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.

REPLY TO APPELLANT'S RETURN TO THE STATE'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

On October 10, 2014, the State moved to dismiss Appellant's appeal for lack of jurisdiction based upon the fact that the only document submitted in the ten days following Appellant's conviction was a *pro se* letter to the trial judge, which was copied to Appellant's "personal attorney." On October 13, 2014, the State received, via electronic mail, a copy of Appellant's Return to the motion. The State submits the following in Reply.

In his Return, Appellant contends that the *pro se* documents[1] he submitted following trial

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[1] In his Return, Appellant refers to these documents as a "motion for new trial" and "notice of appeal." However, the March 21, 2013 *pro se* letter - the only document submitted within ten days of the conviction - stated it was regarding a "Request to re-examine Case # GS2302124-01." (See State's Exhibit # 1). It stated several reasons that the judge should "reconsider the verdict" and "find this jury disqualified or accept their initial split decision for declaration of a mis-trial." (See State's Exhibit # 1). This filing could not in any way be construed as a notice of appeal, despite the fact that Appellant's subsequent *pro se* letter to the solicitor referred to it as a "request for appeal, review, or consideration for changing my trial results to a mistrial." (See State's Exhibit # 2). Note also that the March 21, 2013 *pro se* letter was not filed with the appellate court. In the State's view, the *pro se* filings of Appellant in this case illustrate the problems that arise when inexperienced litigants attempt to submit documents to the court. This is,

did not constitute impermissible hybrid representation because Appellant "did not have an attorney **actively** representing him after the conclusion of the trial or during the time for filing post-trial motions or notice of appeal." (Return, p. 1) (emphasis added). This argument misses the mark because it is undisputed that Appellant's trial counsel had not been relieved as counsel in the ten days following Appellant's trial. At least as far as the State is aware, there is no test regarding an attorney's "level of activity" used in order to determine whether or not a defendant is entitled to submit *pro se* documents. Certainly, when a trial judge receives a *pro se* document from a criminal defendant, he should not be required to undertake an investigation into how "active" trial counsel has been; instead, he should only have to check the file to see whether or not the defendant is represented by counsel and whether or not counsel has been relieved by the court.[2]

Appellant argues in his Return that his case is distinguishable from the case of Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), because Miller involved a civil case (a post-conviction relief case) and because "unlike in Miller, Devore was not acting in parallel with an attorney actively engaged in his representation." (Return, p. 3-4). However, the Miller decision was not limited to civil cases, nor was it limited to situations where both the attorney and the defendant file documents at similar times. To the contrary, the language of Miller is clear and unequivocal:

> 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. **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

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at least in part, the reason for the Supreme Court's opinion in Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010).

[2] In this case, Appellant made no request for his counsel to be relieved following trial.

> 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.

Miller, 388 S.C. at 347, 697 S.E.2d at 527 (citations omitted) (emphasis added).

In his Return, Appellant also points to a defendant's right to act as his own lawyer and argues that "in the absence of counsel, Devore had an absolute right to represent himself and file a *pro se* motion for a new trial and notice of appeal." (Return, p. 3). However, a criminal defendant is only allowed to act as his own lawyer after being properly warned about the dangers of self-representation. See, e.g., State v. Barnes, 407 S.C. 27, 36, 753 S.E.2d 545, 549 (2014) ("Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel.") (citation omitted). In this case, Appellant was never "in the absence of counsel." Instead, he was at all times represented by counsel; consequently, he was never warned of the dangers of self-representation.

Appellant also contends that there was no hybrid representation in his case "as counsel had concluded his representation and left the country." (Return, p. 3). However, in criminal cases, attorneys are not entitled to unilaterally "conclude" their representation of defendants even if they have plans to leave the country. Here, for the ten days following Appellant's conviction, jurisdiction over the case remained in the circuit court, and counsel had not been relieved by the court. Therefore, **only** counsel could properly file a motion for reconsideration or a notice of appeal.

It seems that in Appellant's view, because he was not "actively" representing Appellant, trial counsel did nothing wrong by leaving the country on vacation without filing a notice of appeal or motion for reconsideration on Appellant's behalf. And perhaps he did not; it may be

that Appellant expressly instructed counsel not to file an appeal for one reason or another. However, to the extent counsel did, in fact, do something "wrong," he should be held accountable. The proper forum for resolution of this matter is through the processes of post-conviction relief, because this Court does not have jurisdiction over Appellant's direct appeal. See, e.g., 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."). In that forum, any questions related to trial counsel's representation of Appellant can be addressed along with any direct appeal issues if it is shown that trial counsel's representation deprived Appellant of his right to a direct appeal. See White v. State, 263 S.C. 110, 113, 208 S.E.2d 35, 36 (1974).

CONCLUSION

Based upon the foregoing, in addition to the arguments made in the State's previous motion to dismiss, the State respectfully requests that this Court dismiss Appellant's appeal for lack of jurisdiction.

Respectfully submitted,

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Attorney General

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October 15, 2014

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

RECEIVED
OCT 15 2014
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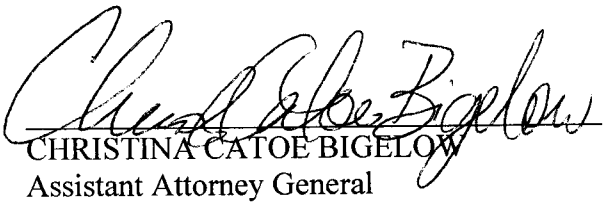
v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

PROOF OF SERVICE

The undersigned attorney hereby certifies that the State's **Reply to Appellant's Return to the 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 **15th** day of **October, 2014.**



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ALAN WILSON
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October 15, 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 **Reply to Appellant's Return to 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
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Greenville, South Carolina 29601