

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
G. Thomas Cooper, Circuit Court Judge

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FEB 07 2019
SC Court of Appeals

THE STATE,

Respondent,

vs.

JEFFREY BOYD COOPER,

Appellant.

Appellate Case No. 2016-000189

STATE'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Petitioner State now requests a rehearing on the following points that this Court may have overlooked or misapprehended. In so doing, the State maintains all its prior arguments as set out in its brief of respondent.

Respondent respectfully submits that this Court's opinion is unfair to Magistrate Davis. It presupposes Magistrate Davis could not be fair. It finds Magistrate Davis was made aware of the magistrate's court's failure to send notice to the right address when no motion was made to him seeking new trial on this error. This Court's ruling is based on alleged facts that if true, were never presented to Magistrate Davis. Nothing in the record indicates that Cooper's trial/appellate counsel, after discovering a clerical error resulted in notice being sent to the prior

office address, brought the problem to Magistrate Davis' attention and he did not attempt to seek a new trial from Magistrate Davis. While opposing counsel apparently discussed this issue with the chief magistrate, nothing in the record indicates he asked the chief magistrate to set aside the conviction, assuming the chief magistrate had jurisdiction to do so. Opposing counsel could have brought this issue before Magistrate Davis by way of a Rule 29, SCRCrimP motion, but failed to do so.

The opinion of this Court rejects the State's position that the error was not preserved by concluding:

Attorneys are placed in precarious positions when forced to repeatedly call a court's attention to its own errors. This is the very reason our preservation rules recognize "that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused." State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005).

However, opposing counsel did not bring this error to the presiding magistrate's attention. In his motion for new trial, he agreed with the magistrate that he was not blaming the magistrate's office for the lack of notice. R. pp. 20-21. That is the only motion presented to Magistrate Davis. This Court notes opposing counsel waited until November 12, eight days before the November 20th oral argument in circuit court, to send a supplemental notice of appeal complaining for the first time of the apparent clerical error. This Court then indicates Magistrate Davis and the chief magistrate did not respond to the supplemental notice of appeal. This Court further concludes they could have done so because they were both present at the circuit court argument; the source of this claim is solely based on representations of counsel at oral argument before this Court. However, it would have been highly irregular in an appeal for the judge whose ruling is being reviewed to intervene in an oral argument. Undersigned counsel, in

eighteen years of experience, has never been in a situation where a trial judge intervened or supplemented the record during oral argument in any reviewing court and is unaware of any authority to do so. Opposing counsel did not move to continue the proceedings for a supplemental return.

Invocation of the futility doctrine is simply inappropriate in the instant case because there is no indication that the motion never made would be futile. The opinion paints the magistrate in a light that is not favorable and presupposes the magistrate was incapable of being fair and impartial. Further, the opinion fails to note that at oral argument before Judge Cooper, opposing counsel acknowledged he corrected the address issue. R. p. 36. Therefore, the suggestion that the magistrate's court did not take any steps to resolve the issue is inaccurate.

Further troubling is that this Court reached this conclusion on self-serving letters from counsel and his representations made at oral argument. While it is often tempting for the State to present matter outside the record its appellate attorneys learn from prosecutors, the State refrains from doing so in observance of the rules. See Rule 210(c), SCACR. This appeal was decided after only hearing a one-sided version of events. This is why post-conviction relief, in the absence of the more appropriate Rule 29 motion, was the most appropriate vehicle to review the matters this Court instead decided in contravention of the rules of error preservation and the appellate court rules.

This Court relied on State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005). In that case, this Court recognized the limits of the futility doctrine and affirmed the decision of the family court, observing, "Regrettably, Appellant has suffered a violation of her right to a jury trial in this case. However, because she failed to raise an objection at trial, we are

compelled to let the unconstitutional sentence stand.” This Court distinguished Passmore’s situation from State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999), in which the futility doctrine was employed to reverse an illegal sentence because of the danger Johnston’s incarceration would exceed beyond the legal sentence during the pendency of a collateral challenge. This Court observed Passmore already served her sentence so Johnston did not control. As in Passmore, that problem does not exist in the instant case.

This Court should grant the State’s petition for rehearing and find the issue was not preserved. At a minimum this Court should amend the opinion to reflect that the day of trial, Magistrate Davis attempted to contact opposing counsel’s law firm “to no avail.” R. p. 26.

WHEREFORE, the State requests this Court to grant the petition for rehearing and affirm the convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: 

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ATTORNEYS FOR PETITIONER/RESPONDENT

February 7, 2019

STATE OF SOUTH CAROLINA

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Appeal From Kershaw County
The Honorable G. Thomas Cooper, Circuit Court Judge

Appellate Case No: 2016-000189

THE STATE,

v.

JEFFREY BOYD COOPER,

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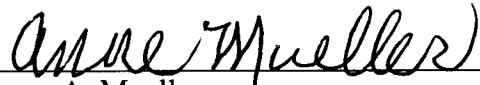
FEB 07 2019

SC Court of Appeals

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within State's Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert J. Butcher, Esquire, The Camden Law Firm, PA, PO Box 610, Manning, SC 29021.

I further certify that all parties required by Rule to be served have been served.
This 7th day of February, 2019.


Anne A. Mueller
Legal Assistant for the Respondent

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ALAN WILSON
ATTORNEY GENERAL

February 7, 2019

Robert J. Butcher, Esquire
The Camden Law Firm, PA
PO Box 610
Manning, SC 29021

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SC Court of Appeals

Re: **The State v. Jeffrey Boyd Cooper**
Appellate Case No: 2016-000189

Dear Mr. Butcher:

Enclosed please find two copies of the State's Petition for Rehearing in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: The Honorable Jenny A. Kitchings (with original and 6 copies)
Victim Advocacy Division