STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

The State is hereby moving this Court to dismiss Appellant's direct appeal based upon a lack of jurisdiction, and is further requesting that this Court hold the time period for the filing of the Initial Brief of Respondent and Designation of Matter in abeyance pending the resolution of this motion. The basis for this motion is explained below.

Background Facts

Appellant was indicted in Greenville County in November 2012 for driving under the influence, second offense. On March 14, 2013, Appellant was tried before the Honorable D. Garrison Hill and a jury. Appellant was represented by Steve W. Sumner, Esquire. The jury found Appellant guilty, and, on that same date - March 14, 2013 - Judge Hill sentenced Appellant to ninety days and imposed a fine of $3,000.00. This sentence was suspended upon service of five

days of active time under Greenville County's "Home Incarceration Program," payment of a $2,100.00 fine, and probation for six months. Judge Hill also ordered that Appellant attend MADD meetings and complete substance abuse counseling while on probation. Eight days after trial, on March 21, 2013, Appellant submitted a *pro se* letter to the judge asking for reconsideration of his conviction. This letter stated it was being copied to the "GS Court, Prosecutor, personal attorney." (See Exhibit #1, 3/21/14 Letter). On April 1, 2013, Appellant submitted a second *pro se* letter to the solicitor referencing his prior letter and referring to it as a "request for appeal, review, or consideration for changing my trial results to a mistrial." (See Exhibit #2, 4/1/14 Letter). Subsequently, Appellant retained J. Falkner Wilkes to represent him. On April 19, 2013 - thirty-six days after Appellant's conviction - counsel filed and served an "Amended Notice of Appeal" referencing Appellant's previous *pro se* filings. On June 21, 2013, this Court remanded the case to the circuit court "for the limited purpose of consideration of Appellant's motion for reconsideration." On March 17, 2014, a hearing on Appellant's post-trial motion was held, and Judge Hill denied the motion in an oral ruling from the bench. On March 27, 2014, Appellant's counsel filed and served a new Notice of Appeal. On March 31, 2014, Judge Hill filed an Order Denying Defendant's Motion for New Trial. (See Exhibit #3, Order).

Discussion

Rule 203 of South Carolina's Appellate Court Rules states, in pertinent part:

> After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents **within ten (10) days after the sentence is imposed**. In all other cases, a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment. When a **timely** post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion (emphasis added).

Rule 29(a), SCRCrimP, provides, in pertinent part, that post-trial motions shall be made **within ten days** after the imposition of the sentence and that the time for appeal shall be stayed by a **timely** post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion.

In Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), the South Carolina Supreme Court stated as follows:

> Since there is no right to "hybrid representation" that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). Because petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. **The motion was essentially a nullity**. We therefore vacate the order ruling on the motion and dismiss petitioner's notice of appeal as moot. We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel (emphasis added).

In Appellant's case, there was no proper, timely motion for reconsideration or notice of appeal within the ten days after the conviction. Appellant was admittedly represented by counsel at the time he submitted the March 21, 2013 letter to the trial judge. (See Exhibit #3, 3/17/14 Transcript, p. 3, lines 19-21; see Exhibit #1, 3/21/13 Letter). Under Miller, this document was an improper *pro se* filing that should not have been - and could not properly have been – accepted or ruled upon by the trial judge; it was a nullity. Miller at 347, 697 S.E.2d at 527; see also Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) ("There is no constitutional right to hybrid representation either at trial or on appeal."); Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (ordering the Clerk of Court to return a substantive *pro se* document filed while the petitioner was represented by counsel). Therefore, the March 21, 2013 letter could not operate as a

notice of appeal or a motion for reconsideration that would stay the time period for the filing of the appeal.

