THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

RECEIVED
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S.C. SUPREME COURT

Beaufort County, Appellant,

v.

Adams Outdoor Advertising Limited Partnership and Bo Hodges, Respondents.

APPELLANT BEAUFORT COUNTY'S PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Under *James v. State*, 372 S.C. 287, 293 (2007), where a criminal statute requires written notice to the defendant, "the law only requires actual notice." The trial court held that "[i]t is clear that the Defendants had actual notice of the requirement that the county approve any work" to the billboards that they took down and rebuilt with new support poles, so the County's failure to follow its zoning ordinance's written notice requirements was harmless. (R. p. 283.) Does the Court of Appeals' contrary decision, which affirmed the vacatur of defendants' convictions, conflict with *James* and require reversal?

Statement of the Case

A. Summary of Proceedings Below.

Beaufort County cited Respondents Adams Outdoor Advertising Limited Partnership and its real estate manager, Bo Hodges (collectively, "Adams"), for violating its Community Development Code ("CDC") § 5.6.50(E), which governs maintenance of off-premises signs (billboards). The zoning citations were tried before the Beaufort County Magistrate Court, which issued a Verdict finding Respondents guilty. On appeal, the Court of Common Pleas reversed, vacating the convictions. The Court of Appeals affirmed, and denied the petition for rehearing.

B. Factual Background.

CDC. The CDC prohibits new billboards and limits the maintenance that can be done to existing billboards, which are to come down as they deteriorate. (R. p. 279-280 (§ 5.6.50(E).) It is unlawful to repair a billboard without "[r]eceiving written notice" from Beaufort County "authorizing the repair work," (*id.*), or to "install, create, erect, alter, or maintain any sign without first obtaining the appropriate permits or development approvals." (R. p. 280.)

Two Old Billboards. Adams sought to replace the rotted support poles for two decades-old billboards across from each other on Trask Parkway. SCDOT issued permits. (R. p. 281.)

On April 6, 2021, Hodges told the County of the SCDOT permits and Adams's plans to do the construction work on the billboards. (R. pp. 500-506.) The County responded that "prior to any repairs being done Zoning will need to review the billboards and give approval for any repairs." (R. p. 500.) On April 7, the Zoning Administrator asked Hodges for "a picture of the sign as it stands now. I will make a decision after I have reviewed the photograph." (R. p. 515.)

But Hodges did not respond, (R. p. 281), taking the position that Adams did not need County approval. (R. p. 234:22-23 ("I was not asking for approval. I didn't need approval.").) So on Saturday, April 10, Adams's contractors began tearing down the billboards and replacing

their structural supports. Contrary to the CDC and the County's explicit instructions, Adams removed the old sign poles and began erecting brand new 35-ft. poles a few feet in front of the preexisting sign locations. (*See, e.g.*, R. pp. 473-474.)

That evening between 6:00 and 7:00, interim County Administrator Eric Greenway was driving back into town and saw the crew re-erecting the decades-old billboards: "I saw cranes parked on the side of 21, in the right of way of 21, lifting poles into position in front of the McDonald's sign, and I knew that was not appropriate underneath the Community Development Code." (R. p. 194:13-20.) He stopped at the site and asked the project superintendent to show him any documents "that he had authorizing that work by the County and a copy of his business license to do business in Beaufort County. (R. p. 194:20-195:2.)

But the superintendent could not produce any. (*Id.*) Greenway told the superintendent that his SCDOT letter "is not a local permit," and asked him to get Hodges on the phone. (R. p. 195:5-7.) The superintendent could not reach Hodges, and called an Adams representative ("Romera" [*sic*]), but that person would not speak with Greenway. (R. p. 195:8-13.)

