

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Perry H. Gravely, Circuit Court Judge

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MAY = 4 2016

SC SUPREME COURT

ELI TORRENCE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002328

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

The PCR judge erred in denying petitioner's allegation that his Magistrate's Court convictions were in obtained in violation of his constitutional rights that guaranteed a jury trial, and the representation by counsel at trial, and his presence at trial.

STATEMENT

On August 15, 2013, petitioner Eli Torrence was convicted in a Greenville County Magistrate's Court of driving without a license, simple possession of marijuana, and reckless driving before Judge Dean E. Ford. App. 25 – 27. Petitioner received a time served sentence to run currently with the fifteen-year sentence he presently serves on a prior second degree burglary conviction. Petitioner did not appeal his Magistrate's Court convictions.

On July 17, 2014, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 1 – 7. The respondent filed a return dated November 22, 2014, requesting that the case be summarily dismissed for failing to state a cognizable PCR claim. App. 8 – 11.

A PCR hearing was convened on October 21, 2015, at the Greenville County Courthouse before Judge Perry H. Gravely. App. 12 – 19. Petitioner was present at the hearing and represented by R. Mills Ariail, Jr., and Assistant Attorney General Karen C. Ratigan appeared on behalf of the state. On November 3, 2015, Judge Gravely issued an Order of Dismissal with prejudice in the case. App. 21 – 24.

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

ARGUMENT

The PCR judge erred in denying petitioner's allegation that his Magistrate's Court convictions were obtained in violation of his constitutional rights that guaranteed a jury trial, and representation by counsel at trial, and his presence at trial.

The Clerk of Court records from Magistrate's Court reflect that petitioner received a bench trial in Magistrate's Court on August 15, 2013, and was adjudicated guilty by Judge Dean E. Ford on the charges of driving without a license, simple possession of marijuana, and reckless driving. App. 25 – 27.

During the PCR hearing, petitioner testified that he never appeared before Judge Ford in Magistrate's Court for adjudication and sentencing on the charges in question. App. 13, l. 5 – 13; App. 13, l. 24; App. 16, l. 2 – p. 17, l. 8; App. 18, l. 3 – 24. Petitioner explained further as follows:

Judge Diane Cagle and her secretary pulled me from Kirkland Correctional Institute to the Lieber Correctional Institution where she held court for certain cases. She asked me if I wanted to apply for indigent defense or if I had my own attorney or if I wanted to go ahead and plead out to the charges on that day. I stated that I needed indigent defense because I didn't have money for my own attorney, and she handed me a paper saying to contact the Indigent Defense office in Greenville to take my case. I left. I never pled out to any record at all of me ever seeing the judge, there are no transcripts, there's no record of anything. It's like I never seen anybody.
App. 14, l. 24 – p. 15, l. 14.

The PCR judge ruled that petitioner's Magistrate's Court convictions were constitutional based on the summary court records reflecting that such an adjudicatory a bench trial occurred in Magistrate's Court on petitioner's behalf on August 15, 2013.

The scope of review on PCR appeal is whether there is "any evidence" of probative value that is sufficient to support the post-conviction relief judge's findings. Webb v. State, 281 S.C. 237, 314 S.E.2d 639 (1984).

A.) Right to be Present at Trial

Petitioner alleged that he was not present at any bench trial in Magistrate's Court on his behalf. App. 16, lines 2 – 19. There is no evidence in the record to refute this claim. An accused has a right to be present at every stage of his criminal proceeding per the Sixth Amendment and its applicability to the states via the Fourteenth Amendment. Illinois v. Allen, 397 U.S. 337 (1970).

B.) Right to a Trial by Jury

Petitioner stated that he never agreed to a bench trial in Magistrate's Court. App. 16, lines 20 – 23. There is nothing in the record indicating that petitioner waived his right to a trial by jury and consented to a bench trial in Magistrate's Court. A waiver of a jury trial in Magistrate's Court must be agreed upon by the prosecution and the trial judge and impliedly by the defendant. See State v. Hanson, 285 S.C. 543, 331 S.E.2d 782 (1985), citing to Singer v. United States, 380 U.S. 24 (1965). See also S.C. Code Ann. § 22-3-770, and S.C. Cost. Art. 5 § 1, and State v. Warren, 273 S.C. 159, 255 S.E.2d 668 (1979).

C.) Right to Counsel

Petitioner testified at the PCR hearing that he was not appointed counsel to represent him in Magistrate's Court on the charges against him. App. 16, l. 25 – p. 17, l. 6. The Sixth Amendment right to counsel attaches in Magistrate's Court if an indigent defendant could receive a sentence that might end up in the actual deprivation of his or her liberty. See Tally v. State, 371 S.C. 535, 640 S.E.2d 878 (2007), citing to Alabama v. Shelton, 535 U.S. 654 (2002), and Argersinger v. Hamilton, 407 U.S. 25 (1972), and Scott v. Illinois, 440 U.S. 367 (1979). Also, the record indicates no valid waiver by petitioner of his right to counsel. See Faretta v. California, 422 U.S. 806 (1975).

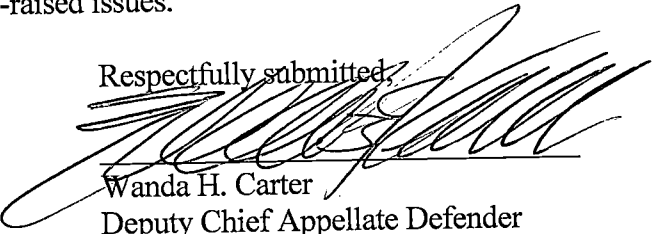
A waiver is the intentional relinquishment of a known right Johnson v. Zerbst, 304 U.S. 458 (1938). The record does not indicate that petitioner waived his right to a jury trial, or his right to

counsel, or his right to be present at his bench trial. Thus, petitioner's Magistrate's Court convictions were unconstitutionally obtained and must be vacated.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner requests that the petition be granted and full briefing allowed on the above-raised issues.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Perry H. Gravely, Circuit Court Judge

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PETITIONER,

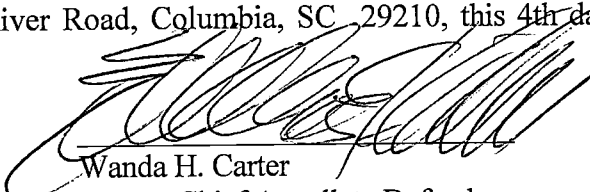
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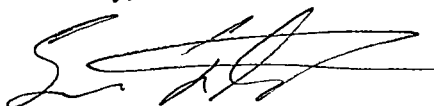
CERTIFICATE OF SERVICE

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 Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Eli J. Torrence #356338, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of May, 2016.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of May, 2016.



(L.S.)

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