

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

William H. Seals, Circuit Court Judge

ANTHONY TYRONE WILLIAMSON,

RECEIVED

DEC 18 2017

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001050

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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II. Trial counsel erred in failing to move for a continuance when appointed to represent petitioner on the day of his second jury trial **after** the selection of the jury concluded because he had no time to prepare for trial previously and was unprepared to represent petitioner competently at that time, particularly since the Court in Morris v. State² held that the ineffectiveness of counsel is likely to be found in cases where counsel fails to move for a continuance when a defendant is tried in absentia.9

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¹ Both petitioner’s first and second trials were consolidated into one case on direct appeal.

² 371 S.C. 278, 639 S.E.2d 53 (2006).

ISSUES PRESENTED

I. Did trial counsel erred in failing to raise via objections during petitioner's second trial and at petitioner's sentencing hearing (when the sealed sentences were published) to errors associated with petitioner being tried in his absence sans any waiver at both his first and second trials, and to errors associated with petitioner being tried sans any waiver without counsel at his first trial because the omissions rendered these issues abandoned and not preserved for appellate review?³

II. Did trial counsel erred in failing to move for a continuance when appointed to represent petitioner on the day of his second jury trial **after** the selection of the jury concluded because he had no time to prepare for trial previously and was unprepared to represent petitioner competently at that time, particularly since the Court in Morris v. State⁴ held that the ineffectiveness of counsel is likely to be found in cases where counsel fails to move for a continuance when a defendant is tried in absentia?

³ Both petitioner's first and second trials were consolidated into one case on direct appeal.

⁴ 371 S.C. 278, 639 S.E.2d 53 (2006).

STATEMENT

Petitioner Anthony Tyrone Williamson was convicted of trafficking in cocaine base and possession of cocaine base with intent to distribute within proximity of a school/park on April 13, 2009, (hereinafter referred to as trial number one under 08-GS-21-317), at the Florence County General Sessions Court before Judge Ralph King Anderson, Junior. App. 1-73.

Also, petitioner was convicted of distribution of cocaine base (second offense), distribution of cocaine base within proximity of a school or park, trafficking in cocaine base (second offense), and possession of cocaine base with intent to distribute on April 22, 2009, (hereinafter referred to as trial number two under 09-GS-21-334), at the Florence County Courthouse before Judge Michael Nettles. App. 75-217.

Petitioner was tried in his absence at both trials, and Assistant Solicitor Patricia S. Parr appeared on behalf of the state at both trials. Petitioner was not represented by counsel at his first trial, but petitioner was represented by counsel, that being William V. Meetze, at his second trial **after** the selection of the jury was complete. Sealed sentences were imposed after each of the two trials. Petitioner was sentenced on October 29, 2009, at the Florence County General Sessions Court before Judge Anderson. App. 218-232. Petitioner was present at the sentencing hearing and represented by Attorney William V. Meetze at that time, and Assistant Solicitor Patricia S. Parr appeared on behalf of the state. Petitioner received an aggregate sentence of twenty-five years imprisonment as a result of his convictions from both cases.

Subsequently, petitioner appealed both cases. Although two separate briefs were filed, both of petitioner's cases were consolidated into one single appeal on file at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, formerly of the Office of Appellate Defense, represented petitioner on direct appeal in both cases.

In the appeal of his first trial, the following issues were raised:

- 1.) Whether the trial court erred by allowing the state to call appellant's case to trial when appellant was not represented by counsel.
- 2.) Whether the trial court judge erred by allowing the state to call appellant's case to trial when the state failed to show it had meaningfully informed appellant that a trial would occur on that date and would proceed in his absence. See App. 234-245.

In the appeal of his second trial, the following issue was raised on appeal:

Whether the trial court judge erred by declining to grant appellant's motion for a mistrial when a law enforcement officer testified that at the time they executed the search warrant they possessed a warrant for appellant's arrest. App. 259-270.

Assistant Attorney General David Spencer filed briefs in cases numbered one and two, respectfully, on behalf of the respondent. App. 246-258; App. 271-281.

