

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY 28 2014

S.C. Supreme Court

Certiorari to Lancaster County

Clifton Newman, Circuit Court Judge

STEVEN MCFARLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002787

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to advise petitioner of a firm date on which his trial was scheduled to begin because this omission resulted in petitioner being tried in absentia on the first day of his trial and violated his right to be present at every stage of his trial.

STATEMENT

Petitioner Steven McFarland was found guilty of shoplifting, third offense, per jury trial held during the July 2010 term of the Lancaster County General Sessions Court before Judge Paul M. Burch.¹ Petitioner was sentenced to imprisonment for a period of ten years, suspended upon the service of nine years, and five years probation. App. 1-102. Mark Grier represented petitioner at trial, and Assistant Solicitor Trey Cook appeared on behalf of the state. Petitioner appealed, but his conviction and sentence were affirmed. Kathrine H. Hudgins represented petitioner on direct appeal. See State v. McFarland, Unpublished Opinion No. 2012-UP-586 (S.C. Ct. App. October 31, 2012). App. 111.

On November 26, 2012, petitioner filed a PCR application with the Lancaster County Office of the Clerk of Court, and then he filed three amended PCR applications with the Clerk's Office dated May 9, 2013, June 12, 2013, and July 15, 2013, respectively. App. 104-110; App. 117-125.

The respondent filed a return dated June 25, 2013, in response to petitioner's PCR action and requested that a hearing be held in the case. App. 113 – 116.

A hearing was convened on August 5, 2013, at the Lancaster County Courthouse before Judge Clifton Newman. App. 126 – 173. Petitioner was present at the PCR hearing and represented by Charles T. Brooks, and Assistant Attorney General Suzanne White appeared on behalf of the state. On December 12, 2013, Judge Newman issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 175-183.

Petitioner appealed Judge Newman's Order of Dismissal. This petition follows.

¹ Petitioner was tried in absentia on the first day of his trial, but he appeared on the second (final) day of his trial.

ARGUMENT

Trial counsel erred in failing to advise petitioner of a firm date on which his trial was scheduled to begin because this omission resulted in petitioner being tried in absentia on the first day of his trial and violated his right to be present at every stage of his trial.

The state's case at trial consisted of the testimony of two state's witnesses: arresting officer Ricky Funderburke, and Walmart Manager Diane Smith. The defense presented one witness (Cynthia Gaston) at trial.

Police Officer Ricky Funderburke testified that he was on foot patrol at Walmart in Lancaster around 10:00 p.m. on November 22, 2009, when he encountered a male (and his girlfriend) who looked like they were shoplifting from the store. Officer Funderburke stated that he saw the male, who was later identified as petitioner, "holding his coat out ...while the female subject [stood] behind him and was stuffing some items [meat]...in the back of his jacket." Officer Funderburke stated that he ordered the two to stop, but both fled instead. Officer Funderburke explained that he chased petitioner into the parking lot and ultimately had to use a taser on petitioner to stop him and then apprehend him. Petitioner was in possession of meat at the time of his arrest. App. 25, l. 16 – p. 35, l. 5. Walmart store manager Diane Smith was working and on the scene when these events in question occurred. Smith gathered up all the stolen meat that was in the parking lot and totaled the goods at \$220.71. App. 44, l. 12 – p. 47, l. 25.

Defense witness Cynthia Gaston testified on behalf of the defense at trial and explained that she went into Walmart on that night to in effect shoplift because she needed money to keep her "power [from being] turned off." Gaston stated that she stuffed her pocketbook, jacket, and shirt with meat and steaks, and that while doing so, petitioner came into Wal-Mart to "check on [her],"

and that she tried to put the “stuff” coming out of her shirt into Steve’s jacket when the officer witnessed this. App. 56, l. 25 – p. 63, l. 17.

