

To: The Hon. Jenny A. Kitchings, Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

From: The Honorable Patrick L. Booker
P.O. Box 1151
Fairfax, S.C. 29827

Date: May 28, 2013

Re: State vs. Patrick L. Booker
Appellate Case No. 2012-213687

Dear Clerk Kitchings:

Enclosed for filing, please find the "Notice of Clerical Misprision, Fraud Upon The Court, and Professional Misconduct of Attorneys of Record" and the "Disclosure of Legal Authority Regarding Motion to Reinstate", within which there are executed certificates of service, regarding the above-matter.

* I beg you to please get these documents before the judges.

cc: My File

RECEIVED

MAY 31 2013

SC Court of Appeals

Best regards,


STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenville County
The Honorable Letitia H. Verdin, Circuit Court Judge
Appellate Case No. 2012-213687

The State

Respondent,

— VS —

Patrick L. Booker

Appellant.

NOTICE OF CLERICAL MISPRISION,
FRAUD UPON THE COURT, AND PROFESSIONAL
MISCONDUCT OF ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that the Appellant hereby provide notice to this Court of the clerical misprision, fraud upon the court, and professional misconduct of the attorneys of record.

— Clerical Misprision —

"Clerical misprision" means a court clerk's mistake or fraud that is apparent from the record. See, Black's Law Dictionary, 8th Edition (2004) (under misprision).

On February 13, 2013 this Court's deputy clerk (V. Claire Allen) committed a clerical misprision by issuing a dismissal order in this matter without being authorized by law to do so.

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In particular, the Clerk has no legal authority under the South Carolina Appellate Court Rules ("SCACR") to issue a dismissal order unless, and only whenever, it appears that an appellant has failed to comply with the SCACR. See, Rule 260(a), SCACR ("Whenever it appears that an appellant has failed to comply with the requirements of these Rules, the Clerk shall issue an order of dismissal which shall have the same force and effect as an order of the appellate court. ").

In filing and serving the Notice of Appeal in this matter, the Appellant fully complied with the requirements of the SCACR. Indeed, the clerk has made no allegation that it even appeared the Appellant had failed to comply with the requirements of the SCACR.

Because the Appellant had fully complied with the SCACR, it was a mistake that is apparent from the record for the deputy clerk to issue a dismissal order in this matter. Hence, clerical misprision.

In the dismissal order, the deputy clerk stated: "We dismiss the appeal pursuant to the orders of the Supreme Court of South Carolina dated October 9, 2012 and April 7, 2010." (See Order dated February 13, 2013). This was yet another instance of clerical misprision because it was a mistake that is apparent from the record for the deputy clerk to issue a dismissal order on the ground for which she stated.

As explained and shown above, Rule 260(a), SCACR is the only provision which authorizes a clerk to issue a dismissal order and that is only when it appears that an appellant has failed to comply with the requirements of the SCACR: There is

no provision in the SCACR which authorizes the clerk to issue a dismissal order otherwise, even if it may appear that an appellant has failed to comply with the requirements of a court order. And that is for good reason, because it is not the function of court clerks to make judgements or legal interpretations of the ramifications of court orders. The South Carolina Supreme Court has recently admonished and specifically prohibited court clerks from refusing to perform their duties based on their opinion about the appropriateness of a legal matter sought to be filed. See, e.g., Miller vs. State, 377 S.C. 99 (2008) ("It is not within the clerk of court's authority to refuse to perform her duty based on her opinion that a filing lacks legal merit or is untimely."). In this case, the clerk's deputy apparently made a legal interpretation of the ramifications of the Supreme Court's orders and thereupon decided that the Appellant was not in compliance with the orders — which she was not authorized to do. See, 21 C.J.S. Courts § 338 (2006) ("A clerk of court cannot ordinarily determine questions of law or render judgements."). Hence, the deputy clerk is indeed guilty of clerical misprision.

— Fraud Upon The Court and Professional Misconduct —

Without question, a lawyer's misrepresentations to the courts constitutes fraud upon the court. See, In re Cleisor, 499 S.E.2d 809 (1998) (finding misrepresentations to court to be fraud upon the court). It is also beyond dispute that it is professional misconduct for a lawyer to engage in misrepresentations. See, Rule 8.4(d), Rules of Professional Conduct ("RPC") ("It is professional

misconduct for a lawyer to engage in misrepresentation.").

The opposing counsel, Attorney Salley W. Elliott, committed multiple misrepresentations to this Court in the Return to Motion to Reinstate.

On page 3 at Section 4 of the Return, attorney Elliott stated: "Appellant was 'again' notified that further filings of this nature without first obtaining permission of the South Carolina Supreme Court may result in further restrictions on Appellant's ability to make filings in the courts." (emphasis added).

Then, at Section 5 of the Return, attorney Elliott stated: "'Thereafter' and on information and belief, on June 19, 2012, Appellant filed a Motion to Vacate for the 2003 convictions in the Greenville County Court of General Sessions." (emphasis added).

The above emphasized statements of fact to this Court by attorney Elliott are false and thus, a misrepresentation because (1) the Supreme Court notified the Appellant only "once" of potential sanctions and (2) the Appellant has not made any further filings in the circuit court regarding his 2003 convictions after that one warning of potential sanctions.

Attorney Elliott's misrepresentations to this Court causes the record to appear that the Supreme Court has issued multiple warnings of potential sanctions, and that the Appellant filed the motion to vacate after the Supreme Court's potential sanctions warning.

Finally, it is clearly established that an attorney has a professional obligation to not assert any frivolous issue before a court. See, Rule 3.1, RPC.

Attorney Elliott has asserted and submitted a frivolous issue before this Court.

In the Return, attorney Elliott stated: "Appellant is incorrect in his assertion that the Motion to Vacate Judgment is a direct challenge to the 2003 convictions rather than a collateral attack. Respondent submits that Appellant's ability to initiate a direct challenge to the 2003 convictions expired with the time frame required for filing a direct appeal from the 2003 judgement of conviction." (emphasis added).

The defense or issue asserted above by attorney Elliott is frivolous because attorney Elliott was well aware that, although a direct appeal is necessarily a direct attack, a direct attack is not necessarily a direct appeal (e.g., motion for new trial under Rule 29, S.C.R.Crim.P) and therefore, attorney Elliott was aware that the ability to initiate a direct attack does not necessarily expire with the time frame required for filing a direct appeal.

Regardless, attorney Elliott is aware that a "direct attack is an attack on a judgement made in the 'same proceeding' as the one in which the judgement was entered." Black's Law Dictionary, 8th Ed. (2005) (emphasis added). And attorney Elliott was aware that the Appellant did precisely that, i.e., he filed an attack - on the 2003 criminal judgements - in the very "same

proceeding" as the one in which the judgements were rendered. Accord, Fouche vs. Royal Indem. Co. of N.Y., 60 S.E.2d 73 (s.c. 1950) ("a judgement may be attacked... 'directly by motion' in cause between the same parties"). Therefore, attorney Elliott was aware that the Appellant's Motion to Vacate Judgements was not a collateral proceeding but was a direct attack, falling outside the prohibition of the Supreme Court orders. See, Collins Music Co., Inc. vs. Lord, 346 S.E.2d 724 (s.c. 1986) ("In our view this particular action is not a collateral proceeding, but the respondent is attempting to directly attack the judgement.")

Lastly, attorney Elliott was well aware that any argument regarding the timeliness of the Appellant's motion was moot because the trial court heard and ruled upon the merits of the motion. Perry vs. Green, 437 S.E.2d 150 (ct. App. 1993) ("We need not address Green's argument concerning the timeliness of the post-trial motions because it is moot in light of the trial court's hearing of and ruling on these motions on their merits. ").

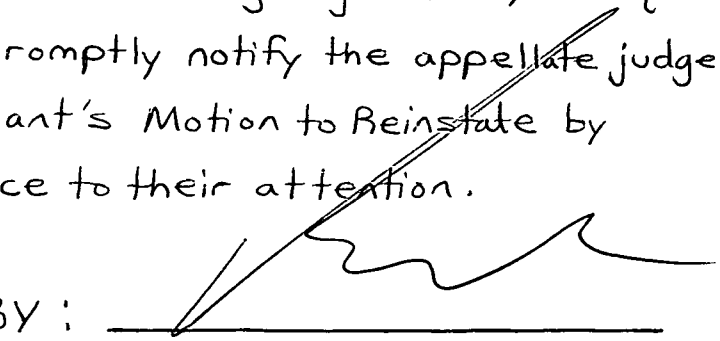
It should be noted that attorney Elliott was aware of the deputy clerk's "clerical misprision" but nevertheless stated: "Respondent submits that this Court properly dismissed the pending appeal" (See, Section IX of the Return). Attorney Elliott, as an officer of the court, has a professional obligation by sworn oath to "never seek to mislead the judge by any artifice."

Thus, consistent with that obligation, Elliott should promptly withdraw that statement or otherwise explain how the deputy clerk's dismissal order was proper when the deputy clerk committed misconduct/clerical misprision by issuing the dismissal order in this matter.

Finally, the Appellant's attorney of record is Robert M. Dudek, upon information and belief. Attorney Dudek has totally abandoned me; he has never contacted me, he has allowed me to be subjected to the misconduct ~~above~~ without helping me or protecting my legal interest herein. This is clearly professional misconduct by attorney Dudek.

WHEREFORE, having made the foregoing notice, I request the Clerk of this Court to promptly notify the appellate judges assigned to hear the Appellant's Motion to Reinstate by immediately bringing this notice to their attention.


May 27, 2013
Fairfax, South Carolina

BY: 
The Honorable Patrick L. Booker
P. O. Box 1151
Fairfax, S.C. 29827
APPELLANT PRO SE

— Certificate of Service —

I, Patrick L. Booker, do certify that I have this date served a copy of the foregoing upon all parties entitled to service by depositing the same in the U.S. Mail, postage prepaid.

5/28/13
(Date)


(Signature)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenville County
The Honorable Letitia H. Verdin, Circuit Court Judge
Appellate Case No: 2012-213687

The State

Respondent,

- VS -

Patrick L. Booker

Appellant.

Disclosure of Legal Authority
Regarding Motion to Reinstate

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SC Court of Appeals

In accordance with my professional obligation under the Candor Toward The Tribunal Rule, I hereby disclose legal authority of this jurisdiction known to me to be directly adverse to the position of the Respondent and which was not disclosed by the opposing counsel. See, Rule 3.3(a)(2) of Rule 407, SCACR, Rules of Professional Conduct.

In the Return to the Motion to Reinstate, the Respondent takes the position that the Appellant's post-trial motion (i.e., his Motion to Vacate Judgment) was not timely filed in the trial court. (see, Section IX of Return at 4). The trial court, however,

heard the motion, and issued a ruling upon the merits of the motion. (see, Section V of the Return at 3).

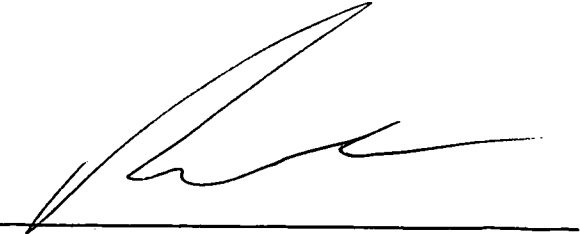
This very same Court of Appeals has held that any argument regarding the timeliness of post-trial motions is moot where the trial judge hears the motions and rules upon their merits. See, Perry vs. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct.App. 1993) ("We need not address Green's argument concerning the timeliness of the post-trial motions because it is moot in light of the trial court's hearing of and ruling on these motions on their merits. ").

The Respondent's lawyer, Salley W. Elliott, is perhaps guilty of "professional misconduct" for violating her duty of candor toward the tribunal, by failing to disclose the legal authority of Perry vs. Green, supra, despite her knowledge that such legal authority is directly adverse to the position taken by her client. See, Rule 3.3(a)(2) of the Rules of Professional Conduct ("A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. ").

WHEREFORE, having made the foregoing disclosure, I request the Clerk of this Court to promptly notify the appellate judges assigned to hear my Motion to Reinstate by appending/attaching this disclosure to my Motion to Reinstate and to the Return to the Motion to Reinstate.

(Signature Page To Follow)

May 26, 2013
Fairfax, South Carolina

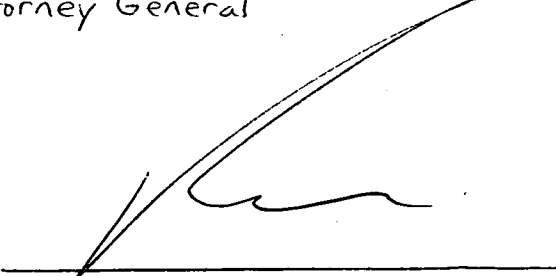
BY: 
The Honorable Patrick L. Booker, Esq.
Post Office Box 1151
Fairfax, S.C. 29827

Certificate of Service

I, The Honorable Patrick L. Booker, Esquire, do hereby certify that I have served the foregoing upon the Respondent by depositing a copy thereof in the U.S. Mail, postage prepaid, addressed as:

Salley W. Elliott, Esquire
Senior Assistant Deputy Attorney General
P.O. Box 11549
Columbia, S.C. 29211

5/28/13



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MAY 31 2013

SC Court of Appeals