

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 382

September Term, 2017

DONALD RAY ZACHARY

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: March 13, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After a jury trial in the Circuit Court for Anne Arundel County, Donald Ray Zachary, appellant, was found guilty of one count of sexual abuse of a minor and acquitted of two counts of third-degree sexual offense, two counts of unnatural or perverted sexual practice, four counts of fourth-degree sexual offense, and one count of second-degree assault. He was sentenced to incarceration for a term of 15 years with all but six years suspended.

The sole issue presented in this appeal is whether the circuit court erred in denying Zachary's motion to strike an inconsistent verdict and failing to grant a new trial. We are precluded from deciding that issue, however, because Zachary did not file a timely notice of appeal. Accordingly, we shall dismiss this appeal for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Facts

A detailed recitation of the underlying facts is not necessary to our resolution of this appeal. It is sufficient to state that Zachary was accused of various sexual crimes against his 15-year-old daughter, D.Z. The State alleged that on February 28, 2016, Zachary fondled D.Z.'s breasts, vagina, and buttocks, kissed her, performed cunnilingus, and bit and sucked her breast. D.Z. testified that after she returned home from spending the weekend at a friend's house, her father helped her make her bed. After the bed was made, D.Z. laid down and her father sat beside her. D.Z. testified that the following occurred:

My Dad started to rub on my stomach and he started to move his hand down and he started to move his hand more and more down. He started to rub my vagina.

He started to pull up my shirt and he went up to my breasts and he started to rub on my breasts and he started to kiss me on my lips and he rubbed my butt and he put his hand back down to my vagina and he started to rub on my vagina and then he stopped. And he put his elbows on his knees and he put his head in his hands

* * *

It looked like he just stopped, and then he got up and I thought he was leaving, but he got up and he closed the door and he came back and he started to put his mouth on my vagina and my breasts and he started using his tongue in my vagina. He kind of nibbled on my breasts on my right, on my breasts. And then he stopped and he told me that he loved me and he asked me did I love him and I nodded my head, and he said that it's just that you're pretty and he gave me a hug and then he left my room.

When questioned as to whether her father had touched her underneath her clothing, D.Z. stated that he had rubbed her buttocks over her clothing but that otherwise he touched her skin. She also clarified that he put his mouth on her right breast.

A DNA sample taken from D.Z.'s genitalia tested positive for Zachary's DNA. DNA obtained from D.Z.'s right breast revealed a mixture of DNA with ten times more male DNA than female DNA. The major component of the DNA mixture matched Zachary's DNA and the minor component matched D.Z.'s DNA.

D.Z.'s mother did not always live with her, her father, and her siblings, but on the night of the incident her mother had returned to the apartment. D.Z. testified that she was unhappy and felt uncomfortable about her mother living with the family, that she preferred to stay at the home of her friend, and that she hoped one day to live with her friend and her friend's mother, Ms. P. D.Z. acknowledged that in 2014 she made a report that when she

“was like four” and living in Texas, her step-grandfather had sexually assaulted her. At the time the report was made, D.Z.’s step-grandfather was dead. D.Z. also acknowledged reporting that when she was in the third grade and living in Maryland, a person she could not identify sexually assaulted her on a number of occasions in a wooded area as she walked home from school.

B. Post-Verdict Events

After deliberation, the jury returned a verdict of guilty on the charge of sexual abuse of a minor, but not guilty on all other counts. The jury was polled and the verdicts were confirmed. Before the jury was hearkened, the judge sent the jurors back to the jury room and engaged in the following discussion with counsel:

THE COURT: Well, the jury has been polled, but the verdict has not been hearkened. But the Court believes we have a problem because there has been a finding of not guilty on Counts III (sic) through X, which are the sex offense and the assaultive conduct, and a guilty finding on Count I, which is sexual child abuse. But as the parties are well aware, it’s difficult to have a finding of sexual child abuse without a finding of an underlying sex offense on a case. So we have an issue. Now, I’ve never had the issue of a factually or legally inconsistent verdict. While I read the cases on it, I haven’t spent a whole lot of time dealing with it because I’ve never had to deal with it. But I have a jury which has now returned a polled verdict which has not been hearkened which at the very least on Counts II through X found him not guilty. What do the parties propose that I do from this point forward?