Later that evening, Greenway emailed Hodges, copying other local Adams managers, Liz Mitchum and Joseph Romeo, explaining that he observed Adams "in the process of completely rebuilding two signs, located on both sides of Hwy. 21, near the address of 3589." (R. p. 487.) He explained that the County "has issued no approvals for Adams to conduct this work and will not issue approval for the complete rebuild of these signs since doing so will violate the Community Development Code." (*Id.*) Greenway reiterated that a SCDOT letter "is not a local permit nor proper authorization to reconstruct an outdoor advertising display." (*Id.*)

The next morning (Sunday, April 11), Adams's general counsel, Richard Zecchino, responded to Greenway. He argued that state law displaces the CDC as to the two billboards, that the CDC is

invalid, and that Adams did not need County approval. (R. p. 485-486.) Zecchino—fully aware of the two billboards at issue and the County's instructions to obtain review and approval for any construction work under the CDC—then asserted: "Should you take any action to prohibit Adams from doing what it is legally entitled to do with respect to this work, all you will be doing is inviting a lawsuit by Adams against the County. *Adams intends to complete the work approved by SCDOT today*. (R. p. 486 (emphasis added).)

Greenway replied that morning, and again asked Adams "to hold off on any more construction until this issue can be appropriately resolved." (R. p. 485.) Adams refused, and completed reconstructing and re-erecting the billboards on Sunday.

By the time that Greenway met with County staff on Monday morning, April 12, it was clear that obtaining Adams's voluntary compliance with the CDC was *not* possible. The County issued a stop work order and uniform ordinance summonses (citations), together, to both Adams and Hodges via certified mail. (R. p. 489-492; R. p. 251:9-25.) The stop work order cited, and included a copy of, CDC § 5.6.50(E) (Maintenance Standards for Off-Premises Signs). (R. p. 489-491.) It further stated that the unpermitted work was done "to billboards 7036/74062 and 74065/70091 located on Trask Parkway in Beaufort County," identifying the two signs by the ID tag numbers assigned to each face of the double-sided billboards. (R. p. 489; R. p. 103:9-19.)

The citations identified the violation date as April 10, 2021—the date that Greenway stopped at the site where Adams was reconstructing the two billboards referenced in Hodges's April 6, 2021 correspondence. (R. p. 489-492.) The stop work order, a copy of CDC § 5.6.50(E), and the citations were delivered to Adams on April 15, 2021 (R. p. 238:7-20; R. p. 251:9-252:4.)

Trial. At trial, Adams and Hodges were represented by counsel, presented evidence and testimony, and cross-examined County staff, including Greenway. (R. p. 97:4-275:4.) Hodges

testified. He did not dispute that Adams completed construction work on April 10-11, without County approval, on the two billboards that Hodges had emailed staff about on April 6.

Instead, Adams claimed that, while it was blatantly violating the CDC over the weekend, the County was required to send Adams a warning notice of violation via U.S. Mail—and that absent that futile act, the citations were invalid. (R. p. 266:19-25.) Adams also claimed that they were invalid because they lacked the billboards' legal descriptions and address. (R. p. 282.)

Code Enforcement Director Antonacci confirmed, however, that "the purpose of the warning system" is "simply to give someone who may not know that they're engaged in a violation" the instruction "that they need to abstain until they get the proper approval" where that is possible. (R. p. 185:7-13; *see also* R. p. 507 (§ 9.1.10 ("The provisions of this Article are intended to encourage the voluntary correction of violations, where possible.")).) This was not such a case, and Antonacci confirmed that blatant CDC violators are issued citations when verbal directives are ignored. (R. p. 185:14-23.)

Verdict. The magistrate court issued its Verdict on July 23, 2021. Based on the evidence, the court found defendants guilty of the two violations of CDC section 5.6.50(E.) (R. p. 283.) The court later imposed a fine of $1087.50 for each violation. (R. p. 284.)

