STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000976

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAKE LAKE,

APPELLANT.

REPLY

On June 30, 2017, the State filed a motion to dismiss the appeal for lack of jurisdiction. On July 20, 2017, Appellant filed a return responding to the motion. Pursuant to Rule 240(f), SCACR, the State files its Reply to Appellant's Return.

Appellant's Motion is a Nullity; No Equitable Defenses are Applicable

First and foremost, the State notes Appellant attempts to sidestep the issue of this Court's jurisdiction by claiming the equitable defense of judicial estoppel and laches. However, Appellant's attempt to misdirect the Court's attention ignores the fact that this Court simply does not have the jurisdiction of the case or the ability to consider his equitable claims.

Plea counsel's representation of Appellant was never terminated; thus plea counsel represented Appellant when he filed both of his post-trial motions. "The attorneys . . . of the respective parties in the court below shall be deemed the attorneys . . . of the same parties in the

appellate court until withdrawal is approved and notice is given as provided in this Rule." Rule 264(a), SCACR. Additionally, Rule 602(e)(1), SCACR stipulates, except as otherwise provided, "[t]rial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal." See also Comment 4 to Rule 1.3, RPC, Rule 407, SCACR ("Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.... [I]f a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer should consult with the client about the possibility of appeal before relinquishing responsibility for the matter."); Rule 1.16(c), RPC, Rule 407, SCACR ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.").

In both Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010) and State v. Devore, 416 S.C. 115, 784 S.E.2d 690 (Ct. App. 2016), the Supreme Court of South Carolina and this Court, respectively, found pro se filings from defendants represented by counsel were "essentially . . . nullit[ies]." In Miller, the South Carolina Supreme Court instructed the courts of the state that pro se documents, with the exceptions of motions to relieve counsel, could not even be considered as accepted by the lower court, much less ruled upon.

Appellant fails to understand that his post-trial motions do not exist in the eyes of the law. It was impossible for plea counsel to "adopt Appellant's pro se motion[s] as his own" if, legally, they never existed. In Devore, this Court specifically stated that such a nullity deprived it of appellate jurisdiction over the entire case because, with the post-trial motions nullified, "there was no proper notice of appeal served or post-trial motion made within ten days of

imposition of the sentence." Thus, this Court does not have the jurisdiction to even consider Appellant's equitable defenses.

Finally, even though the State did not reference nullity of Appellant's post-trial motions in prior filings, such omission does not preclude this Court from ruling on the issue. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal).

Appellant's PCR Case Exemplifies the Dangers of Pro Se Filings

The State argues the confusion among the parties and courts demonstrates why the Miller and Devore courts determined pro se filings from parties represented by counsel cannot be accepted by courts. Appellant's PCR application twice referenced his post-trial motions, but neither time did he specify his post-trial motions were filed pro se. Appellant's Exhibit 1. Additionally, Appellant wrote twice in his PCR application that plea counsel "was supposed to arrange a hearing" with the plea judge. Appellant's Exhibit 1. Thus, a plain reading of the PCR application implies plea counsel filed Appellant's post-trial motions. Had Appellant filed his post-trial motions through plea counsel, this confusion would never have occurred.

The State also notes that while Jeffery Bloom, Esquire, sent a letter to the PCR judge informing him that Appellant's post-trial motions were filed pro se, he was not appointed to the case. Appellant's Exhibit 3. Ultimately, a different attorney, David Allen, represented Appellant. Appellant's Exhibit 4. At no point did Appellant or the attorneys representing him move to amend the PCR application and remove the ambiguity in the PCR application.

Appellant is not entitled to Equitable Defenses

Even is this Court had the jurisdiction to evaluate Appellant's equitable defenses, Appellant has fallen woefully short of proving their merit.

A. Unclean Hands

The State contends Appellant is not entitled to equitable defenses because if, as he alleges, the State mispresented inconsistent positions to the PCR Court regarding the author of Appellant's post-trial motions, Appellant also participated in that misrepresentation and failed to correct the record.

"The doctrine of unclean hands precludes a [party] from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the [other party." First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998). "He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) (internal quotation marks omitted).