[DEFENSE COUNSEL]: Your Honor, I would ask that the Court hearken, since they have returned a verdict and they said that they have a unanimous verdict, which they actually have offered to the Court, I’d respectfully request that the Court hearken the jury’s verdict.

THE COURT: I have not -- oh, request --

[DEFENSE COUNSEL]: Not ask -- I'm asking that you do hearken, because they actually have returned a verdict. And --

THE COURT: I know they have.

[DEFENSE COUNSEL]: And then I think I would respectfully request that we be permitted to address this issue in a post-trial motion so we can actually address the issue.

THE COURT: Well, there may not be a whole lot to address.

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: Ms. [Prosecutor]?

[PROSECUTOR]: Your Honor, if I can have Court's indulgence? I also haven't had that situation and Ms. Ullman (ph.) may have some insight for me and I --

THE COURT: Well, the insight's --

[PROSECUTOR]: -- would just like to ask her.

THE COURT: -- going to be in terms of a legal -- legally inconsistent verdict. I'm going to bring them back in, I'm going to hearken it. The case law that I remember says if it's wrong I got to send them back and correct it but I think we're talking about a legal issue here and not a factual issue, so bring them back in, Madam Clerk, and then hearken it.

The verdict was then hearkened. Thereafter, the judge sent the jurors back to the jury room, but did not discharge them. The court asked defense counsel to state the defense's position with regard to the jury verdict and the following colloquy occurred:

[DEFENSE COUNSEL]: I would, well, one is there's been a verdict returned that essentially says, from a factual basis, that there was no basis for any sexual offense in regard to the -- the facts that were presented, they found, did not constitute a basis to find him guilty of any sexual offense. I would argue that as a result of the not guilty's in II through X that there is an

inconsistent verdict that is not legally sufficient in regard to Count No. I. I'd ask the Court to actually strike the verdict. (Pause)

THE COURT: In *Givens vs. State* [449 Md. 433 (2016),] an opinion by Judge Watts which was authored August 22nd, 2016, Judge Watts indicates that to preserve the issue of a legally inconsistent verdict for appellate review, a defendant in a criminal trial by a jury must object or make known any opposition to the legally inconsistent verdict before the verdict becomes final and the trial court discharges the jury.

While the Court has polled the jury and the verdict has been hearkened, the Court has not discharged the jury because the issue that is presented to the Court is one of legal inconsistency. The Court will therefore find for the record that Counsel has preserved the issue to argue legal inconsistency. The Court will at this point in time accept the verdict, note Counsel's objection, and order the clerk to enroll the verdict as hearkened and the jury shall be released.

Madam Clerk, I would ask you to go back and tell the bailiff to release the jury. I'm not going to talk to them as I normally do. Just tell them I'm dealing with other matters and I thank them for their service.

MADAM CLERK: Yes, Your Honor.

THE COURT: Each party in this case is to be given 30 days to file a memorandum consistent with *Givens and Price* [*v. State*, 405 Md. 10 (2008),] and *McNeal* [*v. State*, 426 Md. 455 (2012)]. *Givens* came down from the Court of Appeals on August 22nd, 2016, regarding the verdict in this case and whether the finding of sexual child abuse on Count I but not guilty findings on Count II through X of the underlying sex offenses would allow the Court to have this verdict stand.

The defendant is notified he has 10 days to request a new trial or a new hearing. His right to appeal does not begin because I have not addressed the issue whether or not these verdicts can be accepted -- or this verdict. I'll tell you all, I've never had this. I've never faced it and I'm not a hundred percent sure how to deal with it.

