

Circuit Court for Anne Arundel County
Case No. C-02-CV-18-002491

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2134

September Term, 2019

SAMANTHA FOUNTAIN

v.

STATE HIGHWAY ADMINISTRATION

Berger,
Arthur,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: January 12, 2021

*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.

In an action for judicial review of an agency decision, the petitioner failed, for more than a year, to file the required transcript of the agency proceedings and the required memorandum. When a fourth postponement of the merits hearing was imminent, the circuit court summarily dismissed the petition.

The petitioner appealed. Perceiving no abuse of discretion, we shall affirm.

BACKGROUND FACTS

Samantha Fountain was an employee of the State Highway Administration. Her employment was terminated because of her alleged misconduct.

Ms. Fountain appealed her termination to the Office of Administrative Hearings. After an evidentiary hearing, an administrative law judge upheld the agency's decision on July 9, 2018. On August 8, 2018, Ms. Fountain filed a timely petition for judicial review in the Circuit Court for Anne Arundel County.

In a letter dated September 4, 2018, the senior docket clerk for the Office of Administrative Hearings informed Ms. Fountain of the requirements of Maryland Rule 7-206, which generally concerns the contents, preparation, and transmission of the record in actions for judicial review of agency decisions. Among other things, the clerk informed Ms. Fountain that “[i]t is the responsibility of the party who first filed the petition for review”—in this case, Ms. Fountain herself—“to order a transcription of the testimony in the hearing, and to pay the expense of transcribing the hearing, if the parties have not agreed upon a statement in lieu of the record.” *Accord* Md. Rule 7-206(a), (b). The clerk also informed Ms. Fountain of the estimated cost of preparing the transcript (\$1,445.10). The clerk went on to inform Ms. Fountain that, “to insure that the record is timely

transcribed and transmitted to the Court, and to preserve any right of appeal, [she] should immediately remit payment” to a designated court reporting service. The final paragraph of the clerk’s letter contained the following warning:

YOU ARE RESPONSIBLE FOR COMPLIANCE WITH ALL APPLICABLE REQUIREMENTS OF THE MARYLAND RULES. IF THE RECORD IS NOT COMPLETED BY PROMPTLY SUBMITTING EITHER A TRANSCRIPT OR A STATEMENT IN LIEU OF THE RECORD, YOUR APPEAL WILL NOT PROCEED.

The circuit court initially scheduled a hearing on Ms. Fountain’s petition for March 18, 2019. Ms. Fountain, however, did not request a transcript of the proceedings before the administrative law judge. Instead, on March 8, 2019, when the hearing date was imminent, she requested a continuance. The court granted the continuance and rescheduled the hearing for June 10, 2019.

After she obtained the continuance, Ms. Fountain did not request a transcript of the proceedings before the administrative law judge. Instead, on May 31, 2019, when the rescheduled hearing date was imminent, she requested a second postponement on the ground that her attorney was unable to attend.¹ The court appears not to have taken any action on the request for the second postponement before the rescheduled hearing.

On June 10, 2019, the date of the rescheduled hearing, Ms. Fountain and her attorney appeared in court and requested a postponement. The court granted the postponement, but required Ms. Fountain to order a copy of the transcript within 10 days

¹ The attorney had not yet entered his appearance. According to the docket, the attorney did not formally enter an appearance until December 5, 2019, after the court had dismissed Ms. Fountain’s case.

and to file a memorandum, as required by law.² The court cautioned Ms. Fountain that her failure to order the transcript or to file the required memorandum “may result in the dismissal of the action.” From the docket entries, it appears that the court rescheduled the hearing for August 5, 2019.

On June 18, 2019, Ms. Fountain, through counsel, wrote to the Office of Administrative Hearings to request the transcript in her case. Although Ms. Fountain’s brief asserts that she “paid the cost for the production of the transcript” on that date, her counsel’s letter makes no reference to the matter of payment and does not purport to enclose a check. Ms. Fountain later said, under the penalty of perjury, that she did not pay “the cost for the production of the transcript” until “[o]n or about August 15, 2019.”

Meanwhile, on July 29, 2019, the State Highway Administration moved for a continuance of the August 5, 2019, hearing. In support of the motion, counsel for the agency observed that Ms. Fountain had just requested the transcript and that both she and Ms. Fountain’s counsel were unavailable on the scheduled date.

