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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable William H. Seals, Circuit Court Judge

MAURIO D. RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001106

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

Under the unusual procedural facts of this case, this Court, without a remand to the PCR judge, should find that trial counsel was ineffective for failing to object to the example given by the trial judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof, resulting in prejudice requiring reversal.

A. Procedural History – Remand Not Required

Counsel for Petitioner filed the appendix and petition for writ of certiorari on February 22, 2021. In January of 2021, prior to filing and while preparing the appendix, counsel for Petitioner requested a copy of the Rule 59(e) motion from the Attorney General's Office. The *pro se* Rule 59(e) motion, dated January 10, 2020, included in the appendix is the motion provided to counsel for Petitioner from the Attorney General's Office. Counsel for Petitioner reasonably believed that the Rule 59(e) motion provided by the State had been filed. The filed motion to alter or amend pursuant to Rule 59(e) submitted by PCR counsel, and the State's return were not provided to counsel for Petitioner. As a result, these documents were not included in the original appendix.

The State filed a return on June 10, 2021. Petitioner filed a reply brief on June 21, 2021. On November 28, 2023, this Court granted the petition for writ of certiorari as to question two but denied certiorari as to questions one and three. The brief of petitioner was filed on December 14, 2023. On June 17, 2024, the State filed a motion to strike and require filing of amended appendix and brief of petitioner. Petitioner filed a reply on July 10, 2024. On August 26, 2024, this Court denied the motion to strike but ordered the filing of a supplemental appendix to include the Rule 59(e) motion filed by PCR counsel and the State's return. Petitioner filed the supplemental appendix on September 24, 2024. The State filed the brief of respondent on October 25, 2024, moving for the first time for a remand to the PCR judge. This reply brief is filed in opposition to

a remand. Petitioner submits that this Court can and should decide the merits of the issue without a remand.

1. *Pro se* Rule 59(e) Motion

On January 15, 2020, the South Carolina Attorney General’s Office received the *pro se* Rule 59(e) motion, dated January 10, 2020, and included in the appendix, as reflected on the stamped document. (App. p. 421). It is unclear if the *pro se* Rule 59(e) motion was forwarded to PCR counsel, by the Attorney General’s Office, as is the standard practice. It is unclear why the *pro se* Rule 59(e) motion does not appear in the Colleton County Fourteenth Judicial Circuit Public Index. A *pro se* motion to amend and a *pro se* motion to withdraw attorney appear in the Public Index as being filed November 27, 2017. While there is no constitutional right to hybrid representation, the clerk does not have the authority to refuse to file a *pro se* filing. As the South Carolina Supreme Court wrote in Barnes v. State, 433 S.C. 399, 402–03, 859 S.E.2d 260, 261–62 (2021):

We take this opportunity to remind the clerks of court of their ministerial duty to docket filings irrespective of potential procedural flaws that may exist. Miller v. State, 377 S.C. 99, 102, 659 S.E.2d 492, 493 (2008) (“[I]t 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.”). This duty is not discretionary. *See* 21 C.J.S. *Courts* § 335 (2021). Unless specifically authorized by statute² or a court rule, a clerk of court may not exercise any judicial power reserved for a judge. Id. (“The clerk cannot, without express constitutional or statutory authority, exercise any judicial functions.”). This includes the prohibition of performing any action contingent on deciding a question of law. Id. (“It follows that a clerk of court cannot ordinarily determine questions of law.”). Accordingly, a clerk of court does not have the authority to reject a filing based on ostensible or perceived failures, including whether the document is contained on the proper form. Because the clerk’s role is ministerial in this respect, the clerk shall not be “concerned with the merit of the papers or with their effect and interpretation ...” *Id.* § 337. Stated differently, “[a] clerk of court may not reject a pleading for lack of conformity with requirements of form; only a judge may do that.” Hooker v. Sivley, 187 F.3d 680, 682 (5th Cir. 1999); see also Gorod v. Tabachnick, 428 Mass. 1001, 696 N.E.2d

547, 548 (1998) (“In the absence of an order from a judge, [clerks] may not refuse to accept a notice of appeal, even if they believe that no appeal is available or that the notice is untimely or otherwise defective.”). Instead, the clerk shall accept the filing, thereby permitting the court to decide any issues the parties may have with it.

The *pro se* Rule 59(e) motion notes, “The PCR Courts order also states it was the solicitor (S. Knight) who used the example of the getaway car driver and the burglary defining Accomplice Liability when it was in fact the judge (D. Goodstein).” (App. p. 422). The *pro se* Rule 59(e) motion also states, “Let the court please note that on November 15, 2017, I the Applicant submitted a Motion to Amend the PCR application raising all the above unaddressed issues. And now am requesting this court address all issues adequately. (Marlar v. State 375 S.C. 407, 410-653 SE.2d 266, 267 (2007))” (App. p. 423). As a result of the Attorney General’s Office receiving the *pro se* Rule 59(e) motion on January 15, 2020, the State was on notice that the order of dismissal focused on the solicitor’s closing argument instead of the issue raised during the PCR hearing involving the judge’s instruction to the jury.

2. Rule 59(e) Motion filed by PCR Counsel

PCR counsel filed a motion to alter or amend pursuant to Rule 59(e) on January 23, 2020. The filed motion did not challenge the order of dismissal for failing to address the issue raised during the PCR hearing involving trial counsel’s failure to object to the judge using the example of a getaway driver during the accomplice liability instruction to the jury.

3. Second *Pro se* Rule 59(e) Motion

It appears that on March 30, 2020, Petitioner wrote to PCR counsel in reference to the Rule 59(e) motion filed by PCR counsel dated January 15, 2020, and filed January 23, 2020. In the letter Petitioner noted, “I have a concern however. I see you still did not address all of the issues included in the hearing and the amended PCR application filed Nov. 27th, 2017.” A copy of the

letter was attached and made a part of the return to the State's motion to strike. It appears that a second *pro se* Rule 59(e) motion was attached to the letter. A copy of the second *pro se* Rule 59(e) motion was attached and made a part of the return. The second *pro se* Rule 59(e) motion notes, "The judgement does not address the applicants assertion that, the Trial Court erred, and thereby violated petitioner's right to due process of law by defining the hand of one is the hand of all with a example of a burglary and a getaway driver, where petitioner was on trial for a murder attempt and the difference had a prejudicial impact, shifting the burden of proof to the applicant." (Part V.)

The second *pro se* Rule 59(e) motion also notes, "The judgement does not address applicants assertion that Trial Counsel was ineffective assistance, and thereby violated petitioners right to due process of law by failing to object to the trial courts instruction defining the hand of one is the hand of all with the non-charged offense of a burglary and a getaway driver." (Part VI.). Importantly, the second *pro se* Rule 59(e) motion includes a certificate of service indicating that the motion was mailed to the Office of the Attorney General, just as the first *pro se* Rule 59(e) motion did.

4. State's Return to Rule 59(e) Motion

As noted in footnote 7 of the State's motion to strike, the State's return to PCR counsel's Rule 59(e) motion was not filed. The return is dated July 21, 2020. Although the Attorney General's Office was on notice, since January 15, 2020, that the order failed to address the issue raised during the PCR hearing involving trial counsel's failure to object to the judge using the example of a getaway driver during the accomplice liability instruction to the jury, the return states, "Respondent submits this Court fully ruled on all issues presented through Applicant's post-conviction relief application and Applicant's 'Motion to Amend and Alter Judgment Pursuant to

Rule 59(e), SCRCP' should be denied. As each properly raised allegation was addressed fully in the order, Respondent submits Applicant's assertions are without merit." Contrary to the State's position in the unfiled return, the order of dismissal did not address all issues raised at the PCR hearing, incorrectly limiting the issue to the solicitor's closing argument, as correctly noted in the *pro se* Rule 59(e) motion. The State was on notice of the error in the order of dismissal at the time the return was submitted and failed to correct the error. The State and PCR counsel are equally at fault in failing to correct the order of dismissal. The State appears to concede that it contributed to the error. (Motion to Strike p. 9). Petitioner, acting *pro se*, was the only party to correctly point out the error in the order of dismissal.