While the summonses / citations themselves did not give the exact address or legal description of the property, the magistrate court found that "this failure is harmless in that the Defendants were served immediately after they had clear notice and warning that the signs at issue were the violation." (R. p. 282.) This clear notice was established by "[t]he communication between the parties (Defendant Hodges, other employees of Adams Outdoor Advertising, and administrative staff of Beaufort County) which began with Defendant Hodges' email to Ms. Antonacci on April 6, 2021, and continued until Mr. Zecchino's email to Mr. Greenway on the

morning of April 11, 2021." (*Id*.) These extensive back-and-forth communications about the two signs that Hodges wrote about on April 6 "clearly show that the Defendants received actual notice of the violation and had actual knowledge of the location of the violation. The County's failure to adhere to the formal notice requirements were harmless errors on its part." (*Id*.)

The court concluded: "It is clear that the Defendants had actual notice of the requirement that the county approve any work undertaken by them to the signs in question and that the Defendants chose to perform the work in spite of their failure to obtain the proper approvals from Beaufort County." (R. p. 283 (emphasis added).)

Common Pleas Court Decision. After hearing argument on the record established in the magistrate's court, the common pleas court *did not disturb* the magistrate court's findings that defendants had actual notice. (*See* R. p. 13 ("The Court declines to rule on, or does not find merit in, Appellants' other grounds for appeal not specifically addressed herein.").)

Nevertheless, the common pleas court reversed, and announced that "Appellants are not guilty of the charged violations." (*Id*.)

It ruled that Adams and Hodges have "the right to receive a warning notice," (R. p. 10), despite having actual notice that their proposed conduct violated the CDC *and* despite disregarding the County Administrator's repeated, explicit instructions to stop that conduct while it was in progress. The common pleas court held that "CDC Sections 9.4.40 and 9.4.50 are designed to provide the information and notice necessary to comport with due process," (R. p. 11), but never explained how Adams's and Hodges's due process rights were allegedly violated.

That court also held that, no matter the situation, "the County must first issue a warning notice" before issuing "a citation ticket in order to prosecute" a CDC violation, (R. p. 12), and that failure to do so nullifies the conviction. It held that a conviction must be reversed, even if the

violator has actual notice of the charges and exercises the full panoply of due process protections (i.e., obtains counsel, presents evidence, an cross-examines witnesses).

Because the CDC's prohibition against reconstructing the billboards is clear, the common pleas court did not need to engage in any construction of the CDC's language. Yet that court held that "in the context of strict *construction* of a penal statute," (R. p. 13 (emphasis added)), the magistrate court had wrongly concluded that the County's failure to list details on the summonses (details already known to Adams and Hodges) was harmless error. (*Id.*) Yet the common pleas court did not cite any harmless error case or engage in harmless error analysis.

Court of Appeals' Decision. The Court of Appeals affirmed the decision vacating the convictions. In the face of Adams's actual notice, the court cited a search and seizure case holding that the state constitution can provide more protection than the federal constitution. (Op. at 2 (citing *State v. Boston*, 433 S.C. 177, 182, 857 S.E.2d 27, 30 (Ct. App. 2021)).) The court also held that it must "construe the CDC literally." (*Id.*) The court held that adhering to the written notice procedures is a condition precedent to issuing a Uniform Summons Ticket. (*Id.*)

For the latter proposition, the court relied on a case in which this Court held that a motorist forfeited his statutory benefit to collect benefits against his insurance carrier under an uninsured motorist statute because he failed to comply with that statute. (Op. at 3 (citing *Criterion Ins. Co. v. Hoffman*, 258 S.C. 282, 293-94, 188 S.E.2d 459, 464 (1972)).)

The Court of Appeals performed no harmless error analysis, finding "resolution of the previous issues is dispositive of these claims." (*Id.*)

The County timely filed its petition for rehearing, which the Court of Appeals denied.

Law and Argument

I. This Court should reverse because the Court of Appeals' opinion conflicts with this Court's decision in *James v. State*, and excuses blatant violations of law.

This Court has repeatedly held that where a criminal law requires written notice to the defendant, "'the law only requires actual notice.'" *James v. State*, 372 S.C. 287, 293 641 S.E.2d 899, 902 (2007) (quoting *State v. Washington*, 338 S.C. 392, 398, 526 S.E.2d 709, 711-712 (2000) (upholding sentences of life imprisonment without parole).