The Court of Appeals affirmed both of petitioner's cases as consolidated and outlined its holding regarding the trials in absentia and the trial sans counsel's representation as follows:

- 1.) As to Williamson's issues concerning his right to counsel and his being tried in absentia; State v. Dunbar, 356 S.C.138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."); State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987)("In order to claim the protection afforded by [Rule 16, SCRCrimp], a defendant or his attorney must object at the first opportunity to do so"). App. 282-283
- 2.) As to Williamson's motion for a mistrial; State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000)(stating a defendant must show both error and prejudice resulting from such error to receive a mistrial; State v. White, 371 S.C. 439, 447-48, 639 S.E.2d 160, 164 (Ct. App. 2006)("Insubstantial errors that do not impact the result of a case do not warrant a mistrial when guilt is conclusively proven by competent evidence."). App. 282-283.

See State v. Williamson, Unpublished Opinion No. 2012-UP-089 (S.C. Ct. App. filed Feb. 22, 2012). App. App. 282-283. A petition for rehearing was filed March 7, 2012, and denied by the Court of Appeals on May 4, 2012. App. 284-293. Note that a return to petitioner's petition for rehearing was filed by David Spencer on behalf of the respondent on March 30, 2012. App. 294-300. On May 4, 2012, the Petition for rehearing was denied. App.301.

On August 1, 2012, Dayne C. Phillips, formerly of the Office of Appellate Defense, filed in the South Carolina Supreme Court a petition for writ of certiorari to review the Court of Appeals' decision in the case. App. 302-323. The issues raised were as follows:

1.) The Court of Appeals erred in affirming the trial court's ruling to proceed with petitioner's first trial where petitioner was denied his right to counsel when he was tried in absentia and without counsel.

2.) The Court of Appeals erred in affirming the trial court's ruling to proceed with both of Petitioner's trials in absentia where the State failed to show that Petitioner received meaningful notice of his right to be present or that Petitioner was sufficiently warned the trial would proceed in his absence.

David Spencer filed a return to the petition. App. 324-336 An Order denying the petition was issued on October 18, 2013 by the South Carolina Supreme Court. App. 337. The remittitur in the case was sent down on October 25, 2013.

On January 16, 2014, a petition for writ of certiorari was filed in the United States Supreme Court in petitioner's case by Susan B. Hackett, Esquire, of the Office of Appellate Defense, and Dayne C. Phillips and Carmen v. Ganjehsani, both formerly of the South Carolina Office of Appellate Defense. App. 338-388. David Spencer filed a brief in response on March 24, 2014. App.389-476. On June 16, 2014, the United States Supreme Court denied the petition for writ of certiorari. App. 477.

Petitioner filed a PCR application with the Florence County Office of the Clerk of Court on July 14, 2014. App. 478 – 485. The respondent filed a return and partial motion to dismiss dated November 10, 2014. App. 486-490. A PCR hearing was held in response to petitioner's PCR action on August 10, 2016, before Judge William Seals. Petitioner was present and represented by Johnathan D. Waller, and Assistant Attorney General Johanna C. Valenzuela appeared on behalf of the state. App. 492-550. On February 11, 2017, Judge Seals issued an Order of Dismissal in the case therein denying petitioner's collateral claims. App. 550-564. A Rule 59(e), SCRCF, motion was filed on February 24, 2017. App. 560-561. A return was filed on March 22, 2017. App. 562-562. Judge Seals denied the Rule 59(e), SCRCF, motion on March 27, 2017. App. 566-567.

Petitioner appealed Judge Seals' Orders. This petition follows.

QUESTION I

Trial counsel erred in failing to raise via objections during petitioner's second trial and at petitioner's sentencing hearing (when the sealed sentences were published) to errors associated with petitioner being tried in his absence sans any waiver at both his first and second trials, and to errors associated with petitioner being tried sans any waiver without counsel at his first trial because the omissions rendered these issues abandoned and not preserved for appellate review.⁵

During the PCR hearing, petitioner testified that his private attorney Johnny Etheridge never came to court on his behalf and that he later learned that Etheridge had filed a motion to be relieved as counsel without his knowledge. App. 499, l 5 – p. 500, l. 9. As a result, petitioner was tried in his absence and without representation by counsel at his first trial. Also, petitioner testified that he did not meet his attorney William V. Meetze, who was appointed to represent him at his second trial (**after** the jury was selected), until his sealed sentence was opened. App. 500, l. 10 – p. 501, l.10. Petitioner was tried in his absence at his second trial.