5. Failure to Object or Move for Remand

The State failed to object or move for a remand when the petition for writ of certiorari and appendix were filed on February 22, 2021. The State failed to object or move for a remand when the return was filed on June 10, 2021. The State failed to object or move for a remand when the reply was filed on June 21, 2021. The State failed to object or move for a remand when certiorari was granted in part on November 28, 2023. The State failed to object or move for a remand when the brief of petitioner was filed on December 14, 2023. The State, on notice since January of 2020 that the order of dismissal failed to address the issue actually raised at PCR, waited until June of 2024 to object to the *pro se* Rule 59(e) motion that was provided to counsel for the Petitioner by the Attorney General's Office. The State waited until the filing of the brief of respondent to move for a remand.

6. Objection Abandoned

This Court should find that the State abandoned any objection to the inclusion of and reference to the *pro se* Rule 59(e) motion by repeatedly failing to object. See S.C. Dep't of Transp.

v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008) (Issues not argued in the brief are deemed abandoned and will not be considered on appeal). In its motion to strike, the State argued for the first time, “Critically, because the pro se motion to alter or amend that is contained in the appendix as presently filed was *not* actually presented to or considered by the PCR judge, that matter could not and cannot appropriately be included in the appendix just as it cannot properly be embodied in the appellate briefs.” (Motion to Strike p. 8, citations omitted).

In the return to the petition for writ of certiorari, however, the State asserted, “The post-conviction relief judge properly denied relief for the allegation that trial counsel was ineffective for failing to object to the example given by the trial judge to the jury of accomplice liability because the example was not an improper comment on the facts, and even if it were, it was uncontroverted that Petitioner was the driver of the vehicle.” In both the petition for writ of certiorari and the return the parties addressed the issue of whether trial counsel was ineffective in failing to object to the judge using the example of a getaway driver during the accomplice liability instruction to the jury. The State did not argue in the return, as it does now for the first time, that the *pro se* Rule 59(e) motion, received by the State and provided by the State to counsel for Petitioner was not presented to the PCR judge.

In preparing the petition for writ of certiorari counsel for Petitioner reasonably believed that the *pro se* Rule 59(e) motion, provided by the State, had been filed and presented to the PCR judge, and counsel crafted the arguments to be presented to the appellate court based on that reasonable belief. The State should not be able to use an error created in part, by the State, to now claim a procedural default on an issue that was litigated at the PCR hearing but incorrectly addressed in the order of dismissal.

7. Remand Not Required

While it is unclear if the *pro se* Rule 59(e) motion was presented to the PCR judge, under the unusual circumstances of this case, this Court should decide the case without a remand pursuant to Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019). First, the State shares in the blame for the order of dismissal failing to address trial counsel's failure to object to the judge's improper example. When the State presented the return to the Rule 59(e) motion, the State was aware of the error in the order and failed to correct the error. The State should not be able to complain now about an error the State could have prevented.

Second, the question presented to this Court in the brief of petitioner is, "Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof?" (BOP, p. 1). The question of whether the charge given is an improper charge on the facts is a question of law that is reviewed by this Court de novo. The order is not missing factual findings that would require a remand. Rather, the order is missing a legal conclusion. "We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) ." Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018). Under the very narrow and specific facts of this case and because the review of the issue in this case is de novo, a remand is not necessary. The State suffers no prejudice by this Court deciding a matter of law that was litigated before the PCR court.

B. Trial counsel was ineffective for failing to object to the example given by the trial judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof, resulting in prejudice requiring reversal.

During the instruction on accomplice liability/hand of one is the hand of all the trial judge gave the following example:

For example, ladies and gentlemen, two people can be responsible and can be guilty of burglary if one – only one person went into the house and one person was the lookout and driving the car or the getaway car and the lookout but only one person actually went into the house at night. Ladies and gentlemen, although only one person went into the house, both people are guilty of burglary in the first degree because they acted together in concert to commit a burglary.

The getaway driver example was an improper charge on the facts. The example in the present case is easily distinguished from the example given in the case cited by the State of State v. Young, 238 S.C. 115, 127, 119 S.E.2d 504, 510 (1961), overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In Young the judge gave the following example:

Relative to the question if there be any testimony in a given case showing that more than one person may have been involved therein, I charge you that all persons who are present, concurring and participating by some overt act in any crime are principals therein and the act which caused such crime is regarded in the law as the act of each and all so present and participating and concurring. There is no distinction in law under such circumstances in the degree of their guilt or the nature of their offense founded on the nearness or remoteness of their personal agency. One who is present, helping, aiding and abetting another or others in the execution of an agreement between them with a common purpose to commit a crime would be responsible for the act of any one of the party provided that such act was done pursuant and incidental to such common purpose. Just to illustrate, gentlemen, I happened to be looking last night at a comedy on television where the Kingfish and Andy, I believe, were trying to get out of the telephone slot an old nickel. Well, I believe the Kingfish was outside the telephone booth and Andy was inside the telephone booth. The Kingfish was watching, the other was trying to get the nickel out. Well, the mere fact that the one on the outside was not inside would make no difference in their degree of guilt because in such an instance the act of one would be the act of both if it was in the minds of both when they went there to get the

nickel. So that's what the law means by saying that when two or more parties are engaged in the commission of a crime, the one watches, the other shoots, the law says it makes no difference who fired the fatal shot.

Young, 238 S.C. at 127, 119 S.E.2d at 510. Young was charged with murder, not taking a nickel out of a telephone slot. The charge in Young was not an improper comment on the facts. In contrast, the evidence in the present case showed that Petitioner was the driver and the passenger shot at the police. The getaway driver example given by the trial judge was an improper charge on the facts.

In State v. Quick, 141 S.C. 442, 140 S.E. 97, 99 (1927), another case cited by the State, Quick was charged with violation of the prohibition law for whiskey found in his house. The judge gave an example of possession involving his car. The Court found the example given was not an improper comment on the facts writing, “Oftentimes juries can be made to understand the law of the case easier if they are given helpful illustrations. **In giving such illustrations, however, a trial judge should avoid the facts of the case on trial.** There was no evidence in this case to show that the whisky found was in the appellant's automobile. The language last quoted from the charge, and the illustration made by the circuit judge, contained a correct statement of the law. We do not think it was a charge on the facts.” Quick, 140 S.E. at 99, (emphasis added). The getaway driver example in the present case failed to avoid the facts of the case on trial where the Petitioner was the driver of the car and the passenger shot at police. The example in the present case was an improper comment on the facts.


The example given involving the getaway driver in the present case is analogous to the requested examples of legal provocation refused in State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), overruled by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009). In Hughey the Court wrote, “The requested examples constitute a direct charge on the facts because Hughey

alleges that a knife was pulled on him, Jackson spit in his face, and there was sudden mutual combat. The requested jury charge elevates the specific facts of the case, such as spitting in a person's face, to an acceptable act of legal provocation.” 339 S.C. at 452, 529 S.E.2d at 728. The getaway driver example constituted a direct charge on the facts. The example in the present case improperly elevated driving the car/fleeing from the police to accomplice liability for murder. Trial counsel was deficient in failing to object to the example.

Petitioner was prejudiced by the deficient performance. The getaway driver example diluted the State's burden of presenting evidence of a pre-arranged common design or purpose between Petitioner and the co-defendant for some illegal purpose of which the attempt to murder the police officers was incidental or a natural or probable consequence. Petitioner was fleeing from the police when the passenger in his car started shooting. Petitioner's role in the attempted murder as a driver was in dispute. There was no evidence of a pre-arranged plan to attempt to murder the officer. The example allowed the jury to find Petitioner guilty of attempted murder solely for fleeing from the police and driving the car from which the co-defendant shot at police.

CONCLUSION

Based on the above argument, this Court should reverse the conviction and remand for a new trial.


Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of November, 2024.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable William H. Seals, Circuit Court Judge

MAURIO D. RIVERS,

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V.

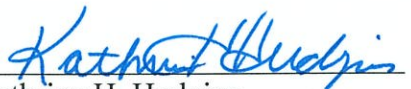
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001106

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Mark R. Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Maurio D. Rivers, #232669, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 7th day of November, 2024.



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From: [Stock, Chris](#)
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Date: Thursday, November 7, 2024 4:20:00 PM
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Mr. Farthing,

Please find attached for service the Reply Brief of Petitioner for Maurio D. Rivers' appeal which will be filed today with the Court of Appeals.

Thank you.
Chris

Chris Stock
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