

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Calhoun County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL ALEXANDER SEALS,

APPELLANT

APPELLATE CASE NO. 2018-000565

INITIAL BRIEF OF APPELLANT

RECEIVED
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SC Court of Appeals

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in conducting a bench trial in appellant's absence, in violation of appellant's federal and state constitutional rights to a trial by jury, which can only be waived by a criminal defendant and not his attorney?

STATEMENT OF THE CASE

On May 6, 2013, a Calhoun County grand jury indicted appellant for armed robbery. R. _____. On July 30, 2013, a bench warrant was issued for appellant because he did not appear in court. R. ____ (Bench Warrant). Appellant's trial was conducted *in absentia* approximately five months after the issuance of the bench warrant, on December 17, 2013. R. ____ (Calhoun County Clerk of Court's Case History). Tr. 3, l. 4 – 5, l. 7. Tr. 6, ll. 6 – 12. The trial was a bench trial. R. ____ (Calhoun County Clerk of Court's Case History). Appellant was represented by Martin Banks at the trial and by Breen Stevens at the sentencing. Tr. 1. Tr. 3, ll. 5 – 11. Ted Lupton represented the State. Tr. 1. Judge Dickson sealed the sentence and on March 28, 2018, Judge Sprouse unsealed the sentencing sheet and pronounced Judge Dickson's ten-year sentence for armed robbery. Tr. 6, ll. 13 – 25. R. ____ (Sentencing Sheet). The court reporter's car was broken into on June 3, 2015, and the recordings of appellant's trial were stolen; therefore, no transcript of the trial exists. R. ____ (Letter from Bethanie K. Creppon to "Judicial Department" dated June 12, 2015). This appeal follows.

STANDARD OF REVIEW

Whether a criminal defendant can be tried without a jury in his absence is a purely legal question and legal questions are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

ARGUMENT

The trial court erred in conducting a bench trial in appellant's absence, in violation of appellant's federal and state constitutional rights to a trial by jury, which can only be waived by a criminal defendant and not his attorney.

Factual and Procedural Background

Appellant did not attend his trial. Tr. 3, l. 4 – 5, l. 7. Tr. 6, ll. 6 – 12. Appellant fled the state, was rearrested out of state, and brought back for his sentence to be unsealed. Tr. 6, l. 6 – 7, l. 1. On July 30, 2013, a bench warrant was issued for appellant because he did not appear in court. R. ___ (Bench Warrant). Appellant's trial was conducted approximately five months after the issuance of the bench warrant, on December 17, 2013. R. ___ (Calhoun County Clerk of Court's Case History). The trial was a bench trial. R. ___ (Calhoun County Clerk of Court's Case History). Judge Dickson sealed the sentence and on March 28, 2018, Judge Sprouse unsealed the sentencing sheet and pronounced Judge Dickson's ten-year sentence for armed robbery. Tr. 6, ll. 13 – 25. R. ___ (Sentencing Sheet). The court reporter's car was broken into on June 3, 2015, and the recordings of appellant's trial were stolen; therefore, no transcript of the trial exists. R. ___ (Letter from Bethanie K. Creppon to "Judicial Department" dated June 12, 2015).

Discussion

Because the trial court violated appellant's right to a jury trial, this Court must reverse his conviction. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. Const. amend. VI, XIV. "The right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14.

Only a criminal defendant can personally waive the foundational right to a trial by jury. McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018); Jones v. Barnes, 463 U.S. 745, 751 (1983). Even if appellant’s lawyer purported to waive appellant’s right to a jury trial, the court erred in accepting any such waiver. Attorneys make many decisions about their cases without a client’s consent, but it “is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, **waive a jury**, testify in his or her own behalf, or take an appeal.” Jones, 463 U.S. at 751 (emphasis added). The Court recently repeated this rule in McCoy, stating, “Some decisions, however, are reserved for the client—notably, whether to plead guilty, **waive the right to a jury trial**, testify in one’s own behalf, and forego an appeal.” McCoy, 138 S.Ct. at 1508 (emphasis added).

In 1930, the Supreme Court dealt with the question of whether a criminal defendant could waive his right to a jury of less than twelve persons. Patton v. United States, 281 U.S. 276 (1930). The Court treated the waiver of the right to a jury of less than twelve as identical to a complete waiver of a jury, and decided that defendants may waive the right. Id., 281 U.S. at 291-96, 305-13. The gravity of the right being waived compelled the Court to caution judges about how to accept such waivers. Id., 281 U.S. at 312-13. The Court concluded its opinion:

Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of the government counsel and the sanction of the court must be had, **in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote**, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

Id. (emphasis added). Patton establishes that the default setting is a jury trial. The Court emphasized that a judge may dispense with a jury trial only after conducting a searching inquiry with the defendant himself. A judge cannot conduct any inquiry if the defendant is not before him. See United States v. Taylor, 498 F.2d 390, 391-92 (6th Cir. 1974) (reversing because trial court did not obtain defendant's personal assent to a jury of less than twelve and refusing to apply a harmless error analysis).

In Boykin v. Alabama, 395 U.S. 238, 242-44 (1969), the Court reversed a state court guilty plea because the trial judge did not conduct a sufficient inquiry to determine whether the accused's waiver of his constitutional rights was knowing and voluntary. The record below indicated the judge asked no questions of the defendant and the defendant never addressed the court. Id., 395 U.S. at 239. The Court singled out the important rights a defendant waives when he pleads guilty and among them was the right to a trial by jury. Id. at 243. "The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." Id. "We cannot presume a waiver of these three important federal rights from a silent record." Id. Here, appellant's absence at his trial is worse than a "silent record." The defendant in Boykin was present and the colloquy was held insufficient.

South Carolina recognizes the primacy of the right to a trial by jury and requires the judge to question the defendant personally before accepting a waiver. State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988). In Arthur, the defendant was present and his attorneys waived his right to a jury trial in a capital sentencing proceeding. Id. at 496-99, 374 S.E.2d at 292-94. The State conceded that "waiver of a constitutional or statutory right requires a showing on the record that the defendant made the waiver knowingly and intelligently." Id. at 497, 374 S.E.2d at 292. The Court reversed because the trial judge erred in accepting the attorneys' waiver and only

perfunctorily questioned the defendant about the waiver. Id. at 496-99, 374 S.E.2d at 292-94.

Our Supreme Court wrote:

We hold that acceptance of a jury trial waiver must be based upon a written record clearly demonstrating that it was made knowingly and voluntarily. This can be accomplished **only through a searching interrogation of the accused by the trial court itself.**

Id. at 498, 374 S.E.2d at 293 (emphasis added).

The waiver in Arthur was insufficient even though the defendant was present and told the judge he agreed. Unlike Arthur, appellant was not present and could not even offer his perfunctory agreement or refusal to waive his right to trial by jury. A straightforward application of Arthur requires reversal of appellant's conviction.

Rule 38 of the South Carolina Rules of Criminal Procedure places the burden on the trial judge to ensure a defendant's right to a jury trial is protected. Rule 14(c), SCRCrim.P. The rule states, "Protection of Right. In all cases, the trial judge shall ensure that the defendant's rights under the state and federal constitutions to a trial by jury are preserved." Rule 14(c), SCRCrim.P. The rule is aligned with federal and state jurisprudence in stating, "A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge." Rule 14(b), SCRCrim.P. This portion of the rule, with its use of the word "defendant," contemplates that only a defendant personally may waive his right to a jury trial. Id. The trial judge failed in his constitutional duties and failed to comply with Rule 14.

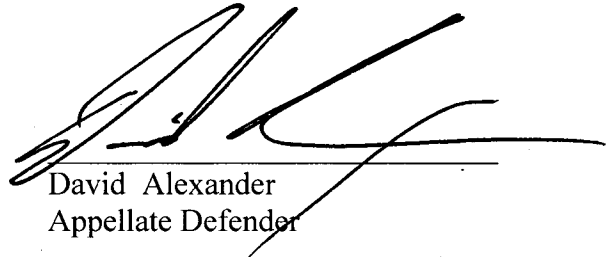
Appellant's absence does not change the analysis. Other states have dealt with the precise issue of an absent defendant being tried by the judge and easily reversed even when counsel purported to waive the right. See State v. Boyles, 204 P.3d 184 (Utah Ct. App. 2009); State v. Mazza, 750 A.2d 133 (N.J. App. Div. 2000); State v. Cochran, 509 P.2d 220 (Ariz.

1973). In Boyles, the state conceded it was error to try the defendant from the bench in his absence. Boyles, 204 P.3d at 185 (“The State concedes that Boyles did not waive his jury trial right and that vacation of his felony conviction is therefore appropriate.”). In Mazza, the state argued that because the defendant was absent, he relinquished to his attorney the decision whether to proceed with a jury trial. Mazza, 750 A.2d at 135. The court rejected the state’s argument finding that a defendant must personally waive the right. Id., 750 A.2d at 135-36. The Arizona Supreme Court placed the duty on the trial judge to find a valid waiver. Cochran, 509 P.2d at 221. The Cochran court held, “We do not believe that a waiver of a jury trial is a right that can be waived by counsel without the express permission or ratification by the defendant and therefore the waiver was ineffective.” Id.

The facts of this case are simple and the law is easy to apply. Appellant was not present for his trial. A trial cannot proceed without a jury unless the defendant personally, voluntarily, and knowingly waives that fundamental constitutional right. Appellant could not have waived that right because he was not present. If his attorney waived it, such waiver was invalid and the trial court erred in accepting it. Appellant’s conviction must be reversed.

CONCLUSION

For the foregoing reasons, appellant's conviction must be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County

Honorable R. Scott Sprouse, Circuit Court Judge

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THE STATE,

RESPONDENT,

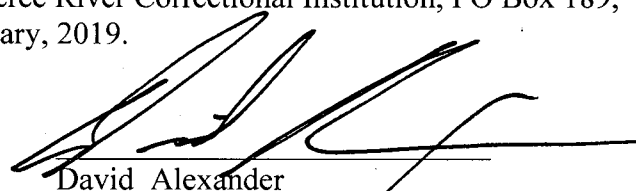
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MICHAEL ALEXANDER SEALS,

APPELLANT

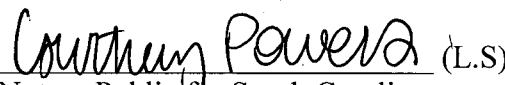
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Michael Alexander Seals, #375957, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 3rd day of January, 2019.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of January, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.