

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

JAN 13 2017

R. Lawton McIntosh, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2016-001615

The State of South Carolina Respondent,
v. Petitioner
John Garvin Appellant.

SUPPLEMENTAL INITIAL BRIEF OF
PETITION FOR WRIT OF CERTIORARI

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A Party Unrepresented
By Counsel

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFICATE OF A PARTY UNREPRESENTED BY COUNSEL

Petitioner as a party unrepresented by counsel certifies that the petition for rehearing was made and finally ruled on by the court of appeals on July 7, 2016 and respectfully petition for a writ of certiorari to review the judgment order of the South Carolina Court of Appeals in State v. Garvin, Appellate Case No. 2015-002614 (Lockemy, Thomas, and McDonald).

QUESTIONS PRESENTED

This is a case that involves questions of exceptional importance, concerning the violation of Rule-506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct and the court of appeals abuse of discretion in overlooking question of facts as it applies to question of law and as both the finder of fact and finder of law on the merit of appellants motion to reinstate his appeal. The question(s) are presented as followed below:

1. Whether can an order denying a motion for a new trial pursuant to Rule-29(b), S.C.R.Crim.P., Based Upon Newly Discovered Evidence. Whereas the appeal of that motion is dismissed by the Clerk of The South Carolina Court of Appeals for the violation of Rule-203(b)(2), S.C.A.C.R., for the respondent, to whereas the respondent never filed a motion to dismiss the appeal. Did performed duties of partiality that conflict with court duties and has created the appearance of impropriety in violation of Rule-506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, S.C.A.C.R. and has violated petitioner's Fourteenth Amendment right to due process?

2. Whether did the Court of Appeals err in holding that petitioner's Motion to Reinstate the Appeal, which was construed as a petition to rehear the dismissal of the appeal has overlooked questions of facts presented by the petitioner of which he manifested to the courts that apply to questions of law that he actually did timely served his Notice of Appeal on respondent, was an abuse of discretion by the court of appeals?

STATEMENT OF THE CASE

Petitioner, John Garvin and his Co-Defendant, Jonathan Perez was arrested on July 17, 2012 and was charged with Trafficking in Heroin (S.C. Code Ann. § 44-53-370(e)). On December 6, 2012, the Spartanburg County Grand Jury indicted Garvin in Indictment No.: 2012-GS-42-5978 and 2012-GS-42-5979. However, at trial, the state elected to proceed only with Indictment No.: 2012-GS-42-5979 and choosing to try the appellant at a later date on Indictment No.: 2012-GS-42-5978.

Petitioner was convicted as charged on Indictment No.: 2012-GS-42-5979 after a jury trial that was held on May 21-23, 2013, in Spartanburg County General Session Court and was sentenced on May 23, 2013 to a term of twenty-five (25) years in prison and fined \$200,000.00 (McIntosh, L. at trial and Sentence).

A notice of appeal was timely filed; On June 6, 2013 the court of appeals granted petitioner permission to appeal. And on October 10, 2013, Indictment No.: 2012-GS-42-5978 was nolle prosequi. On November 26, 2014 the Court of Appeals affirmed petitioner's conviction.

On June 15, 2015, Petitioner inadvertently discovered evidence that is actually relevant and relates to his case. On August 25, 2015, petitioner filed a motion for new trial, based on after – discovered evidence with supporting affidavit in the Spartanburg County General Sessions Court, which was filed September 2, 2015.

On November 9, 2015, the Honorable R. Lawton McIntosh denied petitioner's Motion for a New Trial. On November 20, 2015, petitioner filed his Notice of Appeal with the Court of Appeals and with Spartanburg County General Sessions Court, whereas it was returned to him clock stamped dated November 30, 2015 (see Appx. pg. 47) enclosed with that clock stamped Notice of Appeal was a notice letter that had advised him to 'send a copy of [his] notice of appeal to the Attorney Generals Office dated December 2, 2015. (see Appx. pg. 46). On December 8, 2015, petitioner mailed copies of his Notice of Appeal and Certificate of Service to respondent.

On December 29, 2015, petitioner received a deficiency letter from the deputy clerk of Court for The South Carolina Court of Appeals dated December 23, 2015,

indicating to petitioner about deficiency or deficiencies with his proof of service that's was not in compliance with South Carolina Appellate Court Rule in the format shown by Form 7 in Appendix C to the rules. (see Appx. Pg. 42)

On January 5, 2016, petitioner re-submitted his notice of appeal and a corrected proof of service (see Appx. pg. 38) on the respondent, which involved every party in the appeal. On May 4, 2016, the Deputy Clerk of Court issued an order of dismissal for failure to timely serve the notice of appeal upon the respondent. (see Appx. pg. 37) On May 13, 2016, Petitioner filed a motion to reinstate his appeal. (see Appx. pg. 14-36) On May 26, 2016, the respondent filed a return to petitioner's motion. (see Appx. pg. 9-13) On June 7, 2016, the petitioner filed a reply/response to respondent's return. (see Appx. pg. 3-8) On July 7, 2016, the court of appeals issued an order dismissing petitioner's motion to reinstate the appeal, which was construed as a petition for rehearing.(see Appx. pg. 1-2)

ARGUMENT

I.

THE CLERK OF THE SOUTH CAROLINA COURT OF APPEALS SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS/HER QUASI-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH ITS OFFICIAL DUTIES.

Petitioner contends that his appeal should not have been "dismissed based on allegation that [his] notice of appeal was not timely served" on the respondent (The State's Attorney General) by the Clerk of Court, for the respondent are therefore actions that improperly favors the respondent. See Bowen v. Bowen, 287 S.C.188, 377 S.E.2d 1 (1985)("The Supreme Court, held that appeal would not be dismissed based on allegation that notice of appeal was not timely served.")

Here in petitioner's case the respondent would allege that petitioner has failed to timely serve a notice of appeal within ten (10) days of petitioner's receipt of Judge McIntosh's written notice of entry order of dismissal of petitioner's Motion for

A New Trial, Based on After-Discovered Evidence, before the Court of General Sessions upon the respondent.

The clerk would then issue an order of dismissal pursuant to Rule-260(a), S.C.A.C.R., on allegation that notice of appeal was not timely served in violation of Rule-203(b), S.C.A.C.R.(see Appx. pg.1) without the filing of a motion to dismiss by the respondent's (The State's Attorney General) is conduct that reasonably appears to conflict with court duties. The law clerk and the respondent have engaged in activities that would put into question the propriety of the law clerk's conduct in carrying out the duties of its office.

The clerk's office has allowed its relationship with the respondent's to influence its official conduct and judgment. And it has lended the prestige of its office to advance the interest of the respondent's (The State's Attorney General) in violation of Rule-506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, Canon-2; Rule-8.4(e), RPC, Rule-407, S.C.A.C.R., and in violation of petitioner's Fourteenth Amendment right to due process.

The dismissal of petitioner's appeal by the Clerk of The South Carolina Court of Appeals was done in violation of Rule-506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, Canon-1, 2, 3(D)(E)(2), and 5(D)(3). The clerk's quasi-judicial acts are acts that were undertaken to perform a legal service, and that of an advisor, and that of the appellant court. See In The Matter of C.H. Barrier, 375 S.C. 490, 654 S.E.2d 85 (2007)(Attorney's actions in practicing law while he was employed as a law clerk constituted engaging in the unauthorized practice of law, in violation of the Rule of Professional Conduct.).

The clerk office has performed the duties of its office partially. "[The] law clerk should never perform any discretionary or ministerial function,...in a manner which improperly favors any litigant or attorney." See Rule 506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, Canon - 3; for the clerk to serve as an advisor, a lawyer, and that of the appellant court for the respondent, does "reasonably appear to conflict with [it's] court duties ... [and] create[s] the appearance of impropriety." See Rule-506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, Canon-5 (D)(3).

This conduct has prejudice petitioner and has deprived him of his right to appeal the order denying his motion for a new trial, to prove his actual innocence on allegation that his notice of appeal was not timely served. "It is professional misconduct [] to engage in conduct that is prejudicial to the administration of justice." Rule-8.4(e), RPC, Rule-407, S.C.A.C.R.

A. Conduct Prejudicial to the Administration of Justice

"It is profession misconduct for a [Staff Attorney or Law Clerk] to ... engage in conduct that is prejudicial to the administration of justice." Rule-8.4(e), RPC, Rule-407, SCACR. Additionally, a [Staff Attorney or Law Clerk] is subject to discipline for "engage[ing] in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute ..." Rule-7 (a)(5), RLDE, Rule-413, SCACR. This court has stated that a [Staff Attorney and Law Clerk] "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the court. When a [Staff Attorney or Law Clerk] fails to conduct himself appropriately, he brings into question the integrity of the judicial system." (See, In RE Anonymous Member of South Carolina Bar, 392 S.C. 328, 709 S.E.2d 633 (2011)(Citing In RE Goude, 296 S.C. 510, 512, 374 S.E.2d 496, 497 (1988)).

