

§3.C.00 | DISMISSAL⁸⁰

The proper method of raising a procedural or jurisdictional bar to an appellate proceeding is to file a motion to dismiss the appeal or petition for review.⁸¹ A motion to dismiss could be used to present any of the following arguments:

- (1) the appellate court lacks jurisdiction,
- (2) the issue raised in the review proceeding is moot,
- (3) the party seeking review has disobeyed the order that is the subject of the review proceeding,
- (4) the appeal or petition is frivolous, or
- (5) the party seeking review has committed a violation of the rules serious enough to warrant dismissal as a sanction.⁸²

Perhaps the most frequently asserted ground in support of a motion to dismiss is that the appellate court lacks jurisdiction. This argument may be presented successfully so long as the proceeding is not within the appellate court's subject-matter jurisdiction.⁸³ For example, if a party appeals a nonfinal order that is not one of the orders that is subject to review by appeal, the opposing party could raise the absence of subject-matter jurisdiction by filing a motion to dismiss in the appellate court. Another class of jurisdictional issues includes those in which the order is appealable, but the party seeking review has failed to take the necessary steps to invoke appellate jurisdiction.⁸⁴ If a party files an untimely notice of appeal from a final judgment, the appellate court will lack jurisdiction to hear the appeal, even though the court otherwise has potential appellate jurisdiction to hear appeals from final orders. Many of these issues will be raised by the appellate court, but it is certainly proper for the defending party to challenge appellate jurisdiction by filing a motion to dismiss.

Closely related to the issue of appellate jurisdiction is the question of whether there is a case or controversy. This problem is commonly presented by an appeal or petition that initially was within the jurisdiction of the appellate court, but that has become moot by the expiration of time or as a result of subsequent events. Cases of this nature remain within the jurisdiction of the court in a technical sense, but they could be dismissed on the ground that the appellate court's decision would have no effect on the

litigants. An appellate court may retain jurisdiction over an issue that has become moot only in limited circumstances.⁸⁵

The proper method of asserting a claim of mootness is to file a motion to dismiss. As a practical matter, the mootness of an issue might not be apparent to the appellate court if it were not presented by a party's motion. The event that makes the issue moot might be a change in circumstances that would not be apparent from anything in the record from the trial court. For this reason, it may be necessary to prepare an appendix to the motion to establish the factual basis for the claim of mootness.

Among the contentions that properly may be asserted in a motion to dismiss is the argument that the proceeding should be dismissed because the appellant or petitioner has disobeyed the order under review. Deliberate noncompliance with the order or judgment may be treated as a waiver of the right to challenge it on review.⁸⁶ Appellate courts usually allow the offending party an opportunity to comply with the order before dismissing the case in much the same fashion as a litigant would be allowed to purge a contempt.⁸⁷

Regarding disobedience of a civil judgment, an appellate court may dismiss a criminal appeal if the defendant has become a fugitive and is no longer within the appellate court's control.⁸⁸ However, this Rule applies only if the defendant absconds after invoking the appellate court's jurisdiction.⁸⁹ A criminal defendant who becomes a fugitive before the sentencing hearing does not forfeit the right to appeal once he or she is taken back into custody and sentenced.⁹⁰

Another ground for dismissal is that the proceeding before the appellate court is frivolous. This is not often a good basis for a motion to dismiss, given the general legal policy favoring decisions on the merits when possible, and given the fact that it often will be difficult to evaluate the case until the record is filed. After the record is filed, it might be just as easy to affirm the case. There are instances, however, in which appellate courts have dismissed proceedings on the ground that they were frivolous.⁹¹ In Florida,

[a] frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed.... It must be one so clearly untenable, or the insufficiency of which is so manifest

on a bare inspection of the record..., that its character may be determined without argument or research.⁹²

Finally, appellate courts may employ dismissal as the ultimate sanction for a failure to comply with the Rules. Although it does not occur frequently, there are instances in which the courts have dismissed a case because the record or appellate brief was not filed within the appropriate time periods.⁹³ In this situation, the power to dismiss an appellate proceeding should be regarded as an extreme remedy.

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Footnotes

⁸⁰. See Padovano, *supra* n. 1, at ch. 15 for the source of the material that is adapted in this Subsection.

⁸¹. McClain v. Fla. Parole & Probation Commn., 416 S.2d 1209, 1211 (Fla. Dist. App. 1st 1982).

⁸². *Infra* nn. 83–93 and accompanying text.

