

court preserves nothing for appellate court review. A party cannot take a contradictory position on appeal, and the appellate court should review the case only upon the theory tried to the circuit court. *Spicer v. Farrell*, 650 S.W.2d 695 (Mo. App. S.D. 1983). "A party is bound on appeal by the position he/she took in the trial court… since [the appellate court] will not convict a lower court of error on an issue it was not given an opportunity to decide." *Id.*

Second, the complaint alleged that the Department of Corrections had miscalculated Goldsby's life sentences. Inherent to the idea of "miscalculation" is the idea that the Department had performed a calculation. In the petition, Goldsby agrees with the fact that the Department calculated the life sentence as life, when he argued that the Department should somehow treat a life sentence as something other than life (LF 7).

Third, as an exhibit to the petition, Goldsby attached a copy of his Missouri Department of Corrections face sheet, a document that shows that the Department acknowledged and applied Goldsby's life sentence for rape. The "face sheet" Goldsby attached to the petition showed that the Department understood Goldsby had a life sentence (LF 17). The Department calculated that the sentence had begun on June 26, 1997 (LF 17). Because it is a life sentence, it ends upon Goldsby's death. The Department reflected this fact by noting that the maximum release date is

"99/99/9999" (LF 17). *See Ashford v. State*, 226 S.W.3d 243, 245 (Mo. App. W.D. 2007) (life sentence reflected as 99/99/9999).

Goldsby may argue that the Department has told him that it had not "calculated" his life sentence (LF 11). The Department has not computed a release date for a life sentence. That is the practical answer because a life sentence is a life sentence, not a defined term of years. *E.g.* section 558.011.4(1), RSMo 2016 (conditional release calculated for term-of-year sentences, not life sentences); *Cooper v. Holden*, 189 S.W.3d 614 (Mo. App. W.D. 2006). While the Department did not calculate an early release date for the life sentence, Goldsby does acknowledge that he has a parole hearing date in 2020 (LF 20).

Goldsby complains that the circuit court considered matters that were not part of his complaint in deciding the motion to dismiss (Substitute Brief, pp. 33-34). The circuit court could consider the exhibits Goldsby attached to his complaint. *Doe v. McCulloch*, 2017 WL 6327682, at *2 (Mo. App. E.D. Dec. 12, 2017), quoting *Smith v. Humane Soc. Of United States*, 519 S.W.3d 789, 797-8 (Mo. banc 2017).

Goldsby also complains that the exhibits attached to the motion to dismiss were improperly considered (Substitute Brief, p. 33, 34). A motion to dismiss is a proper means by which to raise issues of res judicata and collateral estoppel. *Williston v. Vaterling*, 2017 WL 4779455, *15 (Mo. App.

W.D. Oct. 24, 2017). Courts can and should take judicial notice of their own records in resolving these questions in a motion to dismiss. *Id.*

Finally, Goldsby seems to contend that a controversy remains between him and the Department (Substitute Brief, p. 35). But the Cole County Circuit Court correctly determined that the controversy has been resolved. Goldsby's unwillingness to accept court judgments does not give rise to a real controversy.

Conclusion

The claims brought in the complaint were denied as repetitive, and Goldsby does not complain about the denial on appeal. While Goldsby does present a claim on appeal, it is not the claim presented to the circuit court. Alternatively, the allegations and attachments to the petition show that the appellate claim does not warrant declaratory judgment relief. The Court should affirm the circuit court decision.

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction. Alternatively, the Court should affirm the judgment of the Cole County Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document is printed in 13 point proportionally spaced in type (Century Schoolbook), that it was prepared with Word 2010 software and according to this software the document contains 5,075 words.

\s\ *Stephen D. Hawke*
Stephen D. Hawke
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the Case.Net system and thereby served to counsel for Apellant, this 26 day of February, 2018, to:

\s\ *Stephen D. Hawke*
Stephen D. Hawke
Assistant Attorney General