This court should conclude that the action of the Clerk of South Carolina Court of Appeals and the Respondent is conduct tending to bring the legal profession into disrepute and is prejudicial to the administration of justice. By undertaking to perform a legal service, and that of an advisor, and that of the appellate court to deprive appellant of his right to appeal pursuant to Rule-203(b), SCACR, Judge McIntosh's November 9, 2015, written notice of entry order of dismissal for a motion for a new trial, based on after-discovered evidence, on allegation that his notice of appeal was not timely served upon the respondent

Should bring into question as to when and how did it come to the Clerk's attention about the timely filing of appellant notice of appeal. And why didn't the respondent's make the assertion that appellant's notice of appeal was not timely

served upon the respondent's on November 24, 2015, after the expiration date of the required ten (10) day filing of his notice of appeal.

Here, the action of the State's Attorney and the clerk of the court of appeals, disrepute "the proper functioning and integrity of [the] court ... and the proceeding before it in accordance with the rights guaranteed to the rule of right, "of due administration of justice. See Black Law Dictionary 53 (Deluxe 10th Ed. 2014); See Canon-5(D)(3) of Rule-506, SCACR; also see In the Matter of C.H. Barrier, 375 S.C. 490, 654 S.E.2d 85 (2007)(Attorney's Conduct in practicing law while he was employed as a law clerk and in allowing closing documents to be signed by witness who was not at closing violated Rules of Professional Conduct.) The Supreme Court should not affirm the erroneous decision of the Court of Appeals. To do so would be a miscarriage of justice and not in the interest of justice.

II.

THE COURT OF APPEALS ERROR OF FACTS IS AN ABUSE OF DISCRETION OF THE COURT'S FAILURE TO EXERCISE SOUND, REASONABLE, AND LEGAL DECISION-MAKING CONCERNING QUESTIONS OF FACT AND QUESTION OF LAW ABOUT THE TIMELY FILING OF A NOTICE OF APPEAL.

A. The Courts Erred in Construing A Motion to Reinstate Appeal As A Petition for Rehearing

The purpose of a rehearing is to call to the appellate court's attention any errors of fact, as well as of law, and to provide the court with a final opportunity to see that justice is done. In this regard, a properly drawn petition for a rehearing in the [state] appellate courts serves a very limited purpose; it must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." See 5 Am. Jur.2d Appellate Review § 821(July 2016 update).

For the Court of Appeals to construe petitioner's Motion to Reinstate Appeal as a Petition for Rehearing is an abuse of discretion. South Carolina Appellant

Court Rules State that, “Whenever it appears that an appellant has failed to comply with the requirement of the S.C.A.C.R., an order of dismissal shall be issued.... The Clerk of Court shall remit the case to the lower court in accordance with Rule–221, S.C.A.C.R., unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal.” (See Rule-260(a), S.C.A.C.R.) ;(Wise v. South Carolina Dept. of Corrections, 372 S.C. 173, 642 S.E.2d 551 (2007)).

Here, the petitioner’s motion was the first time he presented his issues to the courts, about the timely filing of his notice of appeal issue before the court of appeals. To call his motion to reinstate appeal, a petition for rehearing means that the timely filing of his notice of appeal issue was already heard in the courts. A petition for rehearing is “a court’s second or subsequent hearing of a case, a motion, or an appeal, usually to consider an alleged error or omission in the court’s judgment or opinion.” See Black Law Dictionary 1476 (Deluxe 10th Ed. 2014).

Petitioner’s motion to reinstate appeal was his first opportunity to even present his arguments and evidence about the timely filing of his notice of appeal to the court of appeals, when the clerk and the respondent’s made the allegation that the petitioner’s notice of appeal was not timely served. By making such an erroneous decision, the courts has overlooked and misapprehended petitioner’s motion to reinstate appeal in violation of his Fourteenth Amendment right to due process and under S.C. Const. Art. I § 3.