[DEFENSE COUNSEL]: Your Honor, the Court -- it was Givens, Price and, I'm sorry, but Givens is -- quotes the other two cases, I assume.

THE COURT: Read Givens. Givens will give you all the guidance you need.

[DEFENSE COUNSEL]: Judge Watt's [sic] case. Good.

THE COURT: So you have 30 days. Okay?

On January 13, 2017, defense counsel filed a motion to strike the inconsistent verdict and for a new trial. Shortly thereafter, the State filed a response. On January 31, 2017, the court issued a "Directive" stating that it would consider the motion on February 9, 2017, just prior to the sentencing hearing.

After hearing argument, the court denied the motion to strike the inconsistent verdict and Zachary's request for a new trial. The court concluded that after the jury's verdict was returned, defense counsel requested that the court accept the verdict and failed to object to the inconsistent verdicts as required by *Givens v. State*, 449 Md. 433 (2016).

C. Motion for New Trial

After Zachary was sentenced, the court advised him that he had "30 days to note an appeal, 90 days to ask me to reconsider the sentence, and you have the right to ask a three-judge panel to review this matter[.]" On March 1, 2017, defense counsel filed a motion for modification of sentence, but requested that the court hold that motion *sub curia*, which it did. On that same day, Zachary, proceeding in proper person, filed a notice of appeal, but failed to include with it an admission or waiver of service or a signed certificate showing the date and manner of making service. Notwithstanding the failure to include an

admission or waiver of service or a certificate of service, the clerk's office accepted Zachary's notice of appeal. In a memorandum dated March 6, 2017, the circuit court clerk wrote to Zachary and advised him, in relevant part, as follows:

Your Defendant's Notice of Appeal contained no Certificate of Service. The appeal was accepted through File & Serve, but is not properly filed and may be stricken unless the deficiency is corrected. Per Rule 1-321 Md. Ann. Code: Every Pleading and other paper filed after the original pleading shall be served upon each of the parties. Please see the enclosed sample Certificate of Service.

In addition the appeal filing fee of \$121.00, was not attached to the pleading and no Request for fee waiver was included with the appeal. Please consider this letter a notice that these fees are due immediately.

It was later determined that although the certificate of service had not been filed, Zachary had, in fact, paid the required filing fee for his appeal.

On April 5, 2017, nearly a month after the time had passed for Zachary to file a notice of appeal, the circuit court issued a show cause order requiring Zachary to show within 15 days why his appeal should not be stricken for failure to file a certificate of service. The following day, the circuit court clerk again wrote to Zachary advising him that the required filing fees had been paid in full but that the certificate of service had not been received. The clerk's memorandum provided, in part:

A sample Certificate of Service was sent to you. MD [sic] Rule 1-321 Md. Ann. Code states: Every Pleading or other paper filed after the original pleading shall be served upon each of the parties. The appeal should not have been accepted without a Certificate of Service. Please correct the deficiency. The appeal will be dismissed if the deficiency is not corrected by re-filing the Notice of Appeal with Certificate of Service attached.

For assistance you may contact the Office of the Public Defender (Appellate Division)

In a letter dated April 17, 2017, and filed on April 21, 2017, Zachary wrote to the clerk stating:

Please do not stricken my appeal. Circuit Court of Ann Arundel County send me a Certificate of Service on March 6, 2017. I did not received it to April 2,2017. and I am sending you a copy of the Envelope. When I received my mail at ECI facility and Westover I did not get it to April 2,2017. On April 7, 2017 I was transfer to JCI facility for Court and was lock down from April 7, 2017 to April 11, 2017. When I returned to ECI facility My Housing Unit was lock down from April 12, 2017 to April 17, 2017 was unable to mail anything out. All the paper work has been mail out for the Certificate of Service. Please Reconsider My Appeal !!

