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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

CHARLES HENRY DAVIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000049

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Did the PCR judge err in not finding trial counsel ineffective for failing to challenge the trial in absentia based on the fact that the bond form warning Petitioner that he could be tried in his absence was signed on May 26, 2007, and the State failed to call the case for trial until almost six years later on February 13, 2013?

STATEMENT

On February 7, 2013, the Lancaster County Grand Jury indicted Petitioner Davis for burglary first degree and assault and battery of a high and aggravated nature [ABHAN], indictments #2007-GS-29-866, 867. On February 13, 2013, the State called the case for trial before the Honorable Brooks P. Goldsmith. Mark Grier represented Petitioner at trial. Randy Newman prosecuted the case. Petitioner did not appear for the trial and was tried in his absence. The jury returned verdicts of guilty and Judge Goldsmith sentenced Petitioner under seal. On June 18, 2013, Petitioner appeared before the Honorable J. Ernest Kinard for pronouncement of the sealed sentence. Judge Goldsmith had sentenced Petitioner to twenty (20) for burglary first degree and ten (10) years concurrent for ABHAN. Judge Kinard reduced the sentence on the burglary charge from twenty (20) years to fifteen (15) years. A timely notice of intent to appeal was filed and the direct appeal perfected. Lara M. Caudy of the South Carolina Commission on Indigent Defense Appellate Division represented Petitioner on appeal. On July 16, 2014, the South Carolina Court of Appeals dismissed the appeal. State v. Davis, Op. No. 2-14-UP-209 (S.C.Ct.App. Filed July 16, 2014).

On August 5, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 31, 2014. On February 3, 2015, an evidentiary hearing was held before the Honorable Deandrea Benjamin. W. Michael Hemlepp, Jr. represented Petitioner at the PCR hearing. Croom Hunter represented the State. In a written order signed November 23, 2015, Judge Benjamin denied relief and dismissed the application. A timely notice of intent to appeal was served on January 4, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in not finding trial counsel ineffective for failing to challenge the trial in absentia based on the fact that the bond form warning Petitioner that he could be tried in his absence was signed on May 26, 2007, and the State failed to call the case for trial until almost six years later on February 13, 2013.

On February 13, 2013, the State called Petitioner's case for trial. The actions giving rise to the indictments took place almost six years earlier on May 26, 2007. The State alleged that Petitioner burglarized the apartment of Sharita Ryan Colbert, the mother of Petitioner's unborn twins, and assaulted her boyfriend. At trial Colbert admitted that she had given petitioner a key to the apartment. (App. p. 42, lines 9-17). Petitioner, however, failed to appear for the trial.

Counsel for Petitioner moved for a continuance. (App. p. 3, lines 5-17). The State opposed the continuance motion. (App. p. 3, lines 19-22). The judge questioned the State, "What makes you think that he [Petitioner] knows that if he doesn't show up for trial this week that he might be tired in his absence?" (App. p. 4, lines 12-14). The State replied, "He signed the bond papers which state, 'It has been explained to me that if I fail to appear before the court as required a warrant will be (blank) for my arrest. I have a right and obligation to be present at trial and should I fail to attend the court the trial will proceed in my absence, signed Charles Davis, May 26, 2007.'" (App. p. 4, lines 15-20). The bond form was not made a part of the record. The judge then specifically asked the State if Petitioner was advised during the last term of court that if he did not appear for trial, he would be tired in his absence. (App. p. 4, lines 21-25). The State replied, "I believe he was, Your Honor. In fact I remember myself and Mr. Grier had a conversation about it and I offered to put something on the record and Mr. Grier said, 'No, I understand, if he's not here we're going forward.'" (App. p. 5, lines 1-5). Trial counsel then stated, "I can't specifically remember that but that is not unlikely." (App. p. 5, lines 6-7). The

judge then denied the continuance motion stating, “I find that the defendant knew or should have known that he had to be here this week for trial, that he has failed to appear and therefore he has waived his right to be present at trial.” (App. p. 5, lines 8-11). The trial judge failed to make findings of fact in regard to whether Petitioner was warned he would be tried in his absence should he fail to attend. Trial counsel failed to object to the judge’s failure to make findings of fact about whether Petitioner was warned about a trial in absentia and failed to object to the trial in absentia. Trial counsel was ineffective in failing to challenge the trial in absentia based on the fact that the bond form purporting to warn Petitioner that he could be tried in his absence was signed on May 26, 2007, and the State failed to call the case for trial until almost six years later on February 13, 2013.