In direct contravention of that rule, the Court of Appeals held that defendants—who had actual notice of their violations—are entitled to have their zoning convictions (and resulting fines) vacated because the County did not follow its ordinance's written notice requirements.

This result encourages violations of law, serves no valid purpose, and should be reversed.

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)). The Court of Appeals held that written notice was required for the life without parole sentence, relying on one of its earlier decisions.[1] This 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.
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> [W]e are faced with a situation in which this Court has made a clear pronouncement

[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).

> 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 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).

This is an *a fortiori* case. If actual notice is sufficient to impose a life sentence without parole, then actual notice is certainly sufficient to impose a fine for defiantly rebuilding decades-old billboards without required approvals and in contravention of a zoning ordinance.

This Court has made a "clear pronouncement" that actual notice is all that is required, even where the relevant statute states that "written notice must be given," and even where the stakes are life in prison without parole. *James*, 372 S.C. at 293, 641 S.E.2d at 902.

Here, "[t]he purpose of" the CDC's written notice requirements is to give a violator actual notice of the location and nature of the violation, and the steps he must take to abate it.

But it is undisputed that Adams had actual notice of the location and nature of its violations of the CDC. Adams submitted the SCDOT permits, with the billboard locations, to the County four days before it began the work, and the Zoning Administrator informed Adams of the CDC's requirement to obtain County approval for any repair work to be done. Moreover, the County Administrator caught Adams *in the act* of illegally rebuilding its antiquated billboards, and 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 of Appeals, in vacating convictions based on a lack of statutory written notice, has once again ignored *James*'s clear pronouncement that "the law only requires actual notice."

Adams's defiance—its failure to comply with the CDC as directed by the Zoning Administrator, its refusal to obey the County's Administrator's instructions to stop the work, and its general counsel's stated intention to continue the work without County approval (coupled with his threat of litigation)—all show that any written warning would have been utterly futile.

Thus, the magistrate court correctly explained that because Adams and Hodges had actual notice of their violations but chose to proceed with them anyway, the County's failure to follow the CDC's written notice requirements was harmless. (R. p. 282.)

The common pleas court and appellate court disagreed with that conclusion, but gave no reasons why. Their opinions cited no authority on harmless error, and did not conduct any harmless error analysis.

Yet the Supreme Court has been clear that most errors, including 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).

These rules apply with full force here. The County's failure to comply with the CDC's written notice requirements—by sending Adams and Hodges information that they were already fully aware of—would not have changed the result of the trial. The defendants knew rebuilding the signs without County approval violated the CDC, but they flagrantly violated it anyway.

No 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 conviction should not [have been] reversed." *Thompson*, 352 S.C. at 562, 575 S.E.2d at 83.

The Court of Appeals 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 the Beaufort County CDC 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 defendants had actual knowledge of the violations.

The only case the Court of Appeals cites for its strict compliance holding, *Criterion Ins. Company v. Hoffman*, 258 S.C. 282, 188 S.E.2d 459 (1972), does not apply. There, this Court held that if a motorist seeks to collect benefits against his insurance carrier under an uninsured motorist statute—a right to recovery that is a pure "creature of the legislature"—he must comply with that statute. *Id.* at 290-291, 188 S.E.2d at 462-463. Since he failed to serve the carrier with 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 here, the County's authority to enforce its ordinances is neither a statutory benefit nor contingent upon following a futile notice procedure.

The opinion below cites *no case* where a defendant had actual notice, but his conviction was reversed for the government's failure to comply with written notice requirements. On the

contrary, this Court's decisions in *James*, *Washington*, *Thompson*, and *Lyles* dictate that the convictions should stand.

II. Conclusion

The defendants had clear, actual notice of their violations of the CDC, making any failure to comply with that ordinance's written notice requirements harmless—and not grounds for vacating their convictions. Under *James*, the defendants' convictions should be reinstated, and the Court of Appeals' contrary holding should be reversed.

Respectfully submitted,

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