In an attached memorandum, Zachary reiterated that a disturbance had occurred on April 12, 2017, and that the building he was housed in was locked down. He requested “another extension due to the fact a disturbance took place[.]” Also included was a handwritten certificate of service that did not reference any particular document, but provided:

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Certificate of Service

I HEREBY CERTIFY that on or about the 15 day of April, 2017, a copy of the foregoing was sent by first class mail, postage paid, to plaintiff at the following address:

Office of Maryland State Attorney
8 Church Circle
Annapolis, MD 21401

4/15/2017
Date

Zachary's signature
Signature

On May 8, 2017, an affidavit was filed in the case record by an individual named Susan Bastas, whose position is not identified. The affidavit provided as follows:

STATE OF MARYLAND V. DONALD RAY ZACHARY
CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

C-02-CR-16-621, CSA-REG- ____ - 20__

AFFIDAVIT
COURT OF SPECIAL APPEALS

I, Susan Bastas, am over the age of eighteen and otherwise competent to testify as follows:

A Pro Se appeal was accepted in File & Serve in the above-numbered case on 3/01/2017. The appeal was accepted, and filed, despite lacking a Certificate of Service. Defendant was notified of the deficiency and responded in a correspondence on 4/21/2017. (There was some confusion with fees, as well, however -- appeal fees have been paid in full.) An appellate case number has not been assigned. (Clerk is sending/re-sending the appeal, with this Affidavit)

Def./Appellant requested in his appeal, the assistance of the Office of the Public Defender. OPD filed an appearance on 5/03/2017. OPD filed a request for transcripts on 5/03/2017.

The record was due on 5/01/2017.

The transmittal delay is due to no fault of the Appellant or Appellant's counsel, however, because transcripts have not yet been filed, Clerk has requested that OPD file an extension, so that the complete record can be sent -- all at once. Clerk has contacted the OPD Appellate Division, and they have agreed to file an extension.

I solemnly affirm under the penalties of perjury that the contents of the foregoing are true to the best of my knowledge, information and belief.

 /s/
Susan L. Bastas

May 8, 2017
date

cc: SAO, OPD, Def., AGO

On May 10, 2017, Brian Saccenti of the Office of the Public Defender’s Appellate Division entered his appearance on behalf of Zachary. Rachel Simmonson, also of the Appellate Division, entered her appearance on behalf of Zachary on August 8, 2017.

DISCUSSION

I.

As a result of Zachary’s failure to include an admission or waiver of service or a certificate of service with his notice of appeal, it is necessary for us to consider whether we have jurisdiction to address this appeal. The necessity for an admission or waiver of service or a certificate of service is governed by Maryland Rule 1-323, which provides:

The clerk shall not accept for filing any pleading or other paper requiring service, other than an original pleading, unless it is accompanied by an admission or waiver of service or a signed certificate showing the date and manner of making service. A certificate of service is prima facie proof of service.

In *Lovero v. DaSilva*, 200 Md. App. 433 (2011), we addressed the issue of whether a notice of appeal is effective if it is not accompanied by an admission or waiver of service or a certificate of service. In that case, a judgment ordering Lovero to pay indefinite alimony was entered on the docket on July 31, 2009. *Lovero*, 200 Md. App. at 436. Lovero filed a notice of appeal on August 28, 2009, but failed to include an admission or waiver of service or a certificate of service as required by Rule 1-323. Notwithstanding the failure to comply with Rule 1-323, the notice of appeal was accepted and listed on the docket

entries. *Id.* at 437-38. Lovero also failed to serve a copy of the notice of appeal upon the attorney of record for the opposing party. *Id.*

On September 4, 2009, more than 30 days after the judgment had been entered, Lovero filed an amended notice of appeal accompanied by a certificate of service showing that the notice of appeal was mailed to counsel for the opposing party on September 4th. *Id.* at 438. On September 8, 2009, the notice of appeal and the amended notice of appeal were entered on the docket. *Id.* The opposing party, Da Silva, filed a motion to strike Lovero’s notices of appeal which the circuit court denied without explanation. *Id.* at 438-39.

