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DISTRICT IV

November 24, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP574

Richard A. Dodson v. Jeffrey Pugh (L. C. No. 2012CV2956)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Richard Dodson, pro se, appeals an order dismissing with prejudice his petition for a writ of certiorari after he failed to timely file his opening circuit court brief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and we summarily affirm. *See* WIS. STAT. RULE 809.21.¹

Dodson is an inmate at Waupun Correctional Institution, serving a twenty-year sentence for first-degree sexual assault of a child. *See State v. Dodson*, case No. 1994CF706 (Kenosha County Cir. Ct.). On July 16, 2012, Dodson filed a petition in Dane County Circuit Court for a

¹ References to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

writ of certiorari. The relevant allegations in the petition involve prison disciplinary proceedings that Dodson was issued for lying to staff, disobeying orders, and sexual conduct. After unsuccessful appeals through prison administrative review procedures, Dodson filed the petition for a writ of certiorari to challenge the discipline imposed.

On November 27, 2012, the circuit court entered a notice of briefing schedule, requiring Dodson's principal brief to be filed by January 4, 2013. On January 4, rather than filing his opening brief, Dodson filed a motion for an extension of time to file his brief. The court granted Dodson an extension to February 18, 2013. Dodson concedes that he requested, and the court granted, six extensions of time to file his brief. At one point, the court on its own motion entered a decision and order dismissing Dodson's petition, noting it had "reset the briefing schedule several times, and each time Mr. Dodson has failed to timely file his brief." The court attached to its order a "history of that track record." The court concluded "that it has no choice but to dismiss [Dodson's] request for a Writ for failure to prosecute the action." Dodson filed a motion for reconsideration, and after a hearing the court reinstated his case. On October 23, 2013, the court advised the parties by correspondence of a November 29, 2013 deadline for Dodson to file his opening brief. The court stated:

Your brief is now due on November 29, 2013. I need to advise you that no further extensions will be granted. If I receive your brief in time, I will then set a deadline for the defense brief. If you do not meet the deadline, the case will be dismissed – again – this time with prejudice.

Dodson filed his opening brief in support of his petition for writ of certiorari in the circuit court on December 5, 2013. On December 10, 2013, the circuit court dismissed Dodson's case with prejudice. Dodson now appeals.

It is undisputed that the circuit court did not receive Dodson's brief by the November 29, 2013 filing deadline. Nevertheless, Dodson argues that the present appeal is controlled by the "mailbox rule" established in *State ex rel. Shimkus v. Sondalle*, 2000 WI App 238, 239 Wis. 2d 327, 620 N.W.2d 409 ("*Shimkus I*"). In that case, we held that the forty-five-day time limit for filing a certiorari petition is tolled "when a prison inmate places a certiorari petition in the institution's mailbox for forwarding to the circuit court." *Id.*, ¶14.

Dodson argues that a certification of mailing in his brief establishes that he timely filed the brief on November 26, 2013. Dodson's certification states: "The plaintiff hereby certifies that a true, and accurate, copy of this brief was mailed to the respondents, via first class mailing, on today's date, and deposited into the United States Mail by the plaintiff."

We did not decide in *Shimkus I* what proof an inmate must present to receive the benefit of the mailbox rule. However, we did so in our subsequent decision in *State ex rel. Shimkus v. Sondalle*, 2000 WI App 262, 240 Wis. 2d 310, 622 N.W.2d 763 ("*Shimkus II*"). We held that "when an inmate wishes to invoke that tolling rule, the inmate must present proof, by affidavit or other evidentiary submission, of the date on which he or she placed the certiorari petition in the institution mailbox." *Id.*, ¶2. We stated in *Shimkus II*, "An unsworn assertion in a brief is not evidence, and ... is not sufficient to entitle an inmate to the benefit of the *Shimkus* tolling rule." *Id.*, ¶14.

Here, Dodson did not present admissible proof by affidavit to the circuit court. Although *Shimkus II* left the door open to other methods of proving the critical date, it is clear that there must be more than an unsworn assertion in a brief. *See id.*, ¶15. Dodson's certificate of mailing

is nothing other than a bare assertion at the end of his brief, which is not evidence under *Shimkus II* upon which a circuit court may rely.

Dodson states in his reply brief that he “has provided the disbursement receipts, and an affidavit, in the appendix, that verify the mailings.” But Dodson concedes that the disbursement receipts are not part of the record on appeal, and a party may not use an appendix to supplement the record. See *Reznichek v. Grall*, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

Dodson nevertheless insists that the disbursement receipts “although not *tangibly* part of the circuit court record, are ‘the same evidence, or evidence already submitted’, in the record, to the court, via the ‘certification of mailing’ in the brief.” As we stated in *Shimkus II*, however, a “disbursement request form, even if admissible, is not proof of the date on which Shimkus deposited the petition in the institution mailbox.” *Shimkus II*, 240 Wis. 2d 310, ¶11.

As to the affidavit Dodson appended to his reply brief, it is dated October 14, 2014, nearly a year after his opening brief was due in the circuit court. The affidavit is also not part of the record on appeal and we shall therefore not consider it. *Reznichek*, 150 Wis. 2d at 754 n.1. Quite simply, Dodson failed to present proof establishing the date on which he deposited the brief.

Dodson also argues the circuit court “erred in out rightly dismissing Dodson’s certiorari action without a hearing.” We disagree. Dodson repeatedly requested extensions to file his brief. Finally, the court ordered the brief due November 29, 2013, and advised that no further extensions would be granted. Dodson had actual notice that his case would be dismissed with prejudice if he did not file his brief by the November 29, 2013 deadline. On November 15, 2013, Dodson acknowledged in correspondence to the court that he understood the consequences for

late filing. Referring to the court's October 23 letter, Dodson stated: "The court, then went on to set a new briefing deadline, and warning the plaintiff about what would happen if the brief were not filed by the new deadline." Contrary to Dodson's perception, he was afforded due process and the court properly exercised its broad discretion by sanctioning Dodson for failing to obey its order. *See Hefty v. Strickhouser*, 2008 WI 96, ¶72, 312 Wis. 2d 530, 752 N.W.2d 820.

Dodson failed to file a motion for reconsideration of the circuit court's December 10, 2013 dismissal, as he had done in June 2013 when his case was dismissed the first time. As mentioned previously, Dodson provided the circuit court with no evidence as to why his brief was not filed by November 29, 2013. He merely appealed. Dodson fails to explain to this court why, having failed to provide proof under *Shimkus II*, he would be entitled to a second chance at a hearing.

Dodson also argues in his reply brief that *Shimkus II* is distinguishable, as that case involved the filing of the certiorari petition itself rather than the mailing of the opening brief in support of the certiorari petition. This argument is disingenuous. Untimeliness of the filing is essential to the tolling rule, rather than the form of the document. *See, e.g., State ex rel. Griffin v. Smith*, 2004 WI 36, ¶¶36-37, 270 Wis. 2d 235, 677 N.W.2d 259 (recognizing the tolling rule in other contexts). Here, it is undisputed that the circuit court ordered Dodson's opening brief in support of his petition for a writ of certiorari to be due on November 29, 2013. It is also undisputed that Dodson had actual notice of the consequences for late filing. His opening brief was untimely, which resulted in the dismissal of his certiorari petition. Dodson was required to present proof under *Shimkus II* in order to invoke the benefit of the tolling rule. He failed to do so.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals