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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

STEPHENO ALSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001011

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the trial proceeding in Petitioner's absence based on a violation of the Sixth Amendment right to be present at every stage of trial as well as a failure to meet the requirements of Rule 16, SCRCrimP, and failing to move for a continuance so that Petitioner could be notified to be present for his trial?

STATEMENT OF THE CASE

In June of 2011, the Spartanburg County Grand Jury indicted Petitioner, Stepheno Alston, for trafficking in cocaine, indictment #2011-GS-42-3090. (App. pp. 283-284). On March 18, 2013, the case was called for jury trial before the Honorable J. Derham Cole. Petitioner was not present for trial. Andrew J. Johnston represented Petitioner at trial. J. Edward Hunter prosecuted the case. The jury found Petitioner guilty. On September 19, 2013, Petitioner appeared before Judge Cole for sentencing. Andrew J. Johnston again represented Petitioner and J. Edward Hunter again represented the State. The judge announced the twenty-five year sentence imposed after trial. (App. p. 285).

A timely notice of intent to appeal was filed and the direct appeal perfected. On July 29, 2015, the South Carolina Court of Appeals, after hearing oral argument, affirmed the conviction and sentence. State v. Alston, Op. No. 2015-UP-381 (S.C.Ct. App. filed July 29, 2015). A timely petition for rehearing was filed and then denied on September 15, 2015. On October 26, 2015, a petition for writ of certiorari was filed with the South Carolina Supreme Court. The State filed a return on November 24, 2015. On July 18, 2016, the Court granted the petition for writ of certiorari and additional briefs were filed. (App. pp. 286-367). On March 7, 2018, after hearing oral argument, the South Carolina Supreme Court affirmed as modified the opinion by the Court of Appeals. State v. Alston, 422 S.C. 270, 811 S.E.2d 747 (2108). (App. p. 368-385). A petition for writ of certiorari was filed with the Supreme Court of the United States. On October 1, 2018, the Court denied the petition for writ of certiorari.

On October 22, 2018, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 386-399). The State filed a return on February 25, 2019. (App. pp. 400-420). On July 6, 2021, Petitioner filed an amended PCR application. (App. pp. 421-424). On April 15, 2022,

Petitioner filed a second amended PCR application. (App. pp. 425-427). On April 20, 2022, an evidentiary hearing was held before the Honorable G.D. Morgan. Susannah Ross represented Petitioner at the PCR hearing. Chelsey Marto represented the State. In a written order signed March 16, 2023, Judge Morgan denied relief and dismissed the application. (App. pp. 516-538). A timely motion to alter or amend was served on April 7, 2023. (App. pp. 539-550). The State served a return on May 5, 2023. (App. pp. 551-562). On June 7, 2023, Judge Morgan denied the motion to alter or amend. (App. p. 563). A timely notice of intent to appeal was served on June 22, 2023. The petition for writ of certiorari was filed on January 24, 2024. The return was filed on October 7, 2024. This reply follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the trial proceeding in Petitioner's absence based on a violation of the Sixth Amendment right to be present at every stage of trial as well as a failure to meet the requirements of Rule 16, SCRCrimP, and failing to move for a continuance so that Petitioner could be notified to be present for his trial.

On March 18, 2013, the trial judge issued a bench warrant for Petitioner's arrest. (App. p. 12, line 4 -p. 13, lines 1-7). Trial counsel failed to object to the issuance of the bench warrant. The judge recessed for lunch. After lunch the judge heard the defense motion to suppress based on a Fourth Amendment violation. (App. pp. 13-101). After hearing testimony at the suppression hearing, the judge took the matter under advisement and adjourned for the day. (App. p. 100, line 23 – p. 101, lines 1-5). Trial counsel failed to object to the trial proceeding in Petitioner's absence and failed to move for a continuance.

The next day, March 19, 2013, the trial resumed and Petitioner was again not present. The trial judge found that Petitioner received notice that his case was being called for trial, received notice by the bail proceeding form that he would be tried in his absence if he failed to appear, and found that Petitioner knowingly and voluntarily waived his right to be present at trial. (App. p. 102, lines 3 – p. 103, lines 1-9). Trial counsel did not object to the findings by the judge and again did not move for a continuance. The trial judge additionally denied the defense motion to suppress heard the day before. (App. p. 103, lines 10-20). The jury was then selected. (App. pp. 104-122).

After jury selection, trial counsel advised the judge that the bonding company had been in touch with Petitioner and was attempting to bring him to court. (App. p. 123, lines 15-23). Trial counsel stated, "I would respectfully, based on that information, ask that this case be continued until we see if he's actually going to appear." (App. p. 123, lines 23-25). The motion to continue

the case was based on the information that the bonding company might be able to bring Petitioner to court. The continuance motion, based on the information from the bonding company, was made after the motion to suppress had been heard and denied and after jury selection. Again, there was no objection to the trial in the absence. The belated continuance motion does not cure counsel's failure to object to the trial in the absence and failure to move for a continuance when the trial started.

During the PCR hearing, PCR counsel asked trial counsel, "You've – you basically answered this already, but your testimony is that you didn't feel that it would've made a difference to tell the judge that you needed your client with you to try the case?" (App. p. 490, lines 12-15). Trial counsel answered, "No. In – in retrospect, I – I probably should have, but at the time, it seemed like that was – it was a foregone conclusion of what was gonna happen." (App. p. 490, lines 16-18). On re-direct the State asked trial counsel, "And again, you don't think arguing that Mr. Alston would help you in your, I guess, trial, -- that would've made a difference when it came to Judge Cole and determining to proceed in abstentia, correct?" (App. p. 492, lines 13-16). Trial counsel answered, "I'm confident that would not have made any difference, but perhaps I should've argued it for purposes of the record." (App. p. 492, lines 17-19).

Trial counsel was ineffective for failing to object to the trial proceeding in Petitioner's absence based on a violation of the Sixth Amendment right to be present at every stage of trial as well as a failure to meet the requirements of Rule 16, SCRCrimP, and failing to move for a continuance so that Petitioner could be notified to be present for his trial. "A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence. State v. Patterson, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct.App.2006) (citing State v. Jackson, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986)). The judge must make

findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend. Id." State v. Ravenell, 387 S.C. 449, 455–56, 692 S.E.2d 554, 557–58 (Ct. App. 2010). Rule 16, SCRCrimP provides, "Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court."

First, the record fails to show that Petitioner was given notice of the term of court in which he would be tried. " 'Notice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present.' City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct.App.2006). However, if the record does not reveal that the defendant was afforded notice of his trial, the resulting conviction in absentia cannot stand. State v. Jackson, 290 S.C. 435, 436, 351 S.E.2d 167, 167 (1986)." State v. Fairey, 374 S.C. 92, 100, 646 S.E.2d 445, 448–49 (Ct. App. 2007). The bond paperwork from two years earlier did not provide notice of the term of court for which the trial was set. Petitioner's resulting conviction in absentia cannot stand.

During the PCR hearing Petitioner was asked what happened at the docket call when he appeared but then left for the trial. (App. p. 454, lines 8-9). Petitioner testified, "Yes. I – when I – when I was told to come to South Carolina – because I'm from Georgia, I mean, it was basically for roll call. I didn't know I was going to trial." (App. p. 454, lines 10-13). Petitioner also testified:

> So it was just – I mean, he – he said he mentioned it, but he didn't spascifas [sic] – sacifically (as spoken) say that it was gonna be that day, which it could've been the

> next day. I don't know. All I – the only thing I remember, him – me and him talking about a plea deal. He offered me a plea deal, 15 years. I told him I didn't want it. He walked off. He said something about, well, I'm the one that gotta do the time. He walked off. I left. I didn't – I didn't know the trial was – I mean plus it was pretty much – it was almost afternoon, so I knew it couldn't have been no trial going on that day.

(App. p. 454, lines 15-25).

