

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

R. Knox McMahon, Circuit Court Judge

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SEP 10 2014

S.C. Supreme Court

RANDALL Q. SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002632

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner is entitled to the grant of post-conviction relief and a new trial where he was tried in his absence without meaningful notice of the actual trial date?

STATEMENT

Indictment

On January 3, 2008, Petitioner Randall Q. Sanders was indicted by the Sumter County Grand Jury for possession with intent to distribute cocaine. App. 158-159.

Trial and Guilty Verdict

A jury trial was held before the Honorable R. Ferrell Cothran, Jr. on January 13-14, 2009. App. 1. Petitioner was represented by Lauren B. Stevens, and the State was represented by Assistant Solicitor Trey McLeod. Id. Petitioner, however, was not present for his trial. App. 11, ll. 1-3. Defense counsel made a motion for a continuance on the ground that he was not present and because during her last communication with Petitioner in December 2008, Petitioner had expressed that he was dissatisfied with her representation and was going to retain a different attorney. The Trial Court denied defense counsel's motion. App. 11, ll. 1-23.

The State entered as evidence that Petitioner had signed a bond form which provided:

[Petitioner] shall appear at the term of the Court of General Sessions beginning on April the ninth, 2007 at 8 a.m. at Sumter County General Sessions . . . and remain there throughout that term of court.

If no disposition is made during that term, the [Petitioner] shall appear and remain throughout each succeeding term of court until final disposition is made on his case unless otherwise ordered by the Court.

App. 14, ll. 2-10.

On January 14, 2009, the jury found Petitioner guilty as charged. App. 69, ll. 6-8. Later that same day, Petitioner appeared for sentencing. Petitioner informed Judge Cothran that he came to the courthouse every day that week - Monday, Tuesday, and Wednesday -

but that his name was never on the trial list. He did not find out until Wednesday, January 14, 2009 after the jury's verdict that his case had been tried. App. 72, l. 8 – 73, l. 22. Judge Cothran sentenced Petitioner as a third offender to a term of eighteen (18) years and imposed a \$50,000.00 fine. App. 74, ll. 3-9.

On September 24, 2009, a hearing was held before Judge Cothran on Petitioner's motion for reconsideration of his sentence. App. 78-92. Defense counsel argued to Judge Cothran that the first day Petitioner's name appeared on the trial list was Tuesday and he was tried on Wednesday. Defense counsel believed that if more notice of the trial date had been given, Petitioner would have been present for his trial. App. 81, ll. 18-22. Judge Cothran declined to change his sentence. App. 91, ll. 9-12.

Direct Appeal

Petitioner appealed his conviction and sentence to the South Carolina Court of Appeals. Appellate Defender Robert M. Pachak filed a brief of appellant pursuant to Anders v. California, 386 U.S. 738 (1967), arguing the Trial Court's jury charge on reasonable doubt did not meet constitutional standards. App. 94-103. The Court of Appeals dismissed the appeal on February 22, 2012. App. 104.

Application for Post-Conviction Relief and Evidentiary Hearing

On March 15, 2012, Petitioner filed an application for post-conviction relief ("PCR"), asserting in part that he was denied the right to be present at trial. App. 105-111. The State filed its Return on or about July 25, 2012. App. 112-117.

An evidentiary hearing was held before the Honorable R. Knox McMahon on October 2, 2013. App. 118-147. Petitioner was represented by Charles T. Brooks, III, and

the State was represented by Assistant Attorney General Daniel F. Gourley, II. App. 118. Both Petitioner and his trial counsel testified at the hearing. App. 121-145.

Petitioner testified that he was not notified of his trial date. When he arrived at the courthouse, he learned that his case had just been tried to a verdict that day. He said he then appeared for sentencing and was sentenced to eighteen (18) years. App. 123, l. 24 – 124, l. 21. Petitioner asserted that if he had been made aware of his trial date, he would have appeared for trial. App. 124, ll. 22-24; 125, ll. 20-22. Petitioner was emphatic that he received no notice “in any way, shape or form” of his trial date. App. 124, l. 25 – 125, l. 5; 126, ll. 23-25. Petitioner testified that he had always been there for other roll call dates. App. 129, l. 22.

Petitioner’s trial counsel claimed that she had a meeting with Petitioner the very morning of trial and informed him that his trial was going forward that morning at 9:30 a.m. whether he was present or not. App. 135, l. 25 – 136, l. 10. Her testimony at the PCR evidentiary hearing, however, was in direct contradiction to her statements made to the Trial Court on the morning of trial where she advised the Trial Court that she had not had any communication with Petitioner since a December 2008 preliminary hearing. App. 11, ll. 4-8. At the trial, Petitioner’s trial counsel made absolutely no mention of the fact that she had just spoken with Petitioner that morning. She instead represented to the Trial Court that it had been a little while since she had last spoken with Petitioner.

Petitioner’s trial counsel did testify that if Petitioner had checked the trial list on January 12, 2009, Petitioner’s case would not have been listed that day. His name would not have shown up until the 13th, the first day of trial. App. 141, ll. 4-17.

At the conclusion of the evidentiary hearing, Petitioner's PCR counsel argued to Judge McMahon that Petitioner was entitled to a new trial where he did not receive notice of his trial. App. 146, ll. 2-5.

Order of Dismissal

On December 9, 2013, Judge McMahon filed his Order of Dismissal ruling that Petitioner had not established any constitutional violations or deprivations that would require the court to grant his PCR application. Judge McMahon therefore denied and dismissed Petitioner's PCR application with prejudice. App. 149-156. In the Order of Dismissal, Judge McMahon found that trial counsel's testimony was more credible than Petitioner's. App. 152. Judge McMahon further ruled that Petitioner was not entitled to a new trial where the trial occurred in his absence because trial counsel had testified that she met with Petitioner the morning of trial and informed him that his case would be tried that day. App. 154.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner is entitled to the grant of post-conviction relief and a new trial where he was tried in his absence without meaningful notice of the actual trial date.

