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JUL 05 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. 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.

RESPONDENT’S PETITION FOR REHEARING

On June 19, 2019, this Court issued an unpublished opinion in which it reversed the Court of Appeals’ decision dismissing Petitioner’s appeal as untimely. State v. Lake, 2019-MO-030 (S.C. filed June 19, 2019). In reversing the Court of Appeals’ dismissal, this Court held the State was precluded from arguing Petitioner’s appeal was untimely due to him filing a pro se post-plea motion while he was represented by counsel. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because the State believes this Court misapprehended and overlooked the facts, law, and standard of review in reaching its rulings on both issues.

Jurisdiction

Notably, the Court's opinion "[le]ft for another day whether the filing of a pro se motion to reconsider a sentence should ever constitute a procedural default." However, this question was definitely resolved in Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010). In Miller, this court explained "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." Id. This Court went on to say that, because the 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.**" Id. Accordingly, this Court vacated the order ruling on the motion, dismissed the whole appeal as moot, and instructed judges not to accept any substantive documents filed pro se by a party, with the sole exception being motions to relieve counsel. Id.

Pursuant to Miller, Petitioner's pro se motion was not proper because he was represented by counsel at the time it was filed. Accordingly, Petitioner's pro se motion should not have been accepted, should not have been ruled upon, and was "essentially a nullity." Id. The circuit court clerk of court should never have accepted Petitioner's motion and no ruling on it should have ever occurred. Accordingly, this Court should not have issued a substantive ruling on Petitioner's case and should only have affirmed the Court of Appeals' opinion dismissing the appeal.

Judicial Estoppel

In its opinion, this Court found the Court of Appeals improperly dismissed Petitioner's appeal because "the State is precluded from advancing on appeal a position inconsistent with its

position in the trial courts.” However, this Court did not have jurisdiction to even consider Petitioner’s case; as noted above, pursuant to Miller Petitioner’s pro se motion was not proper, should never have been accepted, and should not have been ruled upon because it was a nullity. At the point the State filed its documents stating Petitioner’s October 9 motion was filed “through counsel,” Petitioner’s case, through no fault of the State, had already been a nullity for over three years.

In its opinion, this Court appears to rely upon the doctrine of judicial estoppel in finding that the State’s inconsistent representation. However, the opinion omits an analysis as to whether the State’s actions merit such a remedy, a critical consideration in this 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. Petitioner, not the State, initially informed the Court that his motion was filed through counsel. Similarly, Petitioner signed the consent order claiming his motion was filed through counsel and not pro se. Petitioner is equally, if not more, responsible for the incorrect misrepresentation of the status of his pro se motion and should not be able to profit through his deception.

Further, Petitioner failed to provide, nor does this Court's opinion, indicate the State received any benefit from its acknowledgment that Petitioner's post-trial motion was filed through counsel, or that the inconsistent was part of an intentional effort to mislead the plea court. Notably, the State did not benefit from the inconsistent representation; Petitioner's PCR application and the claims within were not dismissed with prejudice, and Petitioner is free to assert those claims in any future PCR action. Further, the State's representations is not the basis upon which Petitioner's direct appeal was improper; it was his own filing of a pro se motion, without the State's involvement and in contravention of Miller, which renders his direct appeal improper and deprives the appellate courts over jurisdiction of the matter.

Finally, even if this Court found the State's actions satisfied the elements of judicial estoppel, it also failed to consider the State's argument that Petitioner's own unclean hands prevents it from application of estoppel. In the instant case, Petitioner, in his PCR application, claimed he filed his post-trial motions through counsel. Further, Petitioner was a signatory of the same consent order which dismissed his PCR application and claimed that his post-trial motions were filed through his plea attorney. Petitioner's own misrepresentations in his application are what confused the State, and Petitioner had a duty to file an honest and accurate pleading with the PCR court. Petitioner failed to do such and committed fraud on the court. Petitioner should not be allowed to profit from his intentional effort to mislead.

Conclusion

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court reinstate Sims's conviction and sentence for voluntary manslaughter.

Respectfully submitted,

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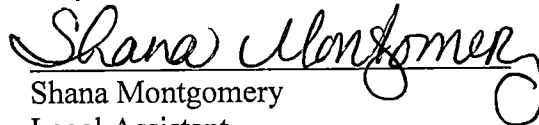
JAKE LAKE, PETITIONER.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Respondent's Petition for Rehearing on Petitioner 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, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 5th day of July, 2019.



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