Trial counsel first testified that he did not tell Petitioner specifically that his case was being called for trial. (App. p. 9, lines 17-19). Trial counsel only told the judge that he informed Petitioner that his case was being called for trial that morning after a second questioning by the judge. (App. p. 10, lines 5-6). Trial counsel told the judge that he "believed" Petitioner understood that his case was being called for trial. (App. p. 10, lines 20-23), but also told the judge that he only told Petitioner that his case was "very high on the docket." (App. p. 10, lines 12-14). The record fails to show that Petitioner was given notice of the term of court in which he would be tried.

Second, the record fails to show that Petitioner was warned that he could be tried in his absence as required by Rule 16. "A bond form that provides notice that a defendant can be tried in absentia **may** serve as the requisite notice. City of Aiken v. Koontz, 368 S.C. 542, 548, 629 S.E.2d 686 689-90 (2006); State v. Goode, 299 S.C. 479, 385 S.E.2d 844 (1989)." State v. Fairey, 374 S.C. 92, 101, 646 S.E.2d 445, 449 (Ct. App. 2007) (emphasis added). Under the facts of this case, the bond paperwork, signed two years earlier, was not sufficient to warn Petitioner that he would be tried in his absence if he did not appear for court when Petitioner was not given proper notice of when his case would be called for trial. If a proper notice of trial had been given, the notice could have included the warning that a defendant can be tried in absentia. Trial counsel testified that, based on his experience, clients do not always understand all of the information in the bond paperwork. (App. p. 478, lines 3-8). Trial counsel admitted that he should have objected

to proceeding in Petitioner's absence. (App. p. 490, lines 16-18; App. p. 492, lines 17-19). Petitioner established deficient performance.

Petitioner was prejudiced by trial counsel's deficient performance in failing to move for a continuance and object to the trial in absence when Petitioner was not notified of the term of court in which he would be tried and was not adequately warned that he would be tried in his absence if he did not appear. The trial judge's comment to the jury prior to the start of the trial that they may not draw any inference from the fact that Petitioner was not present, (App. p. 154, lines 3-6), and the instruction at the end of the trial, (App. p. 259, lines 11-15), cannot cure the violation of this most basic and important Constitutional right to be present at trial when the State failed to provide sufficient notice of when the trial would take place. "A criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial. See U.S. Const. amend. VI; Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) ('One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.')." City of Aiken v. David Michael Koontz, 368 S.C. 542, 546, 629 S.E.2d 686, 688 (Ct. App. 2006).

If trial counsel had objected to the trial in absence based on the State's failure to provide sufficient notice of the trial date and adequate warning about the trial in absence, Petitioner could have urged this Court to find the error structural and not subject to a harmless error analysis. In State v. Rivera, 402 S.C. 225, 246–47, 741 S.E.2d 694, 705 (2013), the South Carolina Supreme Court wrote:

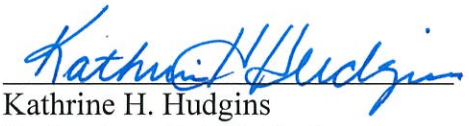
> Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis. See Arizona v. Fulminante, 499 U.S. 279, 306–07, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (recognizing that most constitutional errors are subject to harmless-error analysis and do not automatically require reversal of a conviction) (citing Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). Indeed, "the harmless-error doctrine is essential to

> preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than the virtually inevitable presence of immaterial error.' " Id. at 306–08, 111 S.Ct. 1246 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).
>
> However, despite the strong interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are " 'so basic to a fair trial that their infraction can never be treated as harmless error.' " Id. (quoting Chapman, 386 U.S. at 23, 87 S.Ct. 824). "These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards" and which "affect [ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 309–10, 111 S.Ct. 1246. " 'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " Id. at 310, 111 S.Ct. 1246 (quoting Rose v. Clark, 478 U.S. 570, 577–78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Essentially, an error is structural if it is "the type of error which transcends the criminal process." Id. at 311, 111 S.Ct. 1246.

The State's failure to provide sufficient notice of the date of trial and an adequate warning about the trial in absence and then proceeding with a trial in the absence constitutes structural error that satisfies the prejudice prong under Strickland. This Court should find both deficient performance and prejudice requiring a new trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



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This 17th day of October, 2024.