The PCR court erred in denying Petitioner post-conviction relief where Petitioner was tried in his absence in violation of Petitioner's Sixth Amendment right to be present at every stage of his trial and in violation of the Due Process Clause of the Fourteenth Amendment where Petitioner did not receive meaningful notice that his trial would occur on that particular date.

Under S.C. CODE ANN. § 17-27-20(A)(1), a person whose conviction and sentence was obtained in violation of the Constitution of the United States is entitled to the grant of post-conviction relief. See Gibson v. State, 329 S.C. 37, 41-42, 495 S.E.2d 426, 428 (1998) (recognizing that a petitioner may allege constitutional violations in a post-conviction relief proceeding).

In this case, Petitioner's conviction and sentence were obtained in violation of the Constitution where he did not receive meaningful notice of his trial date and was tried in his absence. The State, instead of giving Petitioner actual notice of the trial date, relied on the boilerplate language of a bond form that insisted Petitioner remain tethered to the courthouse until it decided to exercise its power and call his case to trial. App. 14, ll. 2-10. The bond form that Petitioner signed informed Petitioner that his case would be called to trial on **April 9, 2007** and that if his case was not called on that date, he would be expected to "appear and remain throughout each succeeding term of court until final disposition [was] made on his case." Id. Petitioner's trial did not actually occur until **645 days** later on January 13, 2009. Therefore, for over a year and a half, Petitioner was expected to show up to each term of court and remain there to see if his case would be called for trial.

Such a practice, insisting that the defendant come to every single term of court until his case is called and refusing to provide the defendant notice of the actual trial date, fails to offer meaningful notice to the defendant that his case will be tried and is a fundamental denial of due process.

An accused's right to be present at his own trial is among the most fundamental rights our Constitution secures. It is a basic premise of our justice system that "in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105–106, (1934). This longstanding right reflects the "notion that a fair trial [can] take place only if the jurors me[e]t the defendant face-to-face and only if those testifying against the defendant [do] so in his presence." Crosby v. United States, 506 U.S. 255, 259 (1993); see also Diaz v. United States, 223 U.S. 442, 455 (1912) (right to be present is "scarcely less important to the accused than the right of trial itself"). Thus, in general, "if [the defendant] is absent [from trial], . . . a conviction will be set aside." Crosby, 506 U.S. at 259.

The United States Supreme Court has acknowledged only two exceptions to this general rule. First, at least in noncapital trials, a defendant may waive his right to be present "if, after the trial has begun in his presence, he voluntarily absents himself." Crosby, 506 U.S. at 260, (quoting Diaz, 223 U.S. at 455). Second, "a defendant can lose his right to be present at trial if, after being warned that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly,

disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” Illinois v. Allen, 397 U.S. 337, 343 (1970).

Petitioner’s case does not fall within either of these two exceptions recognized by the United States Supreme Court. Rather, Petitioner was tried in his absence based on his actions prior to the start of trial. This action by Petitioner was the of signing a bond form which did not provide any notice of the actual trial date but yet stated on the form that a trial could proceed in Petitioner’s absence if he failed to attend. App. 17, ll. 19-20.

As Justice Sotomayor of the United States Supreme Court has recognized, “[a] trial conducted without actual notice to a defendant and in his absence makes a mockery of fair process and the constitutional right to be present at trial.” Fairey v. Tucker, 132 S. Ct. 2218, 2221 (2012).

While the PCR court found credible trial counsel’s testimony that she met with Petitioner the morning of trial and informed him that his case would be tried that day, her testimony is not credible in the least where she explicitly informed the Trial Court on the morning of trial, January 13, 2009, that she had not had any communication with Petitioner since December 2008:

[T]he last communication I had with [Petitioner] was a preliminary hearing in December where he expressed dissatisfaction with my representation thus far, had told me that he was going to hire a real attorney.

App. 11, ll. 4-8.

In light of this statement made at trial which directly refutes her testimony at the PCR evidentiary hearing that she saw Petitioner on the morning of trial, trial counsel’s PCR testimony cannot be believed. There is no other evidence that Petitioner received actual notice of his trial date. In fact, Petitioner told Judge Cothran at sentencing that he had

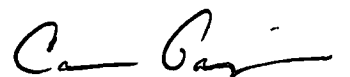
appeared at the Trial Court to check the trial list that Monday, Tuesday, and Wednesday before trial but that his name was not on the list. App.72, l. 25-73, l. 1. At the PCR evidentiary hearing, trial counsel confirmed that Petitioner's name would not have been on the list when he checked. App. 141, ll. 4-17.

Petitioner is accordingly entitled to the grant of post-conviction relief and a new trial where he was tried in his absence in violation of his Sixth Amendment right to be present at every stage of his trial and tried without meaningful notice of his trial date in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth herein, Petitioner Randall Q. Sanders respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
R. KNOX MCMAHON, CIRCUIT COURT JUDGE

RANDALL Q. SANDERS,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-002632

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Randall Q. Sanders states:

1. She is an 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 October 2, 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 Randall Q. Sanders.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of September, 2014

STATE OF SOUTH CAROLINA
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Certiorari to Sumter County
R. Knox McMahon, Circuit Court Judge

RANDALL Q. SANDERS,

PETITIONER,

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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

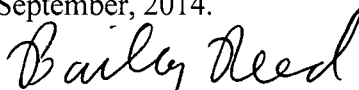
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Randall Q. Sanders, #332675, at Lee Correctional Institution this 10th day of September, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of September, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.