

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County  
John C. Hayes, III, Circuit Court Judge  
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RECEIVED

JAN 13 2014

S.C. Supreme Court

DUVAL M. COOPER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001428  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find counsel ineffective in failing to object to the *trial in absentia* and failing to move for a continuance when petitioner was not present for trial and the record does not support that petitioner had notice of his trial date?

## STATEMENT

On September 15, 2005, the York County Grand Jury indicted Cooper for trafficking in heroin and trafficking methamphetamine, indictments # 2005-GS-46-3486, 3487. On February 15, 2006, Cooper was tried in his absence by a jury before the Honorable Lee S. Alford. Attorneys Vic Meetze and Gary Lemel represented Cooper at trial. Misty Horton prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Alford sealed the sentences.

On May 20, 2010, Cooper appeared before Judge Alford for sentencing. Attorneys B. J. Barrowclough and Jonathan Sullivan represented Cooper at sentencing. Judge Alford sentenced Cooper to 25 years concurrent for each charge. A timely notice of intent to appeal was filed on May 25, 2010, and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Cooper, Op. No. 2012-UP-465 (S.C. Ct.App. filed August 1, 2012).

Cooper filed an application for post conviction relief on September 7, 2012. The State filed a return on December 6, 2012. On May 16, 2013, an evidentiary hearing was held before the Honorable John C. Hayes, III. Attorney Charles Brooks represented Cooper at the PCR hearing. Attorney J. Rutledge Johnson was present on behalf of the State. In a written order signed June 17, 2013, Judge Hayes denied relief and dismissed the application. A timely notice of intent to appeal was served on June 27, 2013. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find counsel ineffective in failing to object to the *trial in absentia* and failing to move for a continuance when petitioner was not present for trial and the record does not support that petitioner had notice of his trial date.

Petitioner Cooper was not present when the State called his case to trial on February 15, 2006. At the call of the case defense counsel told the judge, “Your Honor, with regard to the trial today he [Petitioner Cooper] did not have specific information that this case would be called for trial today.” (App. p. 4, lines 15-17). Counsel explained that he spoke to Cooper during the January 3<sup>rd</sup> term of court and Cooper explained that his grandmother passed. (App. pp. 4-5). According to counsel, Cooper knew that his case could be called for trial as early as January 30, 2006. (App. p. 5, lines 23-25). Counsel admitted, however, that Cooper did not know that his case was specifically set for trial for the week of February 15, 2006. (App. p. 6, lines 1-5). Counsel admitted that he had not tried to contact Cooper the week of February 15, 2006, when the case was called for trial. (App. p. 6, lines 6-20). Counsel also admitted that he had not contacted Cooper’s bondsman. (App. p. 7, lines 1-9). The State noted that the bond paper work signed by Cooper stated that if he did not appear in Court on September 6, 2005, he could be tried in his absence. (App. p. 6, lines 21-25). The State, however, offered no evidence that Cooper had notice of his trial date of February 15, 2006. Counsel did not move for a continuance and the trial was held in Cooper’s absence. Counsel did not object to the trial being held in Cooper’s absence.

In his application for post conviction relief Cooper alleged that trial counsel was ineffective in failing to move for a continuance and failing to object to the trial in Cooper’s absence. (App. p. 178). During the PCR hearing Cooper testified that he did not receive notice of his trial date. (App. p. 192, lines 13-25). Trial counsel testified at the PCR hearing that he mailed a letter to Cooper

indicating that he was required to be in court on February 13, 2006. (App. p. 208, line 4 – p. 209, lines 1-12). Trial counsel testified, however, that he did not specifically recall telling Cooper of his trial date. (App. p. 202, line 24 – p. 203, lines 1-10).

In the order of dismissal the PCR judge found counsel was not ineffective in failing to request a continuance and distinguished Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006). (App. pp. 225-226). The PCR judge further found that even if trial counsel was ineffective in failing to seek a continuance, Cooper was not prejudiced by the error because, according to the PCR judge, Cooper waived his right to be present at trial. (App. p. 226). The PCR judge erred.

Counsel was ineffective in failing to ask for a continuance or object to Cooper being tried in his absence when the record from the trial fails to reflect that Cooper received notice of his trial date. Cooper could not have waived his right to present at trial, as found by the PCR judge, if he did not have notice of his trial date. Cooper was prejudiced by counsel's deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable

probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Counsel was ineffective in failing to ask for a continuance or object to Cooper being tried in his absence. In Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006), the South Carolina Supreme Court found trial counsel ineffective in failing to ask for a continuance so that Morris could plead guilty to the lesser offense of ABHAN as agreed by the State and Morris. In Morris trial counsel objected to the trial proceeding *in absentia* but failed to move for a continuance. In the present case trial counsel did not object to the trial *in absentia* **and** failed to move for a continuance. While Cooper did not intend to enter a guilty, as the defendant in Morris, he did not waive his right to be present at trial.

Rule 16 of the South Carolina Rules of Criminal Procedure 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.

Rule 16, SCRCrimP.

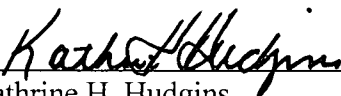
A trial judge must determine that a criminal defendant voluntarily waived his right to be present at trial in order to try the case *in absentia*. See Rule 16, SCRCrimP; State v. Castineira, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct.App.2000) The judge must make findings of fact on the record that the 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. Castineira, 341 S . C. at 623, 535 S.E.2d 451; State v. Jackson, 288 S.C. 94, 96, 341 S.E.2d 375 (1986).

The record fails to reflect that the trial judge made the requisite findings in order to proceed with a trial *in absentia*. While the bond paperwork notified Cooper that he could be tried in his absence if he failed to appear on September 6, 2005, the State failed to present evidence that Cooper had notice of his February 15, 2006, trial date. In the absence of the requisite findings for a trial *in absentia*, the trial judge would have erred in refusing to grant a continuance to allow proper notice to Cooper of his specific trial date. Counsel was ineffective in failing to object to the trial *in absentia* and failing to move for a continuance when the record fails to reflect that Cooper had notice of his trial date. Cooper did not waive his right to be present at trial and was prejudiced by counsel's failure to protect Cooper's right to be present at trial.

**CONCLUSION**

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of January, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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DUVAL M. COOPER,

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APPELLATE CASE NO. 2013-001428

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CERTIFICATE OF SERVICE  
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also Mr. Duval M. Cooper #340970 Broad River Correctional Institution 4460 Broad River Road Columbia, SC 29210, this 13th day of January, 2014.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day  
of January, 2014.

  
\_\_\_\_\_  
(L.S.)

Notary Public for South Carolina  
My Commission Expires: July 24, 2022.