On August 1, 2019, the court granted the motion for a continuance and postponed the hearing, again. On August 12, 2019, the court rescheduled the hearing for December 5, 2019. The court required Ms. Fountain to provide the transcript and to file her memorandum in sufficient time to allow the agency to file its response no less than 30 days before the hearing. By implication, the order required Ms. Fountain to serve her

² Under Md. Rule 7-207(a), a petitioner “shall file a memorandum” in an action for judicial review “[w]ithin 30 days after the clerk sends notice of the filing of the record[.]”

memorandum by October 5, 2019, because the agency ordinarily would have 30 days from service of her memorandum to file its response. *See* Md. Rule 7-207(a); *see also* Md. Rule 7-207(c) (allowing for deadlines to be modified to some extent by stipulation or order of court).

Ms. Fountain did not obtain the transcript or file her memorandum by October 5, 2019. In fact, she had not obtained the transcript or filed her memorandum by November 21, 2019. On that day, the court dismissed the case on its own motion.

Apparently unaware that the court had dismissed the case, Ms. Fountain moved for yet another continuance on November 22, 2019. On November 25, 2019, the clerk returned the motion to Ms. Fountain because the case had been closed.

On December 5, 2019, Ms. Fountain, through counsel, filed what she called a motion to alter or amend the judgment. At the same time, Ms. Fountain filed what she called a motion to reopen the judgment. The two motions, which are largely identical, assert that Ms. Fountain paid the court reporter to generate a transcript on August 15, 2019, that the transcript was to be delivered in late September 2019, but that the court reporter had been unable to complete the transcription in a timely fashion because of an illness. According to the court reporter, the transcript was now ready. The circuit court has not ruled on either of Ms. Fountain’s post-judgment motions.

On December 20, 2019, Ms. Fountain noted an appeal.³ She presents one question, which we have rephrased in the interests of concision: Did the circuit court

³ The appeal is properly before us even if the post-judgment motions remain pending in the circuit court. Because Ms. Fountain filed the motions more than 10 days

abuse its discretion in dismissing Ms. Fountain’s case on its motion, without making findings, conducting a hearing, or giving Ms. Fountain an opportunity to show cause why the case should not be dismissed?⁴

STANDARD OF REVIEW

Both parties agree that we review the circuit court’s decision for abuse of discretion.⁵ “A court’s decision is an abuse of discretion when it is ‘well removed from any center mark imagined by the reviewing court and beyond the fringe of what that

after the entry of the judgment, the motions were, in substance if not in name, revisory motions under Maryland Rule 2-535(a). Unlike a post-judgment motion that is filed within 10 days of the judgment under Rule 2-532, 2-533, or 2-534, a revisory motion under Rule 2-535(a) does not stay the time for noting an appeal from a final judgment. *See, e.g., Pickett v. Noba, Inc.*, 114 Md. App. 552, 556 (1997). Had Ms. Fountain waited for the court to rule on her post-judgment motions before taking an appeal, the sole issue before us would be whether the court abused its discretion in declining to revise the judgment. *See, e.g., Stuples v. Baltimore City Police Dep’t*, 119 Md. App. 221, 231-32 (1998).

⁴ Ms. Fountain formulated her question as follows:

Did the Circuit Court err in, sua sponte, and without informed findings, hearing or an opportunity to show cause, dismissing Ms. Fountain’s case for failure to comply with the Court’s earlier Orders of providing the transcript to the Court without inquiring or giving Ms. Fountain an opportunity to provide information to the Court about the problems with the court reporter whom she had paid?

⁵ In her brief, Ms. Fountain tacitly agreed that we review the decision below for abuse of discretion. In her description of the applicable standard of review, she quotes *Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 700 (1999), which states: “the real question is whether justice has not been done, and the review of the exercise of a court’s *discretion* will be guided by that concept.” (Emphasis added.) At oral argument, Ms. Fountain volunteered that we review the decision below for abuse of discretion.

court deems minimally acceptable.” *Moreland v. State*, 207 Md. App. 563, 569 (2012) (quoting *Gray v. State*, 388 Md. 366, 383 (2005)).