On appeal, Da Silva filed a motion to dismiss Lovero’s appeal on the ground that a timely filed appeal is ineffective *ab initio* if it lacks proof of service. *Id.* Lovero countered that even if the circuit court clerk erred in failing to reject his notice of appeal due to the lack of a certificate of service, that error did not invalidate his appeal, and the acceptance and docketing of the notice of appeal provided constructive notice that the appeal had been taken. *Id.* at 441. In rejecting Lovero’s argument and dismissing the appeal for lack of jurisdiction, we recognized that Maryland Rule 8-202¹, which governs the time for filing a

¹ Maryland Rule 8-202 provided then, as it does now:

(a) **Generally.** -- Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken. In this Rule, “judgment” includes a verdict or decision of a circuit court to which issues have been sent from an Orphans’ Court.

notice of appeal, contains two mandatory parts. The first part requires that “the notice of appeal must be ‘filed.’” *Id.* at 442. The second part requires that “the filing must be within the specified 30-day time period.” *Id.* We also recognized that “[t]he only exception to the duty of the clerk to file a pleading or paper, regardless of a defect or deficiency, is the requirement of Rule 1-323 that the ‘clerk shall not accept for filing’ a pleading or paper requiring service that does not contain ‘an admission or waiver of service or a signed certificate showing the date and manner of making service.’” *Id.* at 443-44. We concluded that “it is clear that in adopting Rule 1-323, and its predecessors, the Court of Appeals intended that a pleading or paper requiring service that did not contain the appropriate proof of service was not to become a part of any court proceeding by being ‘filed’ in the court file of such proceeding.” *Id.* at 445-46. This rule serves the purpose of affording procedural due process to all parties at every step of the litigation process. *Id.* at 446. Thus, we held:

Without the assurance of notification to each party, the foundation of the impartial administration of justice by the courts begins to crumble. Therefore, we hold that a pleading or paper required to be served by Rule 1-321 that does not contain an admission or waiver of service or a signed certificate showing the date and manner of making service cannot become a part of any court proceeding, and the clerk is mandated by Rule 1-323 “not [to] accept for filing” such pleading or paper.

Id. at 446-47.

Having determined that, in accepting Lovero’s notice of appeal, the court clerk failed to follow the dictates of Rule 1-323, we went on to consider the legal effect of that action. We recognized that Rule 1-323 does not prescribe any consequences for a clerk’s

failure to comply with the mandates of that rule and that, under Md. Rule 1-201, “where no consequences are prescribed by the rule for noncompliance with mandated conduct, the court ‘may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule.’” *Id.* at 448 (quoting Md. Rule 1-201(a)). We concluded that “where a clerk accepts for filing a notice of appeal that does not contain any certificate of service, and thus should have been rejected under Rule 1-323, such defective notice of appeal is not ‘filed’ within the meaning of Rule 8-202(a).” *Id.* at 450. We also rejected the argument that the entry of the notice of appeal on the docket provided constructive notice that an appeal had been noted in part because the court clerk was mandated to enforce the requirements of Rule 1-323 by not accepting the notice for filing and because Rule 1-323 “calls into question the legal efficacy of the documents that do not adhere to its strictures[.]” *Id.* at 451-53.

Our reasoning in *Lovero*, a civil case, applies with equal force to cases arising in the criminal law context. In *State v. Andrews*, 227 Md. App. 350 (2016), we reviewed and discussed with approval our holding in *Lovero*, but determined that under the facts of that case, dismissal of the appeal was not warranted. In *Andrews*, the State noted an interlocutory appeal after losing a motion to suppress in the circuit court but failed to list in its certificate of service the party that was served. *Andrews*, 227 Md. App. at 368. Although the public defender acknowledged service, Andrews filed a motion to dismiss the appeal. The State countered that it would be improper to dismiss the appeal because there was no dispute that Andrews had been served in a timely fashion. *Id.* at 368-69.