During the PCR hearing, petitioner testified in effect that he did not receive notice of his trial date along with notice of his right to be present at trial by trial counsel, and that he did not receive notice by trial counsel that he would be tried in his absence if he did not appear in court for his trial. App. 130, l. 4 – 15; App. 135, lines 4 – 14. Petitioner appeared in court at 9:00 am on July 29, 2010, based on counsel’s instructions, but added that counsel never clarified for certain whether he was supposed to have been in court on the day before on the afternoon of July 28, 2010. App. 154, l. 12 –p. 156, l. 3.

Trial counsel’s PCR testimony supported petitioner’s position because counsel admitted that he told petitioner that it was not an “absolute certainty” that the trial would begin at 2:00 p.m. on July 28, 2010. App. 169, l. 3 – 24. Therefore, the trial judge’s finding at trial on July 28, 2010, that petitioner was noticed of his trial date was made sans knowledge that petitioner’s trial counsel did not give petitioner a firm date on which to appear for trial. App. 3, l. 5 – p. 5, l. 18.

The PCR judge ruled that petitioner failed to meet his burden of proof needed to establish that counsel was ineffective in failing to object to his trial in absentia and that even if error occurred in that regard, there was no prejudice in effect shown because petitioner was present at the second (final) day of his trial and available to testify in his defense and present his case in his defense at that time. App. 178 – 180.

Clearly, petitioner was denied his right to be present on the first day of his trial. A defendant has a right via the Confrontation Clause to be present in the courtroom at every stage of his trial. Illinois v. Allen, 397 U.S. 337 (1970). Although a defendant may voluntarily waive his right to be present at trial and be tried in the absence, there must be proof that the defendant has received notice

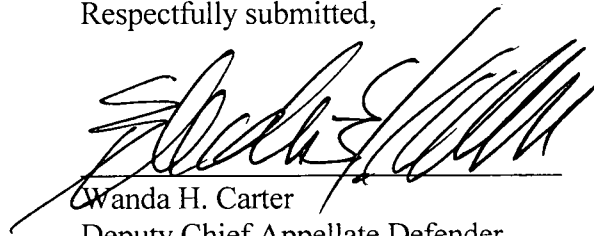
of his or her right to be present at trial and a warning that that trial would proceed in this absence if he did not attend. State v. Fleming, 287 S.C. 268, 335 S.E.2d 814 (1985), State v. Williams, 292 S.C. 231, 355 S.E.2d 861 (1987). Trial counsel's advice to petitioner that it was not an "absolute certainty" that his trial would commence on the afternoon of July 28, 2010, meant that he did not receive notice of a firm date for his trial. In other words, if petitioner was unclear about or knew not the date on which his trial would commence, then he did not properly waive his right to be present at trial and his absence on the first day of his trial violated his constitutional right to be present on that day.

Counsel's error in failing to advise petitioner of a firm date on which his trial was scheduled to have been held constituted deficient performance in violation of petitioner's right to effective assistance of counsel in his case and his right to be present at his trial, both of which are rights guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. See also Strickland v. Washington, 466 U.S. 668 (1984). But for counsel's error in this regard, petitioner would have been present during his entire trial.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue raised above.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of May, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LANCASTER COUNTY
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

STEVEN MCFARLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002787

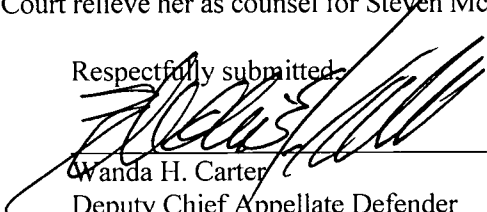
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven McFarland states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 5, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Steven McFarland.

Respectfully submitted,


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of May, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
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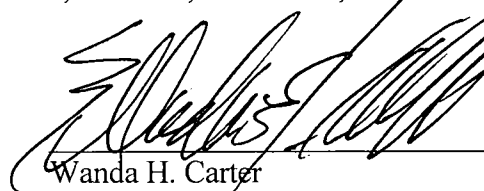
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

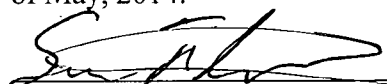
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Steven McFarland, #263704, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128, this 28th day of May, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of May, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.