DISCUSSION

In an action for judicial review, the “administrative agency has the initial responsibility for transmitting the record to [the] circuit court, although the petitioner may be required to pay the cost of any transcription.” *Montgomery County v. Post*, 166 Md. App. 381, 388 (2005) (citing Md. Rule 7-207). “Nevertheless,” the petitioner must initiate the process of obtaining a transcript, “and the petitioner bears the responsibility for compliance with the rules.” *Id.* “The penalty for noncompliance is dismissal of the petition.” *Id.* ; see Md. Rule 7-206(e) (requiring that the action be dismissed “if the record has not been transmitted within the time prescribed unless the court finds that the inability to transmit the record was caused by the act or omission of the agency, a stenographer, or a person other than the moving party”); Md. Rule 7-207(d) (permitting a court to dismiss an action on motion, “[i]f a petitioner fails to file a memorandum within the time prescribed,” and “the failure to file or the late filing caused prejudice to the moving party”).

This Court has drawn an analogy between the burden on a petitioner for judicial review and the burden on an appellant from a final judgment. “A person who notes an appeal from a trial court’s decision has the burden to ensure that the record is complete and transmitted timely.” *Montgomery County v. Post*, 166 Md. App. at 388-89. “If the appellate rules are not complied with, the appellate court may dismiss the appeal.” *Id.* at

389. So too may a circuit court dismiss a petition for judicial review if the petitioner fails to transmit the record in a timely fashion.

In this case, there is no serious dispute that Ms. Fountain failed to comply with the applicable rules. Ms. Fountain petitioned for judicial review on August 8, 2018. Yet, she did not request the transcript until June 18, 2019, and did not pay the court reporter to prepare the transcript until approximately August 15, 2019. In the 53 weeks between the filing of the petition and the payment to the court reporter, the court postponed three merits hearings—two at Ms. Fountain’s request, and the third in part because she had not yet received the transcript (and, in fact, had not yet paid the reporter to prepare it). After the third postponement, Ms. Fountain failed to obtain the transcript in sufficient time to allow her and the agency to file timely memorandums, thus necessitating a fourth postponement if the case were to proceed. Although the final period of delay might have been partially attributable to the court reporter (as Ms. Fountain argued in her post-judgment motions), she did not bring that problem to the court’s attention until the fourth scheduled hearing was less than two weeks away. By that time, the court, correctly recognizing that the hearing could not possibly take place as scheduled, had already taken it upon itself to dismiss the case.

In these circumstances, we cannot say that the court’s decision was well removed from any center mark and beyond the fringe of what we deem minimally acceptable. Before dismissing the case in November 2019, the court could have required Ms. Fountain to explain why she had failed, for the fourth time, to file a timely memorandum,

and why the merits hearing should be postponed once again. But we are aware of nothing that obligated the court to do so, and Ms. Fountain agreed at oral argument that she knows of none. The court has the authority to control its own docket. To the extent that the court is allocating its time and resources to litigants who fail to comply with their procedural obligations, the court is diverting its time and resources from litigants who comply with theirs.

In short, just as this Court has the discretion to dismiss an appeal if an appellant fails to have the record transmitted by the applicable deadline or fails to file a timely brief, the circuit court has the discretion to dismiss a petition for judicial review if the petitioner fails to obtain the transcript, fails to file a timely memorandum, and prevents the adverse party from filing its own timely memorandum, as happened in this case. *See Montgomery County v. Post*, 166 Md. App. at 388. Although a court may require a party to show cause why the case should not be dismissed, it has no obligation to do so.

In arguing for reversal, Ms. Fountain cites *Wormwood v. Batching Systems, Inc.*, 124 Md. App. 695 (1999), in which this Court held that the circuit court erred in proceeding as though it was required to dismiss an appeal of a workers' compensation decision because the appellant bore part of the responsibility for the delay in transmitting the record. *See id.* at 701. We see no indication that the circuit court dismissed the petition in this case because it erroneously believed that it was required to do so. Instead, it appears that the court exercised its discretion to dismiss the petition because Ms. Fountain had been advised of her obligation to obtain a transcript and file a timely

memorandum, had been warned of the consequences of failing to comply with those obligation, and had repeatedly failed to do what she was required to do. The *Wormwood* case does not assist Ms. Fountain.

In summary, the circuit court, in its discretion, had the power to dismiss Ms. Fountain’s petition on account of her serial violations of her procedural obligations. We see no abuse of discretion in this case.⁶

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED; APPELLANT TO PAY
COSTS.**

⁶ It appears that Ms. Fountain’s post-judgment revisory motions remain pending in the circuit court. Assuming that they do, we express no opinion as to the appropriate exercise of the court’s “broad” discretion (*see Dixon v. Ford Motor Co.*, 430 Md. 137, 157 (2013)) in the review of the motions.