Since no proper motion for reconsideration or notice of appeal was filed within ten days of Appellant's conviction, this Court has no jurisdiction over Appellant's case and must dismiss his appeal. See Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is **a jurisdictional requirement**, and the time for service may not be extended by this Court."); Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 24 S.E.2d 416, 418 (Ct. App. 1999) (in a civil case, pointing out that Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of jurisdiction "and results in dismissal of the appeal"); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State."). Although this required dismissal will prevent Appellant from challenging his conviction in a direct appeal, Appellant's issues can be raised in a post-conviction relief application.[1]

[1] At the post-trial hearing on March 17, 2014, Appellant's new counsel explained that Appellant's trial counsel "left on a vacation and left the country without filing the motion [for reconsideration] or notice [of appeal]." (See Exhibit #4, 3/17/14 Transcript, p. 3, lines 21-22).

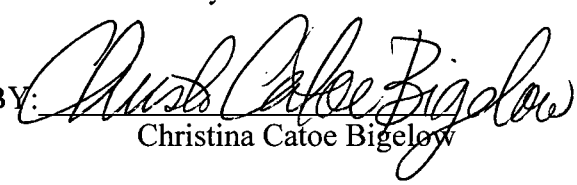
CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court dismiss Appellant's appeal for lack of jurisdiction. The State further requests that this Court hold the time period for the filing of the Initial Brief of Respondent and Designation of Matter in abeyance pending the resolution of this motion.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General

BY: 
Christina Catoe Bigelow

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 10, 2014

EXHIBIT 1 (page 1 of 2)

March 21, 2013

Dear Judge Hill:

Re: Request to re-examine Case# GS2302124-01

On March 14, 2013 I pled innocent but was found guilty of DUI in your courtroom (Case# GS2302124-01).

It is my sincere belief and observation that many occurrences during the trial and primarily during the deliberation continually tipped the scales of justice unfairly against me, an innocent man. The following instances were unfair, caused a miscarriage of justice, and should either dis-qualify the jury or re-establish the trial finding as a miss-trial.

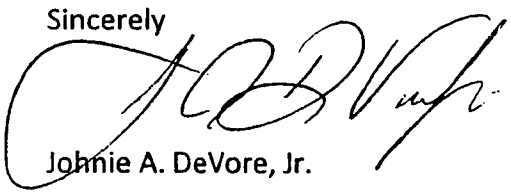
1) After over two hours of deliberation and four rounds of questionable questions, the jury asked: "what happens if we have a split decision?' Rather than answering the question with what I assume proper, "then it will be declared a mistrial", the court instead brought the jury foreman in and asked if the jury would deliberate further or come back tomorrow or deliberate further. This basically said to and forced the jury to come to a unanimous decision based not on their convictions but rather on the threat of having to come back tomorrow, after two hours of obviously confused deliberation. The jury foreman had already reported that they were at a split decision after the two hours and numerous bizarre questions. As presumed innocent, I feel that split decision should have been accepted.
2) In the 3rd round of questions, the jury asked; "can you define DUI?" This was already explicitly defined during and immediately after the trial period. Now the jury was confused on what they were deciding. Although the implications were tremendous on my life, the court incredibly sent a confusing, two-page definition to the jury room for a self-explanation by an admittedly already confused jury. Due to the serious implications, I think the jury should have been brought back to the courtroom and had DUI redefined verbally and explicitly by the judge.
3) The road-side film, though produce digitally, was fully compromised by the analog playback in the courtroom, thus was nearly 90% inaudible. The muffled playback and poor quality projector presented an hour long, inaudible and visually compromised video that subjected the jury to long periods of inattention and even dozing off. This portion of the video was a compromised presentation of our in-car conversation and I

think it should have been dis-allowed from the trial unless shown in the digital quality it was created in.

4) Lack of a jury of my peers was a major imbalance of justice. No one on the jury looked like me. From the pool of 40 jurors, one African American man was brought in and was not selected. A pool of 11 white jurors and 1 black female is tantamount to me being in a foreign country. The City of Greenville is nearly 40% black and the County is 18% black; I was given a jury that was 8% black, an opposing gender? That's not justice. If you or the prosecutor were on trial and had a 92% black jury and with one Caucasian of opposing gender, would you consider that a jury of your peers? I do not.
5) Finally, for a 3rd time, the jury asked to see the road-side film. By a 3rd time, both my and the officers testimony also should have been allowed again as the jury is now prejudiced. However, to further prejudice, the court sent the lap-top computer to the jury room for self-playback. As this was the prosecutor's computer, I don't know what other information was accessed or made available on that computer while in the jury-room accessible to all jurors with absolutely no over-site. After the computer was sent back during the fourth round of questions, the jury finally got a unanimous verdict...guilty? This was improper.

It is 2013; please understand that I understand the establishment of this verdict should be taken serious. I am not a lawyer, but just a citizen still pleading innocent. I am currently carrying out my sentence as prescribed and without contortion. However, I feel and currently live the after-effects of this confused and improperly quantified jury, which are proving tragic to my career, family, and long-term goals. I have worked hard and studied harder for success. My long years of work tough accomplishments should not be derailed unfairly by a faulty jury, poorly replayed film, improper instructions, or basic miscarriage of justice. Please reconsider this verdict and find this jury disqualified or accept their initial split decision for declaration of a miss-trial.

Sincerely



Johnie A. DeVore, Jr.
864-848-6444 home, 864-787-7205 cell
302 Victor Hill Road, Greer SC 29651
Cc: GS Court, Prosecutor, personal attorney

April 1, 2013

EXHIBIT 2

Judge W. Walter Wilkins
13th Judicial Circuit Solicitor
305 E North Street # 325
Greenville, SC 29601

Re: Request for Appeal or Re-examination of Case # GS2302124-01 (J. DeVore, Jr.)

Dear Solicitor Wilkins;

Attached is a request I sent to Judge Hill seven days following my case? I intended for this attachment to be a request for appeal, review, or consideration for changing my trial results to a mistrial. Apparently my letter has been ignored and has remained unanswered.

I too am a government employee, and disappointed that a matter of such importance to my life is being ignored while I as a public servant strive daily to even-handedly answer every call, letter, or email as swiftly as I can. Eminently, the current decision in my case will terminate my employment and career.

I am requesting an appeal to my case primarily not only because I am innocent but also because it was decided by a confused and improperly instructed jury. After halting deliberations a series four times with eleven confusing questions, many of which even confused Judge Hill; the confused, but split jury was hurried to a decision by the threat of returning for a second day. It was never explained that a split decision would be accepted.

I have offered a number of reasons for my requesting an appeal in the attachment sent to Judge Hill. Please read my concerns, respond and schedule the appeal or consider changing my trial results to a mistrial, etc.

Johnie A. DeVore Jr.
302 Victor Hill Road
Greer, SC 29651

EXHIBIT 3

PROCEEDINGS

THE COURT: This is a motion for a new trial, the State v. Johnie Devore.

Yes, sir, Mr. Wilkes.

MR. WILKES: Thank you, Your Honor.

May it please the Court.

I represent Mr. Devore. I will pass up, if the Court would like, a transcript from the end of the trial pertinent to the part that I'm going to talk about.

THE COURT: Okay.

MR. WILKES: And behind that is a rudimentary memorandum that I typed up to try to make sense of what I say since sometimes I don't make sense when I'm saying it.

Mr. Devore had, subsequent to his DUI conviction, filed two documents, one was addressed to Your Honor, which was technically a motion for a new trial which was appropriate under the time frame.

Mr. --

THE COURT: Now, he was represented by counsel, wasn't he, at that point?

MR. WILKES: He was. Mr. Sumner left on a vacation and left the country without filing the motion or notice. There may have been some miscommunication. But, fortunately, Mr. Devore, being astute and aware of the timing, filed both.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
State of South Carolina,	)	Case No.: 2012-GS-23-2124
v.	)	
Johnie Allen Devore, Jr.,	)	**ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL**
Defendant.	)	

The court heard oral argument on Defendant's Motion for New Trial on March 17, 2014. The motion is respectfully **DENIED** for the reasons that follow.

After the jury had been deliberating for some time, they requested to have the video of Defendant's traffic stop replayed. With both parties' consent, the court arranged for the video to be viewed by the jury in the jury room.

The jury asked several questions related to the law, and then sent out a note asking: "What happens if one juror has a different verdict than the others?" Defendant argues that the court's failure to respond to this note and to provide an *Allen* charge unduly influenced the jury and pressured the "one juror" referenced in the note.[1] Defendant argues that the court should have sua sponte issued an *Allen* charge to remind the jury that their verdict must be unanimous and that a mistrial would ensue should they fail to reach unanimity. After discussing the situation on the record with both counsel, the court asked the foreman to check with his fellow jurors and inquire as to whether they wished to continue their deliberations or return in the morning. The foreman reported that the jury desired to stay and continue deliberating. The jury returned a guilty verdict shortly thereafter.

[1] Notes from juries are notoriously unreliable insights into their deliberations, so it would be folly to presume that the jury was deadlocked 11-1, or even deadlocked at all. The jury could have simply been asking a hypothetical question.

#1 & 3
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Defendant makes the novel argument that the court erred by not giving an *Allen* charge. This failure, his argument goes, resulted in isolating the holdout, who was ignorant of his right to hang the jury and cause a mistrial. The trial court's silence therefore pressured the minority juror, increasing his isolation and breaking down his resistance to the majority. Defendant creatively contends that the court should have given the *Allen* "dynamite" charge to lessen the pressure on the minority juror.

This argument fails on several levels. First, it was not raised at trial and cannot be raised by post-trial motion. Second, even assuming there was a lone holdout, it is impossible to determine whether the lone juror changed her vote, or whether she persuaded the majority to change their view. Third, the note did not expressly state the jury was deadlocked, as juror notes often do. Judges have an obligation to assist jurors in their duty to attempt to reach a verdict and avoid a hung jury. This task could hardly be furthered by a meddling judge who hangs the jury on his own initiative. Mindful of the delicate and metamorphic nature of jury deliberations, courts should not rush to complicate matters for a jury that asks hypothetically about the consequences if one juror has a different view from the others. To rashly issue an *Allen* charge in such circumstances might mystify the jury and disrupt the deliberative process that was clearly underway. Moreover, it would set in motion the procedures mandated by S.C. Code Ann. § 14-7-1330, which could ultimately confine the court to being able to diplomatically ask only if the jury thought further explanation of the law would assist them, or further deliberation would be fruitful. *See State v. Barnes*, 402 S.C. 135, 739 S.E.2d 629 (2013).

There is no evidence pressure was exerted on any juror or that their deliberations were otherwise unduly influenced. The jury's review of the video evidence may well have resulted in the verdict, as it often does. Prior to deliberations, the court charged the jury that each juror's

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vote was his or her own vote and the verdict must be unanimous. Furthermore, the jury never specified they were "deadlocked." Finally, Defendant's counsel at trial did not request the court to respond to the jury question, did not object to the continuation of deliberations further into the evening, and did not request an *Allen* charge or other instruction. The transcript reveals no error or a basis for a new trial. There was sufficient evidence to support the jury's verdict.

Defendant's Motion for New Trial is therefore respectfully denied.

IT IS SO ORDERED.

D. Garrison Hill
Circuit Judge

March 28, 2014
Greenville, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

PROOF OF SERVICE

The undersigned attorney hereby certifies that the Respondent's **Motion to Dismiss Appeal for Lack of Jurisdiction** in the above-referenced case has been served upon **J. Falkner Wilkes**, 114 Whitsett Street, Greenville, South Carolina 29601, this **10th** day of **October, 2014.**

CHRISTINA CATOE BIGELOW
Assistant Attorney General

Office of Attorney General
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Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

October 10, 2014

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Johnie Allen Devore, Jr.
Appellate Case No. 2013-000883

Dear Ms. Kitchings:

Enclosed please find the State's **Motion to Dismiss Appeal for Lack of Jurisdiction**, along with **Proof of Service**, in the above-referenced appeal.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina Catoe Bigelow
Assistant Attorney General
S.C. Bar No. 73562

CCB/

cc: J. Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601