⁸³. E.g. Okeelanta Corp. v. McDonald, 730 S.2d 1283, 1284 (Fla. Dist. App. 4th 1999) (granting a motion to dismiss an appeal taken from a nonfinal, nonappealable order); Bernstein v. First Fed. Sav. & Loan Assn. of Orlando, 384 S.2d 301, 302–303 (Fla. Dist. App. 5th 1980) (dismissing the appeal on the ground that the order under review was not within the scope of the court’s appellate jurisdiction).

⁸⁴. A motion to dismiss is proper to contest jurisdiction on the ground that the appeal was not timely filed. E.g. Blackstock v. Blackstock, 776 S.2d 359, 359 (Fla. Dist. App. 1st 2001) (dismissing an appeal based on the appellee’s motion showing that the notice of appeal was not timely filed).

⁸⁵. There are exceptions that allow an appellate court to decide an issue of great public importance, an issue that may become moot so quickly that it is capable of repetition yet evading review, or an issue that would have collateral legal consequences. Mazer v. Orange County, 811 S.2d 857, 859 (Fla. Dist. App. 5th 2002).

⁸⁶. If the appellant has disobeyed an order of the trial court, the appellate court may, in its discretion, entertain a motion to dismiss the appeal. E.g. McLemore v. McLemore, 567 S.2d 23, 24 (Fla. Dist. App. 1st 1990) (dismissing a husband’s appeal because he failed to comply with the order appealed and because he absented himself during the period of the appeal); Keidaish v. Smith, 400 S.2d 90, 91 (Fla. Dist. App. 2d 1981) (dismissing an appeal because the appellant had fled the jurisdiction with certain items of personal property in violation of the injunction order he was appealing); Simoes v. Simoes, 790 S.2d 1221, 1223 (Fla. Dist. App. 3d 2001) (dismissing an appeal based on the appellant’s flagrant noncompliance with the trial court’s orders); Rodriguez v. Rodriguez, 640

S.2d 133, 134 (Fla. Dist. App. 3d 1994) (dismissing the appeal on the ground that the appellant had failed to pay his child support and had absconded from the jurisdiction while the appeal was pending); *Segall v. Downtown Assoc.*, 546 S.2d 11, 12 (Fla. Dist. App. 3d 1989) (dismissing the appeal because the appellant failed to follow post-judgment discovery orders during an appeal from an unsuperseded judgment).

⁸⁷. If a party has not complied with the order under review, the appellate court must provide a grace period to allow the appellant an opportunity to comply before the appeal is dismissed. *Gazil v. Gazil*, 343 S.2d 595, 597 (Fla. 1977). However, it is not necessary to offer a grace period before dismissing an appeal if the appellant has absconded from the jurisdiction. *Rodriguez*, 640 S.2d at 134.

⁸⁸. An appeal by a criminal defendant is subject to dismissal if the defendant becomes a fugitive after invoking the jurisdiction of an appellate court, but not before. Compare *Griffis v. State*, 759 S.2d 668, 672 (Fla. 2000) (noting that an appellate court may dismiss an appeal only if “a defendant absconds after filing [the] appeal”) with *Abed v. State*, 806 S.2d 627, 627 (Fla. Dist. App. 4th 2002) (granting a motion to dismiss because the defendant filed an appeal before absconding).

⁸⁹. *Griffis*, 759 S.2d at 672.

⁹⁰. *Id.*

⁹¹. The court can dismiss an appeal that is frivolous. In *Beiswanger v. Department of Banking and Finance, Division of Securities*, 563 S.2d 700, 700 (Fla. Dist. App. 4th 1990), the appellant had advocated a statutory interpretation not supported by the legislative history or the case law and the court dismissed the appeal on the ground that it was frivolous. Likewise, in *Askew v. Gables by the Sea, Incorporated*, 258 S.2d 822, 823 (Fla. Dist. App. 1st 1972), the court determined that the appeal was dilatory and entered an order of dismissal. It appeared to the court that the appellant had appealed from a post-mandate order of the lower tribunal to relitigate issues that had been decided in the original appeal resulting in the issuance of the mandate. *Id.* As a general proposition, however, a party should not file a motion to dismiss to argue that an appeal is without merit because such arguments belong in the briefs. *Diaz v. Fla. Dept. of Corrections*, 511 S.2d 669, 670 (Fla. Dist. App. 1st 1987).

⁹². *Treat v. State ex rel. Mitton*, 163 S. 883, 883 (Fla. 1935) (relying on *Brahmbhatt v. Allstate Indem. Co.*, 655 S.2d 1264, 1265 (Fla. Dist. App. 4th 1995), to dismiss an appeal on the ground that it was frivolous. The appellant had argued for reversal citing a precedent that supported the trial court’s decision.).

⁹³. E.g. *Swicegood v. Fla. Dept. of Transp.*, 394 S.2d 1111, 1112 (Fla. Dist. App. 1st 1981).