Trial counsel Meetze, who represented petitioner at the second trial (**after** the jury was selected), testified at the PCR hearing and confirmed that petitioner was tried in his absence and sans counsel at his first trial and that he represented petitioner at his second trial, but that petitioner's second trial was held in his absence as well. PCR hearing tr. 22, l. 12 - p. 26, l.13

The PCR judge ruled in effect that petitioner waived all of the rights which he raised on PCR. App. 550-559.

⁵ Both petitioner's first and second trials were consolidated into one case on direct appeal.

Petitioner was tried in his absence during this first and second trials, and petitioner was tried without the assistance of counsel at his first trial. Counsel was appointed to assist at petitioner's second trial (**after** the jury was selected) and the sentencing hearing where his sealed sentences were published.

A.) Trials in Absentia

A defendant has a right to be present at every stage of his trial. Illinois v. Allen, 397 U.S. 105 (1970). See Ellis v. State, 267 S.C. 257, 227 S.E.2d 304 (1976); In the Interest of Dwayne M., 287 S.C. 413, 339 S.E.2d 130 (1986). Also, a defendant has a right to hear the evidence presented against him. State v. James, 116 S.C. 243, 107 S.E.2d 907 (1921). In addition, a defendant has the right to be present and to confront the witnesses in his case. In Re Gault, 387 U.S. 1 (1967). A defendant can only be tried in his absence if he has received notice of his right to be present and advised he would be tried in his absence if he failed to attend. State v. Fleming, 287 S.C. 268, 335 S.E.2d 814 (1984). However, this right can be waived Ellis v. State, 267 S.C. 257, 227 S.E.2d 304 (1976); State v. Green, 269 S.C. 657, 239 S.E.2d 485 (1977). In both cases, the trials proceeded without any showing by the state (other than bond papers) that petitioner had notice of his trial dates and that the cases would proceed in his absence if he failed to attend. See first trial at App. 12-20 and second trial at App. 16-28. This was a fundamental denial of due process. Peralta v. Heights, 485 U.S. 80 (1988); Armstrong v. Munzo, 380 U.S. 545 (1965). Here, the record is devoid of any proof that petitioner waived his right to be present at trial and no showing was made indicating that he was advised of his right to be present at trial.

B.) Trial Sans Legal Counsel's Assistance

Petitioner was tried without counsel's assistance during his first trial. Since Gideon v. Wainwright, 372 U.S. 335 (1963), the Court announced the right to counsel via the Sixth

Amendment for criminal defendants who are indigent. Also, once a trial has commenced, the Sixth Amendment guarantees the defendant the right to have counsel present at all critical stages. United States v. Wade, 388 U.S. 218 (1967); Powell v. Alabama, 287 U.S. 45 (1932). Here, the record is devoid of any proof that petitioner waived his right to counsel at his first trial, and to his right to counsel prior to and during the jury selection at his second trial.

A defendant has to waive the right to counsel knowing the dangers and disadvantages of the absence of counsel's assistance at trial. Faretta v. California, 422 U.S. 806 (1975). A defendant may waive his right to counsel by conduct, verbal request, or forfeiture. State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996). A waiver is an intentional and voluntary relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458 (1938). At petitioner's first trial, where petitioner was tried in his absence, he could not waive his right to counsel verbally or by conduct because he was not present and there was no proof that he waived counsel by forfeiture because there was no indication that he was given notice of his trial date and warned that he would be tried in his absence if he failed to attend. The same is true with regard to petitioner's second trial because counsel was not appointed until after the jury was selected. Prejudice is presumed when a defendant is denied the right to counsel. McKnight v. State, 320 S.C. 356, 465 S.E.2d 352 (1995).