After reviewing the requirements of Rule 1-323 and discussing our holding in *Lovero*, we recognized that there were significant factual distinctions between *Lovero* and *Andrews*. In *Lovero*, no notice of appeal was ever served on Da Silva, whereas in *Andrews*, although the certificate of service failed to identify the party served, the public defender acknowledged service. *Id.* at 370. Moreover, the certificate of service in *Andrews* met the literal requirements of Rule 1-323 in that it provided the date and manner of service and there was no evidence that *Andrews* was prejudiced. *Id.* For these reasons, we held:

Where there is no evidence that *Andrews* was prejudiced or that the course of the appeal was delayed by a defect, “it is the practice of this Court to decide appeals on the merits rather than on technicalities.” *Bond v. Slavin*, 157 Md. App. 340, 352-53, 851 A.2d 598 (2004). *Cf. Williams v. Hofmann Balancing Techniques, Ltd.*, 139 Md. App. 339, 356-57, 776 A.2d 4 (2001) (holding that the appellant’s failure to identify one of the appellees on his notice of appeal did not deprive this Court of jurisdiction). To be sure, the Court of Appeals has observed that “[o]ur cases, and those of the Court of Special Appeals, have generally been quite liberal in construing timely orders for appeal.” *Newman v. Reilly*, 314 Md. 364, 386, 550 A.2d 959 (1988); *see also Lovero*, 200 Md. App. at 450-51 n.8, 28 A.3d 43 (and cases cited therein) (recognizing that where a challenged notice of appeal was timely filed the courts of Maryland construe the notice in favor of deciding the appeal on the merits). We deny *Andrews*’s motion to dismiss the appeal.

Id. at 370.

Although it is certainly our preference to decide appeals on the merits rather than on technicalities, the record in the instant case reveals that *Zachary*’s notice of appeal did not contain an admission or waiver of service or a signed certificate showing the date and manner of making service. As a result, it was not timely filed. The March 6, 2017

memorandum of the court clerk specifically advised Zachary that his notice of appeal was “not properly filed and may be stricken unless the deficiency is corrected.” The clerk’s decision to send Zachary a sample certificate of service and remind him of the requirement to include a certificate of service with his notice of appeal did not extend the time Zachary had to file his notice of appeal. As the Court of Appeals has noted, “pro se parties must adhere to the procedural rules in the same manner as those represented by counsel. Indeed, this Court has stated that ‘[t]he principle of applying the rules equally to pro se litigants is so accepted that it is almost self-evident.’” *Dep’t of Labor, Licensing & Regulation v. Woodie*, 128 Md. App. 398, 411 (1999) (quoting *Tretick v. Layman*, 95 Md. App. 62, 68 (1993)).

Unlike in *Andrews*, there is nothing in the record before us to indicate that the State was aware of Zachary’s notice of appeal. Accordingly, for the reasons set forth in *Lovero*, we conclude that Zachary’s notice of appeal was not filed within 30 days of the judgment appealed from, as required by Rule 8-202(a), because it was not accompanied by an admission or waiver of service or a signed certificate showing the date and manner of making service. Zachary’s notice of appeal should have been rejected by the clerk when it was received for failure to comply with Rule 1-323. That the clerk accepted the notice of appeal does not change the outcome of this case. *Lovero*, 200 Md. App. at 449-50. Even if the certificate of service included in Zachary’s April 17, 2017 correspondence, which did not include a notice of appeal, was sufficient to notify the State of Zachary’s appeal, it was filed more than 30 days after the judgment being appealed. Because Zachary’s notice of appeal failed to include a certificate of service, and because the certificate of service that

was mailed was filed more than 30 days after entry of the judgment from which the instant appeal was taken, we acquired no jurisdiction, and Zachary’s appeal must be dismissed.

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANT.