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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes III, Master-In-Equity

Civil Action No. 2021-CP-07-1507
Appellate Case No. 2022-000681

Beaufort County, Appellant,

v.

Adams Outdoor Advertising Limited Partnership and Bo Hodges, Respondents.

APPELLANT'S PETITION FOR REHEARING

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Preliminary Statement

Beaufort County respectfully petitions for rehearing because this Court's opinion conflicts with the Supreme Court's decision in *James v. State,* 372 S.C. 287, 641 S.E.2d 899 (2007). In *James*, the Supreme Court held that, even if a statute requires the government to give notice in a certain way, "the law only requires *actual notice*." *Id.* at 293, 641 S.E.2d at 902 (emphasis added). So the state's failure to give a statutorily-required written notice to a criminal defendant of its intent to seek a sentence of life without parole (LWOP) did *not* prevent imposition of that sentence upon the defendant. *Id.* This is an a fortiori case—since actual notice is sufficient for a life sentence in prison, the actual notice proven here is sufficient to sustain the fine imposed.

The trier of fact (the Magistrate Court) held that Adams had actual notice that its rebuilding of its dilapidated billboards on Trask Parkway violated the CDC. Thus, due process was satisfied and the County's failure to send a written warning notice of the violation was harmless.

In the face of Adams's actual notice, this Court cited a case holding (in the search and seizure context) that the state constitution can provide more protection than the federal constitution. (Op. at 2 (citing *State v. Boston*, 433 S.C. 177, 857 S.E.2d 27 (Ct. App. 2021).)

But this case is not about the scope of constitutional protection, either state or federal. Rather, it is simply about statutory notice procedures that are not mandated by any constitution.

The question presented is whether failure to strictly comply with statutory notice procedures requires vacatur of a sentence where the defendant had actual notice. On that issue, *James* is on point. *Boston* is not. If strict compliance were the rule, the Supreme Court would have thrown out the LWOP sentence in *James*. But it did not, and under *James*, the failure to follow statutory notice requirements did not violate any *constitutional* right, and was thus harmless. The conviction should be reinstated.

Law and Argument

I. The Court's opinion conflicts with the Supreme Court's decision in *James v. State*.

This case requires the same result as *James v. State*, 372 S.C. 287, 641 S.E.2d 899 (2007).

The criminal statute at issue in *James* provided that where the government intends to seek a sentence of life without parole, "**written notice must be given** by the solicitor **to the defendant and** defendant's counsel not less than ten days before trial." 372 S.C. at 293, 641 S.E.2d at 902 (emphasis added) (quoting S.C. Code Ann. § 17-25-45(H)).

This Court held that written notice was required for the LWOP sentence, relying on one of its earlier decisions.[1] The Supreme Court reversed, stating:

> We held [in *State v. Washington*, 338 S.C. 392, 526 S.E.2d 709 (2000)] that the failure to send a second notice to the defendant did not prevent the imposition of an LWOP sentence under the recidivist statute. After recounting the fact that South Carolina law has historically not required that a defendant be informed if he is going to be punished more severely on the basis of his previous convictions, we stated "[t]his Court has found that **under such notice statutes, the law only requires actual notice**." *Id.* at 399, 526 S.E.2d at 712. Ultimately, this Court concluded that since the defendant "had actual notice of the State's intent, a second notice following re-indictment was unnecessary." *Id.*
>
> Despite *Washington's* clear pronouncement, the court of appeals reached a contrary interpretation of § 17-25-45(H) in *State v. Johnson*, on which the court based its decision in the instant case.
>
> . . .
>
> Although there are subtle distinctions in the facts presented in *Washington* and *Johnson*, any attempt to make a meaningful distinction between the cases does not withstand serious scrutiny. Thus, we are faced with a situation in which this Court has made a clear pronouncement on an issue, and the court of appeals has subsequently strayed from adhering to that pronouncement. Either the rule we announced in *Washington* requires revision, or the rule requires restating.
>
> Nothing about our holding in *Washington* was equivocal, and we can discern no sufficient rationale for adopting a rule contrary to the one we there advanced. The purpose of § 17-25-45(H) is to assure that a defendant and his counsel have actual

[1] *State v. Johnson*, 347 S.C. 67, 552 S.E.2d 339 (Ct. App. 2001), *overruled by James v. State*, 372 S.C. 287, 641 S.E.2d 899 (2007).

> notice that the State is seeking a sentence under the recidivist statute at least ten days prior to trial.

James, 372 S.C. at 293-294, 641 S.E.2d at 902-903 (2007) (emphasis added).

Respectfully, the same is true here. The Supreme Court has made a "clear pronouncement" that actual notice is all that is required, even where the notice statute says "written notice must be given," and even where the stakes are as high as life in prison without parole. § 17-25-45(H); *James*, 372 S.C. at 293, 641 S.E.2d at 902.

The purpose of CDC § 9.4.40 is to give a violator actual notice of the address of the violation, the nature of the violation, and the steps he must take to abate the violation. It is undisputed that Adams had actual notice of its violations of the CDC—the County Administrator told Adams to stop the unpermitted construction *while it was occurring*. (R. p. 283, "It is clear that the Defendants had actual notice . . . and that the Defendants chose to perform the work in spite of their failure to obtain the proper approvals from Beaufort County.")

The Court restates the principle that state constitutions may afford more rights than the Federal Constitution. *State v. Boston*, 433 S.C. 177, 182, 857 S.E.2d 27, 30 (Ct. App. 2021). But no party has argued, nor has the Court held, that Beaufort County CDC § 9.4.40 affords *constitutional* rights to specific notice procedures. The principle in *Boston* does not apply here.

Finally, that the Court must *construe* the CDC literally does not mean that the County's failure to strictly comply with its written notice procedure requires vacating a conviction where the defendant had actual knowledge of his violation. The Court cites no case where a conviction was reversed for failure to comply with a notice provision where the defendant had actual notice.

The only case the Court cites for its strict compliance holding, *Criterion Insurance Company v. Hoffman*, 258 S.C. 282, 188 S.E.2d 459 (1972), does not apply. There, the Supreme Court held that if a motorist wanted to collect benefits against his insurance carrier under an

uninsured motorist statute—a right to recovery that was a pure "creature of the legislature"—he had to comply with that statute. *Id.* at 290-291, 188 S.E.2d at 462-463. Since he failed to serve upon his insurance carrier a copy of his complaint suing an unknown hit-and-run driver—as the statute required—he forfeited his right to the statutory benefit. *Id.*

But Beaufort County's authority to enforce its ordinances is not a statutory benefit, nor is it contingent upon the County following a futile notice procedure. Here, Adams had already told the County Administrator to pound sand when the Administrator told Adams to stop the illegal construction work. Under *James v. State*, the conviction should stand.

II. The Court overlooked the County's harmless error analysis.

As another ground for reversing the circuit court, the County argued that any procedural error was harmless. Like the circuit court below, this Court cited no authority on harmless error and did not conduct any harmless error analysis.

Yet the Supreme Court has been clear that "'most constitutional errors can be harmless.'" *State v. Odom*, 412 S.C. 253, 268, 772 S.E.2d 149, 156 (2015) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). The purpose of the harmless error rule is to prevent "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of a trial." *Id.* When an error is harmless, "the conviction should not be reversed." *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.21d 77, 83 (Ct. App. 2003).

"When guilt is conclusively proven by competent evidence such that no other rational conclusion can be reached, [the appellate court] will not set aside a conviction because of insubstantial errors not affecting the result." *State v. Lyles*, 379 S.C. 328, 345, 665 S.E.2d 201, 210 (2008).

The County showed in its briefing that the "small error or defect," *State v. Odom*, 412 S.C. at 268, 772 S.E.2d at 156, of not sending Adams and Hodges information that they already had

about the address of Adams's signs and the date of the violations, made no difference. Adams and Hodges already knew that rebuilding the signs without County approval was a violation of the CDC, but they flagrantly violated it anyway.

Neither this Court nor the lower court has disturbed the magistrate court's finding that Adams and Hodges had actual notice that they were violating the CDC by "[choosing] to perform the work in spite of their failure to obtain the proper approvals from Beaufort County." (R. p. 283.) Since Adams's and Hodges's "guilt is conclusively proven by competent evidence," *Lyles*, 379 S.C. at 345, 665 S.E.2d at 2010, the harmless error doctrine requires that the conviction be reinstated.

Respectfully submitted,

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PROOF OF SERVICE

I certify that on July 18, 2024, I have served all counsel in this action with a copy of **Appellant's Petition for Rehearing**, via electronic mail, to the following addresses:

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Respectfully submitted,

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July 18, 2024

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South Carolina Court of Appeals
Honorable Jenny Abbott Kitchings
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In re: *Beaufort County v. Adams Outdoor Advertising and Bo Hodges*
Appellate Case No. 2022-000681

Dear Ms. Kitchings:

Please see the enclosed Appellant's Petition for Rehearing for filing in the above-captioned matter. Under Rule 262(a)(3), SCACR and the Order issued by the Supreme Court of South Carolina on April 24, 2024, the County is filing this document electronically as a PDF only, unless the Court requests otherwise. The filing fee for this petition is being shipped to the Court separately. Should the Court need anything additional, please do not hesitate in contacting our office at (423) 899-3025.

Respectfully,

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