STATE OF MICHIGAN

COURT OF APPEALS

EFREN PAREDES,

Petitioner-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

UNPUBLISHED
February 13, 2014

No. 310521
Ingham Circuit Court
LC No. 10-000448-AA

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Petitioner appeals by delayed leave granted the circuit court's denial of his motion to reinstate his petition challenging major misconduct citations after it was dismissed for failure to timely file a brief. We affirm.

Petitioner is a prisoner serving a life sentence for his 1989 jury convictions of first-degree premeditated murder, MCL 750.316, first-degree felony murder, MCL 750.316, and armed robbery, MCL 750.529. On December 23, 2009, petitioner was found guilty of the major misconduct charges of assault and battery against a corrections officer and disobeying a direct order. On January 5, 2010, petitioner was found guilty of the major misconduct charge of possession of contraband. Petitioner's requests for rehearing were denied.

On April 16, 2010, petitioner filed a petition for review in circuit court with regard to the December 23, 2009 decision. On May 24, 2010, petitioner filed an "amended petition for judicial review" which requested review of the January 5, 2010 decision as well. Respondent objected to petitioner's "amended petition," arguing that petitioner was required to file two separate requests for judicial review because he was challenging two separate final decisions. The trial court agreed and entered an order on June 30, 2010, striking petitioner's "amended petition" for judicial review. On July 21, 2010, petitioner filed a motion for rehearing and for leave to amend his original petition for judicial review. He also filed a motion to hold the briefing schedule in abeyance pending resolution of his motion. It does not appear from the lower court record that these motions were resolved.

On March 30, 2011, the Department of Corrections filed the administrative records related to petitioner's hearings. In accordance with MCR 7.105(K)(1), petitioner's brief was due 28 days later, on April 27, 2011. However, the parties stipulated to an extension of time, thus petitioner's brief was due by May 14, 2011. On June 1, 2011, the trial court entered an order dismissing petitioner's petition for judicial review for failure to pursue the matter in accordance with the court rules. The court noted that petitioner's brief was due by May 14, 2011, but no brief was filed.

On June 21, 2011, petitioner filed a motion to reinstate his petition for review. The motion stated that petitioner had contacted his counsel to inform him of several new cases and arguments prior to the May 14, 2011 deadline. Counsel determined that the arguments were not frivolous and required further investigation, but counsel was about to leave on a 10-day vacation. The motion asserted that counsel thought he asked his paralegal to obtain a second stipulation to extend the filing date, but a second extension was not requested or obtained. Petitioner argued that under MCR 7.101 dismissal for failure to file a timely brief was permissive, not mandatory. Petitioner further pointed out that the Court of Appeals required that notice be sent to parties warning them of the error before dismissal of the case, and asserted that if notice had been sent petitioner would have cured the defect. Petitioner submitted his appeal brief with his motion to reinstate.

On June 23, 2011, the trial court entered an order denying petitioner's motion to reinstate. The court observed that since petitioner's counsel left for a 10-day vacation before the brief was due on May 14, 2011, counsel would have returned no later than May 24, 2011. The order dismissing the case was not issued until June 1, 2011.

The circuit court also found petitioner's reliance on MCR 7.101 inapposite because that rule applied to appeals from the district courts and probate courts, whereas this case presented an appeal from an administrative action and was governed by MCR 7.105. The court observed that, although petitioner claimed that notice would have allowed him to cure the defect, petitioner's counsel's factual assertions indicated that counsel returned from his vacation several days prior to the dismissal of the petition. The court reasoned that counsel should have discovered the error within that time. Thereafter, petitioner filed with this Court a delayed application for leave to appeal which was granted. *Paredes v Dep't of Corrections*, unpublished order of the Court of Appeals, entered March 12, 2013 (Docket No. 310521).

Petitioner argues that the trial court abused its discretion by dismissing his appeal without giving him notice that he missed the filing date for his brief and without giving him an opportunity to cure the defect. We disagree.

We review for an abuse of discretion the circuit court's dismissal of a petition for review for failing to file a brief. *Totman v School Dist of Royal Oak,* 135 Mich App 121, 125; 352 NW2d 364 (1984). An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co,* 476 Mich 372, 388;

719 NW2d 809 (2006). "The principles governing statutory interpretation apply equally to the interpretation of the court rules." *Richards v Tibaldi*, 272 Mich App 522, 532; 726 NW2d 770 (2006). Accordingly, if the plain and ordinary meaning of the court rule's language is clear, judicial construction is not permitted. *Yudashkin v Linzmeyer*, 247 Mich App 642, 649-650; 637 NW2d 257 (2001).

At the relevant time,[1] MCR 7.105(K) applied to appeals to circuit court from administrative agencies in contested cases and provided:

> (1) Within 28 days after the record is filed with the court . . . the petitioner shall file with the court its brief . . . serve a copy on all respondents, and promptly file proof of that service with the court. . . . A 28-day extension of the time for filing a brief may be obtained on written stipulation of the parties or by order of the court. Further extension of time for filing of a brief can be obtained only on order of the court on motion for cause shown.
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> (2) If a party does not timely serve its brief, the court may, after notice and opportunity to respond, enter an appropriate order, including dismissal of a petition for review, or affirmance or reversal of the decision appealed from.

Petitioner argues that, pursuant to MCR 7.105(K)(2), he was entitled to notice and an opportunity to respond before the court dismissed his appeal. However, subsection (2) is not implicated where a party does not timely *file* his brief with the court. By its plain terms, the rule applies where a party does not timely *serve* his brief. The terms "file" and "serve" are not synonymous. MCR 7.105(K)(1) clearly sets forth a petitioner's filing requirements and petitioner's attempt to apply subsection (2), related to the untimely service of a brief on opposing parties, to his untimely filing of a brief with the circuit court is unavailing. Further, contrary to petitioner's claim on appeal, the failure to file a brief with the presiding court as mandated by our court rules is not analogous to committing a discovery violation.[2]

Petitioner also argues that the trial court made no findings of a history of delay, a lack of merit in the issues, or bad faith. Further, the trial court made no attempt to balance the equities, and did not consider that counsel's negligence in this case was excusable. However, under MCR 2.504(B)(1) the trial court clearly had the authority to dismiss this case sua sponte and without notice for failing to comply with the court rules or a court order. Petitioner's brief was 18 days late on the day the order dismissing the case was entered. Although the reason for the delay was apparently accidental, counsel was by his own admission back from his vacation for several days prior to the dismissal of the case and, thus, could have discovered and corrected the defect. The

[1] Amendments to the court rules governing appeals to circuit court took effect May 1, 2012.

[2] "The phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002).

circuit court considered these factors in its order dismissing the case. We cannot conclude that the trial court's decision falls outside the range of reasonable and principled outcomes; therefore, the trial court's decision did not constitute an abuse of discretion. See *Maldonado*, 476 Mich at 388.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald