

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
D. Garrison Hill, Circuit Court Judge

RECEIVED

Opinion No. 5392 (S.C. Ct. App. filed March 23, 2016) JUN 20 2016

Appellate Case No: 2016-001073

SC Court of Appeals

The State, Respondent,

v.

Johnnie Allen Devore, Jr., Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Court of Appeals properly dismissed Petitioner's appeal for lack of jurisdiction where Petitioner, who was represented by counsel, failed to properly serve notice of appeal or make a post-trial motion within ten days of imposition of his sentence.

STATEMENT OF THE CASE

Johnie Allen Devore, Jr., (Petitioner) was indicted at the November 2012 term of the grand jury of Greenville County for driving under the influence, second offense. On March 14, 2013, he was tried before the Honorable D. Garrison Hill and a jury. Petitioner was represented by Steve W. Sumner, Esquire. The jury found him guilty, and, on that same date—March 14, 2013—Judge Hill sentenced Petitioner to ninety days' imprisonment and imposed a fine of \$3,000. This sentence was suspended upon service of five days of active time under Greenville County's "Home Incarceration Program," payment of a \$2,100 fine, and probation for six months. Judge Hill also ordered that Petitioner attend MADD meetings and complete substance abuse counseling while on probation. Eight days after trial, on March 21, 2013, Petitioner 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." (R.p.9-10). On April 1, 2013, Petitioner 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." (R.p.11). Subsequently, Petitioner retained J. Falkner Wilkes to represent him. On April 19, 2013 - thirty-six days after Petitioner's conviction - counsel filed and served an "Amended Notice of Appeal" referencing Petitioner'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 Petitioner's motion for reconsideration." On March 17, 2014, a hearing on Petitioner's post-trial motion was held, and Judge Hill denied the motion in an oral ruling from the bench. On March 27, 2014, Petitioner'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. (R.p.13-p.15). Petitioner subsequently filed a brief in support of his appeal and the Respondent (the State) filed a brief in

response. Petitioner's appeal as subsequently dismissed in a published opinion from the Court of Appeals. State v. Devore, Op. No. 5392 (S.C. Ct. App. filed March 23, 2016). (App.p.B1-p.B8). Petitioner submitted a timely Petition for Rehearing and by Order filed April 21, 2016, the Petition was denied. (App.p.A1). On May 19, 2016, Petitioner submitted a Petition for a Writ of Certiorari to this Court and now this Return on behalf of the State follows.

CERTIORARI

Petitioner argues this Court should grant certiorari to review the Court of Appeals' decision because in dismissing his appeal for lack of jurisdiction it "stretched the meaning of 'hybrid' representation beyond its practical limits and former application." (Petition, p.1). He contends his case is unlike the cases relied upon by the Court of Appeals, which arose out of "dual filings" by the represented party and the attorney, and instead consists of only a single pro se filing because his attorney "was not actively representing him after the conclusion of the trial." (Petition, p.1). Petitioner argues that because the decision of the Court of Appeals implicates the constitutional right of a defendant in a criminal case to act as his own lawyer, his case requires review by this Court.

The State disagrees and submits the Court of Appeals properly dismissed Petitioner's appeal for the reason set forth in its opinion and for the reasons argued in the Final Brief of Respondent, which is hereby incorporated by reference. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Indeed, the Court of Appeals decision was a straightforward exercise of applying existing precedent to the procedural facts and circumstances of Petitioner's case and does not merit further review. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

ARGUMENT

The Court of Appeals properly dismissed Petitioner's appeal for lack of jurisdiction where Petitioner, who was represented by counsel, failed to properly serve notice of appeal or make a post-trial motion within ten days of imposition of his sentence.

On appeal to the Court of Appeals, Petitioner argued he was entitled to file a *pro se* post-trial motion or a *pro se* notice of appeal without them constituting hybrid representation because he was not being "actively represented" by an attorney subsequent to trial. He continues to advance this argument in his petition for a writ of certiorari. The State submits Petitioner's argument should be denied and that the Court of Appeals properly dismissed his appeal for a lack of appellate jurisdiction. By submitting the Return to Petition for a Writ of Certiorari, the State does not waive its argument that the Court of Appeals lacked appellate jurisdiction over this case, or that this Court likewise lacks appellate jurisdiction over any further appeals.

The State originally made its argument regarding lack of appellate jurisdiction by way of a Motion to Dismiss dated October 10, 2014. (R.p.4-p.15). Following the filing of a Return by Petitioner and a Reply by the State, the Court of Appeals denied the State's Motion by Order dated November 13, 2014. (R.p.16-p.23). The State continued to make its argument in its Final Brief to the Court of Appeals. The relevant facts follow.

Petitioner was convicted and sentenced for driving under the influence on March 14, 2013. On March 21, 2013—eight days after trial—Petitioner 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." (R.p.9-p.10). On April 1, 2013, Petitioner 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." (R.p.11). Subsequently, Petitioner retained a different attorney to represent him. On April 19, 2013 -

thirty-six days after Petitioner's conviction – Petitioner's new counsel filed and served an "Amended Notice of Appeal" referencing Petitioner'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 Petitioner's motion for reconsideration." On March 17, 2014, a hearing on Petitioner's post-trial motion was held, and the trial judge denied the motion in an oral ruling from the bench. On March 27, 2014, Petitioner's counsel filed and served a new Notice of Appeal. On March 31, 2014, the trial judge filed an Order Denying Defendant's Motion for New Trial. (R.p.13-15).

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 Petitioner's case, there was no proper, timely motion for reconsideration or notice of appeal within the ten days after the conviction. Petitioner was admittedly represented by counsel at the time he submitted the March 21, 2013 letter to the trial judge. (R.p.12, lines 19-21; p.9-10). 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 Petitioner's conviction, neither the Court of Appeals nor this Court has jurisdiction over Petitioner's case, and the Court of Appeals properly dismissed 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 Petitioner from challenging his conviction in a direct appeal, Petitioner’s issues can be raised in a post-conviction relief application.¹

In his response to the State’s Motion to Dismiss and in his current petition for a writ of certiorari, Petitioner contended that the *pro se* documents² he submitted following trial did not constitute impermissible hybrid representation because Petitioner “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.” (R.p.16) (emphasis added). This argument misses the mark because it is undisputed that Petitioner’s trial counsel had not been relieved as counsel in the ten days following Petitioner’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

¹ At the post-trial hearing on March 17, 2014, Petitioner’s new counsel explained that Petitioner’s trial counsel “left on a vacation and left the country without filing the motion [for reconsideration] or notice [of appeal].” (See R.p.12, lines 21-22).

² In his Return, Petitioner 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 R. p. 9-10). 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 R. p. 9-10). This filing could not in any way be construed as a notice of appeal, despite the fact that Petitioner’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 R. p. 11). 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 Petitioner in this case illustrate the problems that arise when inexperienced litigants attempt to submit documents to the court. This is, 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).

defendant is represented by counsel and whether or not counsel has been relieved by the court.³ (See R. p. 217, lines 8-24, wherein the trial judge describes his confusion upon receiving the *pro se* letters from Petitioner).

Petitioner also argues that his case is distinguishable from 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.” (R. p. 18). 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 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 response to the State's Motion to Dismiss and in his petition, Petitioner further pointed to a defendant's right to act as his own lawyer and argued 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.” (R. p. 18). 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

³ In this case, Petitioner made no request for his counsel to be relieved following trial.

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, Petitioner 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.

Petitioner asserts there was no hybrid representation in his case “as counsel had concluded his representation and left the country.” (R.p.18). 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 Petitioner’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 Petitioner’s view, because trial counsel was not “actively” representing Petitioner, trial counsel did nothing wrong by leaving the country on vacation without filing a notice of appeal or motion for reconsideration on Petitioner’s behalf. And perhaps he did not; it may be that Petitioner 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, and the proper forum in which to do so is post-conviction relief. In the post-conviction relief forum, any questions relating to trial counsel’s representation of Petitioner could be addressed along with any direct appeal issues if it is shown that trial counsel’s representation deprived Petitioner of his right to a direct appeal. See White v. State, 263 S.C. 110, 113, 208 S.E.2d 35, 36 (1974). However, under the circumstances of Petitioner’s case at present, this Court does not have jurisdiction over Petitioner’s direct appeal and cannot properly

address Petitioner's direct appeal issues. See, e.g., Hill, 389 S.C. at 21, 698 S.E.2d at 623 ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be extended by this Court."). Accordingly, the State respectfully requests that the Court of Appeals properly dismissed the appeal in its entirety on the basis of lack of appellate jurisdiction. Thus, the State submits the Court of Appeals decision affirming Petitioner's conviction should be affirmed.

CONCLUSION


Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals dismissing the appeal for lack of appellate jurisdiction. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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J. BENJAMIN APLIN
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Columbia, South Carolina
June 20, 2016

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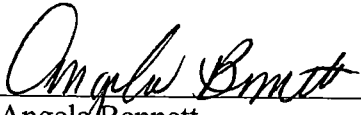
Johnnie Allen Devore, Jr., Petitioner.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated June 20, 2016, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

J. Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

I further certified that all parties required by Rule to be served have been served.
This 20th day of June, 2016.



Angela Bennett
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RECEIVED

JUN 20 2016

SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

June 20, 2016

J. Falkner Wilkes, Esquire
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RE: The State, Respondent, v. Johnnie Allen Devore, Jr., Petitioner
Appellate Case No. 2016-001073

Dear Mr. Wilkes:

I am enclosing two (2) copies of the Return to Petition for a Writ of Certiorari in the above-referenced case.

Sincerely,

B. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Daniel E. Shearouse
(original and six copies enclosed)
Victim Services