Appellant alleges the State's signing of the consent order dismissing the PCR application without prejudice was the State's implicit assent to the representation that the post-trial motions were filed through counsel. Assuming said argument, then Appellant, who, through counsel, also signed the consent order, is equally, if not more, responsible for the misrepresentation to the PCR court because he knew of the inaccuracy in the consent order. Appellant, knowing he, not PCR counsel, filed the post-trial motions, signed off on the mischaracterization of his motions instead of attempting to correct the language of the order. Because of his unclean hands, Appellant is prohibited from seeking equitable relief.

B. Judicial Estoppel

The State would also contend that the doctrine of judicial estoppel does not apply to the instant case. For judicial estoppel to apply, a party must show:

> (1)Two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). Moreover, "[t]he doctrine of judicial estoppel is an equitable concept and should be applied sparingly, with clear regard for the facts of the particular case." Id. In the instant case, the State's confusion over the authorship of the post-trial motions was not part of any intentional effort to mislead the court. As referenced above, any "inconsistency" originated from Appellant's statements in his PCR application.

Furthermore, the "inconsistent" statements were not made for the State's benefit. Notably, the statements were present in only two documents: the State's Return and Motion to Dismiss Without Prejudice and the Order of Dismissal Without Prejudice. Appellant's Exhibits 6 and 7. The State was not attempting to use this minor "inconsistency" to its advantage in either situation; indeed, it sought only to dismiss Appellant's motion without prejudice and allow him to refile his PCR application after the completion of his direct appeal, as required by South Carolina law. See § 17-27-20(B) (1985) (requiring the completion of an Appellant's direct appeal before he may file an application for PCR).

Finally, judicial estoppel "generally applies only to inconsistent statements of fact." Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 477 (1997). As noted by the Miller and Devore courts, Appellant's pro se motions are a nullity, meaning this Court does not have jurisdiction over his appeal. The question of this Court's jurisdiction is ultimately a matter of law, meaning judicial estoppel is not an appropriate means of recourse for Appellant.

Accordingly, this Court should not apply judicial estoppel to the instant matter.

C. Laches

The application of laches to Appellant's case is inappropriate. To claim laches, Appellant must show material prejudice caused by the other party's delay. Mid-State Trust, II, v. Wright, 323 S.C. 303, 474 S.E.2d 421 (1996).

Appellant's claim that the language of the order led him "to believe his direct appeal would be permitted to go forward" is a complete mischaracterization of the language of the order. The language of the order only stated the "PCR application must be summarily dismissed without prejudice until such time as the direct appeal is resolved." Appellant's Exhibit 7. Such action was required under South Carolina law. See § 17-27-20(B) (1985). Neither the PCR court nor the State made any promises about the merits of Appellant's direct appeal.

The State argues Appellant is unable to show any material prejudice to his ability initiate PCR by dismissing this appeal. The PCR order specifically gave Appellant one-year from the ultimate resolution of this appeal to file a new application. Appellant's Exhibit 7. Additionally,

Notably, this Court found in Devore that the proper avenue of relief for the defendant, in light of the Court's lack of jurisdiction to hear his appeal, was PCR. Devore, n.4. In fact, it stated that the failure of Devore's trial counsel to file an appeal was, in itself, a proper ground for relief. Id. Thus, if anything, plea counsel's failure to file the post-trial motions could be an additional ground asserted in a future PCR application by Appellant. The period to file an application on this ground for relief would likely start from the dismissal of this direct appeal. See Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002) (finding the one-year period for filing an application for PCR did not apply where defendant was denied a direct appeal of his conviction due to ineffective assistance of counsel).

Accordingly, Appellant cannot show he was prejudiced in his ability to file future

applications for PCR.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court dismiss Appellant's appeal for lack of jurisdiction.

Respectfully submitted,

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

July 25, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000976

THE STATE OF SOUTH CAROLINA,

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Reply to the Motion to Dismiss in the above-referenced case by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served this 25th day of July, 2017.

Angela Bennett
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ALAN WILSON
ATTORNEY GENERAL

July 25, 2017

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

RE: State v. Jake Lake – Appellate Case No. 2016-000976

Dear Ms. Kitchings:

Enclosed please find the original and six copies of my Reply to the Motion to Dismiss in the above-referenced case, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

William F. Schumacher, IV.
Assistant Attorney General
S.C. Bar No. 100231

WFS/
Enclosures

cc: Susan B. Hackett, Esquire
Victim Advocacy Division