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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

AUG 12 2015
SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
General Sessions Court

William Seals, Circuit Court Judge

Case No. 2014-000849

The State,

Respondent,

v.

Derron Jardell Myers,

Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN PROCEEDING WITH TRIAL IN DEFENDANT'S ABSENCE?

STATEMENT OF THE CASE

On August 29, 2013, Deron Jardell Myers was indicted in case no. 2013-GS-21-01167, with two counts of attempted murder, a violation of S.C. Code Ann. § 16-3-29 (1976) and one count of possession of a weapon during a crime of violence, a violation of S.C. Code Ann. § 16-23-490 (1976).

The trial commenced on April 14, 2014 before the Honorable William Seals, Circuit Court Judge, and concluded on April 15, 2014 with the defendant, Deron Jardell Myers, being found guilty on all three counts of the indictment.

On April 15, 2014, Myers was sentenced to 20 years on each count of attempted murder and 5 years for the count of possession of a firearm during the commission of a crime of violence. The sentences were ordered to run concurrent.

FACTS

Deron Jardell Myers was indicted in a three count indictment in the Court of General Sessions, Florence County, Indictment no.: 2013-GS-21-01167, with two counts of attempted murder, a violation of S.C. Code Ann. § 16-03-29 (1976) and one count of possession of a weapon during a crime of violence, in violation of S. C. Code Ann. § 16-23-490 (1976).

The case was called to trial before the Honorable William Seals, Circuit Judge, on April 14, 2014 (R.p.7, line 3-13). Myers was not present in the courtroom at the call of the case.

The court proceeded to question defense counsel on the notice provided to Myers requiring his attendance at trial. Upon counsel's advising the court that he had met with Myers that morning at his office, the court instructed the bailiff to announce the name of the defendant three times to see if he answered. Upon his failure to answer, the court determined that the defendant was absent from court, even though he was given notice that the trial would go forward without his presence. (R.p.7, line 17-R.p. 8, line 17).

The court then proceeded with the selection of the jury with no further instructions to the jury regarding the defendant Myers' absence from the courtroom (R. p. 8, line 18-R.p.9, line 19). The state presented its first witness, Michael D'Angelo Taylor. At the conclusion of Taylor's testimony the jury was excused for a lunch break (R.p.57, line 20).

Following the jury being excused for a lunch break, the Deputy Solicitor moved for a bench warrant against defendant Myers, with no objection from defense counsel, the court granted the Deputy Solicitor's motion (R.p. 5, line 16 - 24).

Upon resumption of the case following the lunch break, defense counsel advised the court

that the defendant was present and was in fact present at the time the trial began but was unable to gain entry into the courtroom because the bailiff had informed him that he was not allowed to enter the courtroom. The bailiff sent Myers to the 10th floor courtroom where he remained while his trial commenced (R.p. 58, line. 1- R.p.59, line 15).

The trial court in its charge to the jury at the conclusion of the evidence stated the following:

Furthermore, ladies and gentlemen of the jury, at the beginning of this trial the defendant was on the tenth floor of this courtroom instead of the 11th floor courtroom. Apparently, he has received instructions from the court bailiff to go to the 11th instead of here. This resulted in the defendant being absent during the opening statements and the first witnesses' testimony, however, he has been present in the courtroom since that time. In this regard and under the laws of this state, a defendant may be tried even if the defendant does not attend his trial or even part of the trial; but the fact that the defendant was not present during this short time at the beginning of the trial, may not be considered against the defendant in any manner whatsoever. Do not consider the fact in any way in your deliberations. It was a simple mix-up between the bailiff and the defendant and should not prejudice the defendant in any way. (R.p. 186, line 15-R.p. 187, line 10).

There was no further mention or additional charge to the jury concerning the defendant's absence from court.

At the conclusion of the trial the defendant was convicted of both counts of attempted murder and one count of possession of a weapon during a crime of violence. Defendant Myers was sentenced to 20 years on each count of attempted murder and 5 years on the count of possession of a weapon during the commission of a violent crime, the sentences to run concurrent.

ARGUMENT

1. BECAUSE THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION GUARANTEES THE RIGHT OF AN ACCUSED TO BE PRESENT AT EVERY STAGE OF HIS TRIAL, THE COURT ERRED WHEN IT PROCEEDED TO TRIAL IN THE ACCUSED'S ABSENCE.

A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try a 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)).

Here the trial court merely asked defense counsel, "Did you provide him notice to attend his trial?" (R.p. 7, line 14-15). When defense counsel responded affirmatively, the court further inquired, "Do you have a letter to that effect we could make a part of the record?" (R.p. 7, line 17-19). Defense counsel responded that Myers had been in his office that morning. (R.p., line 20-22). Other than instructing the bailiff to call for the defendant three times, no other inquiry was made by the court. (R.p. 8, line 4-17).

No efforts were made to determine if the defendant was in the tenth floor courtroom, where other defendants and Myers had been sent, by the bailiff. The jury selection, opening arguments and the testimony of the first state's witness, all crucial stages in the trial, proceeded without the presence of Myers.¹

It is crucial that the court make a determination that Myers voluntarily waived his right to be present at trial and therefore was properly tried *in absentia*. *State v. Ravenell*, 387 S.C. 449, 443, 692 S.E.2d 554, 558 (Ct. App. 2010).

1. Myers' counsel failed to move for a continuance to allow time for him to locate his client.

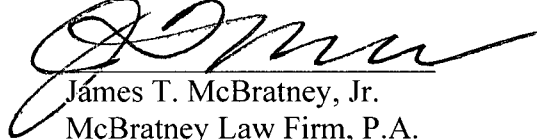
The record reflects that Myers did not voluntarily absent himself from court, but rather was prevented from entering the courtroom by the bailiff. The determination that the absence is voluntary is a crucial element that must be met before a trial *in absentia*. *Ravenell*, 387 S.C. at 452, 692 S.E. 2d at 557.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court, and grant the defendant a new trial.

August 5, 2015

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Brief of Appellant and Record on Appeal by depositing a copy of same in the United States Mail, postage prepaid, on August 11th 2015, addressed to the attorney of record:

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