STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
Appeal from Lexington County
Court of General Sessions
Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2017-002372

THE STATE, ...RESPONDENT,

v.

JAKE LAKE, ...PETITIONER.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals properly dismissed Petitioner's appeal as untimely because Petitioner's pro se post-plea motions, filed while he was represented by counsel, did not toll the time for serving his notice of appeal.

STATEMENT OF THE CASE

Petitioner was indicted in Lexington County in October 2011 for attempted murder. On October 4, 2012, Petitioner appeared before the Honorable Roger M. Young, Sr. for his plea hearing. Frank McMaster, Esquire, represented Petitioner; assistant solicitor Suzanne Mayes, Esquire, represented the State. Petitioner pled guilty to the charge and the plea judge sentenced Petitioner to twenty-eight years' incarceration.

On October 9, 2012, Petitioner filed a pro se motion for reconsideration of his sentence. (App.pp.8–9). On December 4, 2012, Petitioner submitted a pro se motion to withdraw his guilty plea claiming he believed his counsel and the State had agreed upon a recommended sentence of five years' imprisonment. (App.p.10). On April 12, 2013, plea counsel sent a letter to the Lexington County Clerk of Court requesting notice for Petitioner's future hearing on his motion to reconsider, explaining he planned to assist Petitioner. (App.p.11). On March 4, 2014, plea counsel was placed on interim suspension by the South Carolina Supreme Court. In re McMaster, 407 S.C. 213, 755 S.E.2d 107 (2014). As a result, Sarah Mauldin of the Lexington County Public Defender's Office assumed representation of Petitioner.

On March 5, 2015, Petitioner filed an application for post-conviction relief (PCR). (App.pp.45–54). In his application, Petitioner claimed plea counsel represented him during his plea, sentence, and post-plea motions. (App.p.54). Petitioner also included his pro se motion for reconsideration of his sentence. (App.p.51). He further claimed plea counsel "was supposed to arrange a hearing with the [plea] judge" for his post-plea motions. (App.p.50).

Petitioner's application also included two letters from the plea judge addressing his motions. In his January 12, 2015 letter, the plea judge noted the Lexington County Clerk of Court was not in possession of his motion for reconsideration of his sentence, but did have

records of his motion to withdraw his plea. (App.p.53). He informed Petitioner there were not records of the first motion ever being filed, and the second motion was not based on after discovered evidence or timely filed. (App.p.53). He noted plea counsel, the attorney of record, was at that time suspended from the practice of law and recommended Petitioner contact the assistant solicitor assigned to his case. (App.p.53). In his February 3, 2015 letter, the plea judge informed Petitioner he received a follow-up letter from the Lexington County Clerk of Court noting both motions were barred for the issues stated in the prior letter. (App.p.54).

On September 4, 2015, attorney Jeffrey Bloom wrote a letter requesting PCR counsel be appointed to Petitioner's case. (App.p.59). He noted petitioner's post-plea motions were filed pro se and that plea counsel was subsequently suspended from the practice of law. (App.p.59). The letter was sent to Judge Keesley and copied to J. Walter Whitmire, the State's attorney handling the PCR case. (App.p.59). On September 22, 2015, David Allen was appointed to represent Petitioner in the PCR action. (App.p.63). On March 7, 2016, Judge Keesley entered a scheduling order, delaying the PCR action until Petitioner's motion to reconsider his sentence was resolved. (App.p.63).

On April 1, 2016, Petitioner, through counsel, filed a brief in support of his motion to reconsider his sentence, to which the State filed a response. (App.pp.12–24). By order filed April 28, 2016, the plea judge denied Petitioner's motion to reconsider and dismissed the motion to withdraw the guilty plea as untimely. (App.p.25).

On May 6, 2016, Petitioner filed and served a notice of appeal. Pursuant to Rule 203(d)(1)(B)(iv), SCACR, Petitioner also filed a written explanation claiming his plea was not knowing and voluntary because he disputed the charges against him at the plea hearing.

On June 23, 2016, the State, due to Petitioner's pending notice of appeal, filed its return

and motion to dismiss Petitioner's PCR application without prejudice. (App.pp.67–69). In its return, the State incorrectly claimed "[Petitioner], through counsel, moved to reconsider his sentence on October 9, 2012." (App.p.67).

On September 29, 2016, Judge Keesley, Petitioner, Petitioner's PCR Counsel, and Senior Assistant Attorney General Johanna Valenzuela signed a consent order dismissing the PCR application without prejudice until Petitioner's direct appeal was resolved. (App.pp.71–72). The consent order claimed Petitioner, through counsel, filed both of his post-plea motions. (App.p.71).

On February 27, 2017, Petitioner, through appellate counsel, filed his initial brief and designation of matter in his direct appeal. On June 30, 2017, the State filed a motion to dismiss the appeal, claiming Petitioner's post-plea motions, which were filed while Petitioner was represented by counsel, were not timely, proper motions and thus the Court of Appeals lacked appellate jurisdiction over the case. (App.pp.1–26). Petitioner filed a return to the motion, arguing judicial estoppel, laches, and abandonment by counsel legitimized the post-plea motions. (App.pp.27–74). On July 25, 2017, the State filed its reply. (App.pp.75–82). On August 9, 2017, the Court of Appeals dismissed the appeal finding the pro se motions were nullities which were "not proper, should not have been accepted, and should not have been ruled upon." App.pp.83–84) (citing Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010)). Petitioner filed a petition for rehearing, reiterating its prior arguments to the court. (App.pp.85-101). Rehearing was denied on October 18, 2017. (App.p.110).

Petitioner submitted a Petition for a Writ of Certiorari to this Court, and the petition was granted on March 28, 2018. Petitioner filed his brief on April 23, 2018. The brief of respondent follows.

ARGUMENT

The Court of Appeals properly dismissed Petitioner's appeal as untimely because Petitioner's pro se post-plea motions, filed while he was represented by counsel, did not toll the time for serving his notice of appeal.

Petitioner argues the Court of Appeals erred in dismissing Petitioner's appeal, claiming his pro se post-plea motions were appropriate because he was abandoned by counsel. In the alternative, Petitioner claims the doctrines of judicial estoppel and laches bar the State from arguing the motions were not timely filed. The State disagrees with these assertions of error. First, Petitioner fails to recognize the Court of Appeals, and now this Court, cannot consider his arguments because the failure to timely file his appeal deprived the appellate courts of any jurisdiction over this matter. Plea counsel's representation was never terminated, thus the Lexington County Clerk of Court was barred from even accepting Petitioner's motions. Further, Petitioner failed to prove equitable defenses justify consideration of his belated appeal. If anything, the doctrine of unclean hands and Petitioner's misrepresentations to the courts justify the dismissal of his Appeal.

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

Rule 203(b)(2) 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. Further, Rule 263(b), SCACR provides courts may not extend the time for serving a notice of appeal.

In Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), this Court stated:

> 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 State v. Devore, 416 S.C. 115, 784 S.E.2d 690 (Ct.App. 2016), the Court of Appeals, relying on Miller, dismissed Devore's appeal after determining it lacked appellate jurisdiction to consider defendant's appeal because his pro se letter, sent seven days after his conviction, was not a proper notice of appeal pursuant to Rule 203, SCACR or a post-trial motion as described in Rule 29, SCRCrimP. Noting Devore was represented by counsel at the time he sent the letter, the court found the document could not qualify as a proper motion or notice of appeal because it was "essentially, a nullity." Id. at 122, 784 S.E.2d at 694.

Despite Petitioner's assertions to the contrary, the appellate courts simply do not have jurisdiction over this matter. While Petitioner attempts to sidestep the issue of jurisdiction by claiming the equitable defenses of judicial estoppel and laches, this Court simply does not have the jurisdiction to even consider such arguments because they are "legal nullities" in the eyes of the law.