B. The Timely Filing of Petitioner’s Notice of Appeal

Pursuant to Rule-203(b)(2), S.C.A.C.R., in a criminal case an appellant must serve a notice of appeal on all respondent within ten (10) days after the sentence is imposed, or within ten (10) days after receipt of written notice of entry of the order or judgment. The South Carolina Supreme Court has held that an “appeal would be dismissed as untimely based on lack of jurisdiction, and timely service would remain a jurisdictional requirement.” see Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985); also see State v. Devore, 416 S.C. 115, S.E.2d 206 (S.C. 2016)

In this case, the Clerk of South Carolina Court of Appeals, and the respondent would allege that petitioner has failed to timely serve a notice of appeal within ten (10) days of petitioner's receipt of Judge McIntosh's written notice of entry order of dismissal of petitioner's motion for a new trial, based on after discovered evidence before the court of general sessions upon the respondent. And that the Court of Appeals has no jurisdiction over petitioner's case.

The Clerk of the South Carolina Court of Appeals would than dismissed petitioner's appeal pursuant to Rule-260(a), S.C.A.C.R., without the filing of a motion to dismiss by the respondent for the failure to timely serve a notice of appeal upon respondent. Their actions are acts that are in violation of Rule-506, S.C.A.C.R., Code of Conduct for Staff Attorneys and Law Clerks. also see In The Matter of C.H. Barrier, 375 S.C.490, 654 S.E.2d 85 (2007)(Attorney's conduct in practicing law while he was employed as a law clerk and in allowing closing documents to be signed by witness who was not at closing violated Rules of Professional conduct."). And it has deprived petitioner of his right to appeal the judge's erroneous order, pursuant to Rule-203,S.C.A.C.R.

This court has determined that an appeal would not be dismissed based on allegation that a notice of appeal was not timely served and that strict adherence to supreme court rule which requires that notice of appeal contain, if appropriate in determination of timeliness of appeal, a statement of when appellant received notice of court order being appealed from, would be required. Compliance with this provision would eliminate motion to dismiss appeal. See Bowen v. Bowen, 287 S.C. 188, 337 S.E.2d 1 (1985)

To show quo animo, petitioner offered into evidence the filing of his Notice of Appeal, whereas it was determined that it was submitted timely and in good faith and was clock stamped dated on November 30, 2015, (see Appx. pg. 47). Enclosed with that clock stamped Notice of Appeal was a notice letter that had advised him to "send a copy of his notice of appeal to the Attorney Generals Office" dated December 2, 2015 (See Appx. pg. 46).

On December 8, 2015, Appellant mailed copies of his notice of appeal and certificate of service that was within ten (10) days of Spartanburg County Clerk of Court notice letter, to respondent. To whereas, the respondent has admitted to having received on December 10, 2015. Well within the ten (10) days as required by Rule-203(b)(2), S.C.A.C.R.

Petitioner also offered into evidence a notice letter from the court of appeals (see Appx. pg.44), which had docketed petitioner's notice of appeal and assigned it an Appellate Case No. 2015-002614 and upon reviewing petitioner's notice of appeal, it determined that it was submitted timely and in good faith, but the proof of service did not comply with South Carolina Appellate Court Rules and that the deficiency must be corrected within ten(10) days of the date of that December 23,2015, letter or the appeal may be dismissed. (see Appx. pg. 42). On January 5, 2016, appellate re-submitted his notice of appeal with a corrected proof of service on the respondent, which involved every party in the appeal. (see Appx. pg.38)

Despite these facts that the averment is supported by proof, which has been ignorantia facti by the Court of Appeals that has stated that "there is no basis for granting a rehearing, and the petition for rehearing is denied." (see Appx. pg. 1). The Appeals Court has purposely overlooked these explicitly stated fact in portions of there assessment, should raise real doubts in this court's mind whether much care was given by the Appeals Court in reviewing appellant's Motion to Reinstate Appeal that was construed as a Petition for Rehearing.

C. The Court of Appeals Should Not Have Dismissed Appellant's Appeal, Because the Respondent Waives It's Right to Dismiss Appellant's Appeal.

"The proper procedure for raising lack of [appellant] jurisdiction ... is to file a motion to dismiss." (citing Posey v. Proper Mold & Engineering, Inc., 378 S.C. 210, 661 S.E.2d 395 (S.C. App. 2008); also see State v. Devore, 416 S.C. 115, 745 S.E.2d 124 (S.C. App. 2016)(The State filed a motion to dismiss for lack of appellate jurisdiction.) "The failure to plead an affirmative defense is deemed a wiver of the

right to assert it.” se Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 703 S.E. 703 S.E.2d 221 (S.C. 2010).

In Devore, the State would assert an affirmative defense for lack of appellate jurisdiction. It would persist that the court lacks appellate jurisdiction over the matter, and declaring it did not waive the argument and continued to maintain that appeal was served within the required ten days of Devore’s conviction. For Devore’s failure to comply with procedural requirements for timely serves of his notice of appeal. The State, would assert an affirmative defense upon the courts by a motion to dismiss for lack of appellant jurisdiction, as is required by Rule-12(b)(1) of South Carolina Rules of Civil Procedure.

The Rules of Civil Procedure provides as follows:

“Every defense, in law of fact, to...and pleading,...shall be asserted in the responsive pleading there to if one is required, except that the following defense [] may at the option of the pleader be made by motion [for] lack of [appellate] jurisdiction over the subject matter ... A motion making any of these defenses shall be made before pleading if a further pleading is permitted.”

Rule-12(b)(1), SCRCF.

Under Rule-12(b), a defense such as lack of jurisdiction over the subject matter must be made either by responsive pleading or motion within the time period allowed for responding or filing a motion. Thus, a respondent is entitled to file a motion to dismiss within 10 days after the requirement of service of the notice of appeals missed deadline, to assert an affirmative defense for lack of jurisdiction over the subject matter.

Now, turning to the procedural facts of this case, absent service of a proper notice of appeal within ten days of appellant’s November 9, 2015, Judge’s written notice of entry order of dismissal of appellant’s motion for a new trial, based on after discovered evidence. It is undisputed that appellant, Garvin, has served his notice of appeal upon respondent on December 8, 2015, and was received by the Attorney General’s office on December 10, 2015. Well within the ten days of Spartanburg

County's Clerk of Court December 2, 2015, notice letter (Appx. p.46) that had advised appellant to "send a copy of his notice of appeal to the Attorney Generals Office." However, if appellant Garvin has failed to file his notice of appeal within the time as required pursuant to Rule-203(b)(2), S.C.A.C.R., than the Respondent has waived it's right to claim an affirmative defense for it's failure to file a motion to dismiss as is required pursuant to Rule-12(b)(1)(h)(1)

Rule-12(h)(1) of Civil Procedure provides as follows:

"A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived... if it is neither made my motion under this rule nor included in a responsive pleading."

"A party in replying to a preceding pleading shall affirmatively set forth his or her defenses." Rule-8(c), SCRCF. "Every defense, in law or fact, to a cause of action in any pleading ... shall be asserted in the responsive pleading [or motion] thereto" Rule-12(b), SCRCF; See also Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 615, 703 S.E.2d 221 (S.C. 2010), (Citing Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) ("[A]ffirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading [or motion].")) "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Ulbrich, at 615.

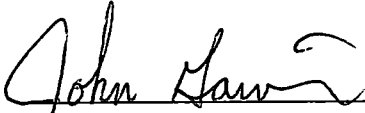
In Ulbrich, there was a Rule-59(e) post-trial motion filed arguing that section 40-11-370 of the South Carolina Code precludes the enforcement of this action. However, Ulbrich never amended it's pleading to incorporate an affirmative defense. Ulbrich could not benefit from an affirmative defense that was never pled. Therefore, since the State never filed a motion to dismiss in Appellant Garvin's case for lack of appellate jurisdiction, it should be deemed that it waives it's right to dismiss appellant Garvin's appeal.

The petitioner in this case hereby asks that South Carolina Supreme Court in its original jurisdiction, to sit as both the finder of fact and the finder of law pursuant to S.C. Code Ann. § 14-3-340 and Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 497, 685 S.E.2d 600, 607, opinion clarified, 386 S.C. 274, 688 S.E.2d 120 (2009).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted in the interest of justice to prevent a miscarriage of justice.

Dated: January 11, 2017



John Garvin, # 355509, Pro-se
Lee Correction Institution
990 Wisacky Highway
Bishopville, S.C. 29010

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
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JAN 13 2017

R. Lawton McIntosh, Circuit Court Judge

S.C. SUPREME COURT


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The State of South Carolina Respondent,
v. Petitioner
John Garvin Appellant.

PROOF OF SERVICE

I, John Garvin, Certify that I have served **SUPPLEMENTAL CITATIONS with a SUPPLEMENTAL INITIAL BRIEF OF PETITION FOR WRIT OF CERTIORARI** on the respondent, The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid on January 11, 2017, addressed to every party involved in the appeal. Daniel E. Shearouse, 1231 Gervais Street, Columbia S.C. 29201; James E. Hunter, 180 Magnolia Street, Spartanburg, S.C. 29304-3483; and John B. Aplin and Alan Wilson, 1000 Assembly Street, Columbia, South Carolina 29211.

Dated: January 11, 2017


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