3.) Ineffective Assistance of Counsel

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge; and issues not raised and ruled upon in the trial court will not be considered on appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). In the case at bar, trial counsel erred in failing to object to and preserve the error of petitioner's two trials held in his absence, which was a right that petitioner did not waive at the circuit court level, and in

failing to object to and preserve the error of petitioner's trial sans the assistance of counsel at his first trial and at the beginning of his second trial, that was also a right which petitioner did not waive. Counsel's failure to raise these issues at petitioner's second trial and/or during his sentencing hearing constituted ineffective assistance of counsel in that these issues were precluded from review on direct appeal; and furthermore, this deficient representation by counsel in this regard prejudiced his case because but for the omissions, appellate review of these issue would have been entertained and not foreclosed, and there was a reasonable probability of success on the merits on appeal regarding the same. Counsel's representation in this case violated the Sixth Amendment in that the omissions at issue fell below the level of competence required of criminal attorneys. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984).

QUESTION II

Trial counsel erred in failing to move for a continuance when appointed to represent petitioner on the day of his second jury trial **after** the selection of the jury concluded because he had no time to prepare for trial previously and was unprepared to represent petitioner competently at that time, particularly since the Court in Morris v. State⁶ held that the ineffectiveness of counsel is likely to be found in cases where counsel fails to move for a continuance when a defendant is tried in absentia.

During the PCR hearing, trial counsel admitted that he was appointed to represent petitioner at this second trial in petitioner's absence on the day of this trial **after** the jury had already been selected, which meant that he had neither reviewed the file nor met or spoken with petitioner about the case, and that he had conducted no investigations into the case, or developed

⁶ 371 S.C. 278, 639 S.E.2d 53 (2006).

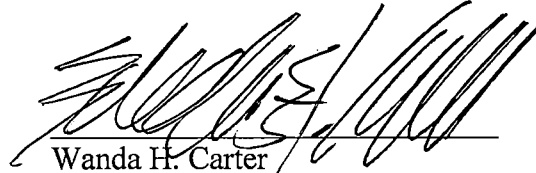
any defenses in the case, or interviewed any witnesses or potential witnesses in the case prior to trial. PCR hearing Transcript p. 22, l. 15 – p. 27, l. 23; Tr. 30, l. 23 – p. 31, l. 5; Tr. 37, l. 4-6. Trial counsel barely had time to review the discovery in the case during the lunch break. PCR Hearing Transcript p. 29, l. 21 – p. 30, l. 22; Tr. 39, l. 10 – p. 40, l. 10. Counsel stated that he made a motion to be relieved because he was not prepared to try the case. App. 518, l. 24 – p. 520, l. 9. See Trial Transcript at p. 97, l. 18 – p. 98, l. 2. However, counsel admitted he neither considered nor moved for a continuance. App. 520, l. 14-18.

Counsel's unpreparedness for petitioner's second trial rendered his representation of petitioner a nullity, i.e., as if petitioner had no representation by counsel at all at trial. See Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988). Counsel's representation of petitioner at his second trial constituted deficient representation in violation of Strickland v. Washington, 466 U.S. 668 (1984), and the Sixth Amendment. A continuance, if granted, would have allowed counsel time to at prepare for trial. A continuance, if denied, would have resulted in a reversal on appeal. Although reversals of denials of continuance motions are as rare as the "proverbial hens' teeth," a clear abuse of discretion in denying a continuance motion would have resulted in a reversal on appeal. State v. Kennedy, 348 S.C. 270 559 S.E.2d 850 (2007); State v. Morris, 371 S.C. 278, 639 S.E.2d 53 (2004). Compare the holding in Morris, when the Court held that where the defendant signed the plea sheet for a plea to ABHAN, but left the courtroom and could not be found for the plea and sentencing dispositions thereafter, and where the trial judge responded by moving forward with a trial in the defendant's absence, that it was error for counsel to object to the trial in absentia, which yielded an ABIK verdict, and not move for move for a continuance first and foremost so that the defendant could receive the benefit of the peal deal. In the case at bar, petitioner's legal counsel

rendered ineffective assistance at petitioner's trial in failing to move for a continuance to prepare for trial in violation of the Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

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



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of December, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

ANTHONY TYRONE WILLIAMSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

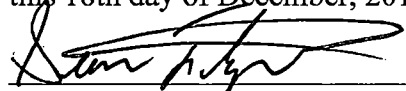
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Anthony Tyrone Williamson, #303726, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 18th day of December, 2017.


Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 18th day of December, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.