Plea counsel's representation of Petitioner was never terminated; thus plea counsel represented Petitioner 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 and Devore, this Court and the Court of Appeals, respectively, found pro se filings from defendants represented by counsel were "essentially . . . nullit[ies]." Miller, 388 S.C. at 347, 697 S.E.2d at 527, see also Devore, 416 S.C. at 123, 784 S.E.2d at 694. In Miller, this 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. Miller, 388 S.C. at 347, 697 S.E.2d at 527.

Because no proper motion for reconsideration or notice of appeal was filed within ten days of Petitioner's conviction, the Court of Appeals did not have jurisdiction over Petitioner's

appeal and thus properly dismissed the matter. See Devore at 122–24, 784 S.E.2d at 694–695; also 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.").

Petitioner 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 Petitioner's pro se motion[s] as his own" if, legally, they never existed. In Devore, the Court of Appeals 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." Devore, 416 S.C. at 123–24, 784 S.E.2d at 694–95. Thus, the Court of Appeals did not have the jurisdiction to even consider Petitioner's equitable defenses.

Similarly, Petitioner fails to acknowledge that practical problems associated with his position. Notably, this Court's acceptance of Petitioner's argument would greatly burden the courts and clerks of courts of this State by allowing a litigant to file his own motions and act independently of his attorney the moment he believes he is "abandoned" by counsel, without any evidence supporting the assertion. This, combined with allowing attorneys to later "adopt" the

pro se filings of their clients would allow defendants to sidestep time limits and filing requirements for the courts. Perhaps the most dangerous consequence of accepting Petitioner's position would be that defendants could intentionally act pro se and file their own independent motions for the purposes of confusing and manipulating the courts and the State. Defendants, feeling "abandoned" may flood the courts with motions to delay trial or disrupt the appellate process. Should this Court overturn the decision of the Court of Appeals and grant Petitioner a direct appeal, criminal defendants state-wide will, without question, try in earnest to replicate such a result and thereby waste the courts' time and resources.

Finally, even though the State did not reference the nullity of Petitioner's post-trial motions in prior filings, such omission does not preclude the appellate courts 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).

Petitioner is not entitled to Equitable Defenses

Even is the Court of Appeals had jurisdiction to evaluate Petitioner's equitable defenses, Petitioner fell woefully short of proving their merit.

A. Unclean Hands

The State contends Petitioner is not entitled to equitable defenses because if, as he alleges, the State mispresented inconsistent positions to the PCR Court regarding the author of Petitioner's post-trial motions, Petitioner 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).

Petitioner 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. More seriously, he claims the only explanation for why the State agreed, during Petitioner's original PCR action, that Petitioner's post-trial motions were filed through PCR counsel was to mislead the courts. Not only does this assumption ignore the common, and likely, explanation of a simple mistake, but Petitioner cannot articulate how the State would have benefitted from such an effort.

Petitioner is unable to recognize his own logic would also apply to him: the "only explanation" as to why Petitioner signed the order would be to deceive the Court. Petitioner is equally, if not more, responsible for the misrepresentation to the PCR court because he knew of the inaccuracy in the consent order. Petitioner, knowing he filed the post-trial motions, signed off on the mischaracterization of his motions instead of attempting to correct the language of the order. Moreover, Petitioner has far more to gain from such a misrepresentation than the State: Petitioner is using this confusion to resurrect his long-expired appeal while the State gained no benefit from dismissing Petitioner's PCR application without prejudice.

Because of his unclean hands, Petitioner is prohibited from seeking equitable relief.

B. Judicial Estoppel

In his petition, Petitioner argues the Court of Appeals misapprehended plea counsel's letter to the court filed April 15, 2013. As noted by Petitioner, plea counsel's letter stated:

> I represented Jake Lake at his guilty plea, which occurred on October 4, 2012. Mr. Lake has filed a Pro Se motion to reconsider and I respectfully request that I receive notice as to the date of the hearing in order that I may assist him if possible. Also, Mr. Lake's father Magistrate Judge Robert H. Lake would like to receive notice of the hearing.

Petitioner claims the court erroneously believed this letter was evidence that plea counsel continuously represented Petitioner from the time of his plea hearing through the date of the hearing, when the letter was actually plea counsel's attempt to adopt the pro se motion as his motion. Under Petitioner's skewed interpretation of the facts, plea counsel's representation of him terminated at the moment the hearing ended and was then restarted months later by the simple act of plea counsel filing a letter with the plea judge. However, such an interpretation is not consistent with South Carolina law. Plea counsel was Petitioner's attorney at the time the motions were filed because he had yet to complete or terminate his representation. See Rule 602(e)(1), SCACR (stating "[t]rial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal . . . ."), Rule 264(a), SCACR ("The attorneys and/or guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties in the appellate court until withdrawal is approved and notice is given . . . ."). Thus, Petitioner was required to file any and all post-trial motions through plea counsel.

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 Petitioner's statements in his PCR application.

Furthermore, the "inconsistent" statements were not made for the State's benefit; Petitioner is unable to describe what this benefit was. 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. Petitioner'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 Petitioner'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 S.C. Code Ann. § 17-27-20(B) (1985) (requiring the completion of an applicant's direct appeal before he may file an application for PCR). Further, the State maintains Petitioner has one year from the completion of his appeal to file a new application.[1] Thus, Petitioner is unable to show the State benefitted from the "inconsistent" positions.

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, Petitioner'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 Petitioner.

In his brief, Petitioner attempts to sidestep this issue by arguing that "fact[s] may inform the legal conclusion to which this this Court ultimately arrives as facts often inform the legal

[1] The State, however, takes no stance on the merits of Petitioner's potential PCR claims.

conclusions." (Br. of Petitioner p.15, n.7). Besides the lack of legal support for Petitioner's interpretation, he ignores the facts of his situation: he filed a pro se motion for reconsideration of his sentence on October 9, 2012, and on June 23, 2016, over three-an-a-half years after his improper motion and the expiration of his ability to appeal his plea, the State filed a return and motion to dismiss Petitioner's PCR application without prejudice. Rather than correct that mistake, both Petitioner and his PCR counsel signed the consent order dismissing the application which described the post-trial motions as originating through plea counsel.

Petitioner claims the State is "finger-pointing" in an effort to escape responsibility. Petitioner fails to recognize that his statements in his PCR application misled the State, and that his decision to sign the PCR order dismissing the case cemented this misunderstanding into the record. Petitioner should not be permitted to weaponize a mistake of his own creation to resurrect his long-dead appeal.

Accordingly, judicial estoppel is not applicable in the instant matter.

C. Laches and Abandonment

The application of laches to Petitioner's case is inappropriate. To claim laches, Petitioner 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).

Petitioner'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." (App.pp.71–72). Such action was required under South Carolina law. See S.C. Code Ann. § 17-27-20(B) (1985). Neither the PCR court nor the State made any promises about the merits of Petitioner's direct appeal.

The State argues Petitioner is unable to show any material prejudice to his ability initiate PCR by dismissing this appeal. The PCR order specifically gave Petitioner one-year from the ultimate resolution of this appeal to file a new application. That time period begins when this Court issues a final disposition in the instant case.

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, 416 S.C. at 123 n.4, 784 S.E.2d at 694 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 and alleged abandonment could be additional grounds asserted in a future PCR application by Petitioner. 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).

In his brief, Petitioner incorrectly claims the State "admits that if this Court determines the direct appeal is not timely, then the only avenue for relief for Petitioner would be a PCR application alleging ineffective assistance of counsel for failing to file a notice of appeal and request for a belated direct appeal." (Br. of Petitioner p.21). However, the State believes this new ground for relief would have its own, separate filing period which begins with the dismissal of the current appeal. As stated above, Petitioner's original PCR claims could also be refiled within a year of the resolution of his direct appeal.

Accordingly, Petitioner cannot show he was prejudiced in his ability to file a future application for PCR.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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May 7, 2018

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CERTIFICATE OF COUNSEL

The undersigned certifies this Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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