The judge erred in refusing to grant a continuance and allowing the trial to proceed in absentia. The trial court’s denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion. State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002). In State v. Ravenell, 387 S.C. 449, 455-456, 692 S.E.2d 554, 557-558 (Ct.App. 2010), the South Carolina Court of Appeals, addressing a trial in absentia, wrote:

It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct.App. 2007); State v. Goode, 299 S.C. 479, 481, 385 S.E.2d 844, 845 (1989). *See also* Rule 16, SCRCrimP (“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.”). A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the 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)). 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. Id.

The trial judge failed to make findings of fact on the record that Petitioner was warned he would be tried in his absence should he fail to attend. The purported bond form from almost six years earlier should not be deemed a sufficient warning when the State failed to call the case to trial for almost six years. The trial judge erred in allowing the trial to proceed in Petitioner absence.

Trial counsel moved for a continuance but did not specifically object to the trial in absentia. In State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554 (Ct.App. 2010), trial counsel also moved for a continuance but did not specifically object to the trial in absentia. “However, because Ravenell’s counsel did move for a continuance, and in light of the fact that the trial judge made findings on the record that Ravenell was given notice the trial would proceed without him and he would be tried *in absentia* should he fail to appear, we find it proper to address the matter on the merits.” Ravenell, 387 S.C. at 456-457, 692 S.E.2d at 558. In contrast, in the present case, the trial judge failed to make the proper findings with regard to whether petitioner was warned that he would be tried in his absence if he did not appear for trial. Trial counsel was ineffective in failing to object when the judge failed to make the proper findings.

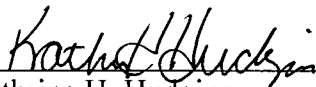
In the order of dismissal the PCR judge wrote: “Accordingly, this Court finds Applicant did not demonstrate any deficiencies in Counsel’s representation. This Court finds that because Counsel’s representation was well within the range of competence required in criminal cases, Applicant has further failed to make any showing that but for Counsel’s alleged deficiencies, the result of Applicant’s case would have been any different.” (App. p. 197). The PCR judge erred.

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.

Trial counsel was ineffective for failing to challenge the trial in absentia based on the fact that the bond form warning Petitioner that he could be tried in his absence was signed on May 26, 2007, and the State failed to call the case for trial until almost six years later on February 13, 2013. Additionally, trial counsel failed to object when the trial judge failed to make specific findings of fact on the record in regard to whether Petitioner was warned he would be tried in his absence should he fail to attend. There is a reasonable probability that but for trial counsel's deficient performance, the outcome of the trial would have been different.

CONCLUSION

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



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lancaster County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

CHARLES HENRY DAVIS,

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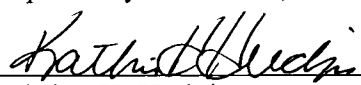
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Charles Henry Davis 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 record of Petitioner's trial before Judge DeAndrea G. Benjamin, which was held on February 3, 2015 (Evidentiary Hearing), and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Charles Henry Davis.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lancaster County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

CHARLES HENRY DAVIS,

PETITIONER,

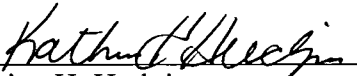
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STATE OF SOUTH CAROLINA,

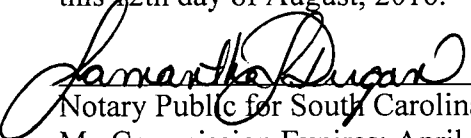
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johanna C. Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Charles Henry Davis, #299511, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of August, 2016.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of August, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026