

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No: 2016-000189

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APR 11 2019

S.C. SUPREME COURT

THE STATE,

Petitioner,

vs.

JEFFREY BOYD COOPER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, S.C. 29202-1987
(803) 576-1800

ATTORNEYS FOR PETITIONER

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals erred by reversing the conviction and sentence by relying on information never presented to the magistrate presiding over the trial, and by relying on information outside the record and instead supplied during oral argument.

STATEMENT OF THE CASE

On March 5, 2014, Appellant Cooper was tried by jury in absentia for Breach of Peace before the Honorable Magistrate James Davis. Neither Cooper nor his attorney, Robert J. Butcher, Esquire, were present. Attorney Butcher (Counsel) continued to represent Cooper throughout the appeal to Common Pleas and the Court of Appeals. Cooper was found guilty, and Magistrate Davis sentenced Cooper to thirty days imprisonment suspended to a \$262 fine.

Counsel moved to vacate the judgment and for a retrial on March 17, 2014, arguing Counsel failed to receive notice of the trial. Magistrate Davis denied the motion at the conclusion of the hearing, finding, based on Counsel's representations, the Magistrate's Office met its obligations to provide notice. In the Magistrate's Return dated May 21, 2014, Magistrate Davis explained, "[N]otice was sent to the address listed at that time with the South Carolina Bar Association for all appearance dates and was mailed in a sufficient amount of time for the Attorney, the Camden Law Firm, and the Defendant, Jeffrey Boyd Cooper, to be present." A. p. 30.

Cooper appealed to Common Pleas. The Honorable G. Thomas Cooper, Jr., heard oral argument on November 20, 2015. Judge Cooper affirmed the conviction and sentence by order dated December 23, 2015, finding, "After considering the record in this case, this Court finds no reason to reverse Judge Davis' sentence or his denial of Mr. Cooper's Motion to Vacate Judgment and For a Retrial." A. p. 50. Judge Cooper denied the subsequent motion to reconsider by order dated January 12, 2016. A. p. 55.

Cooper appealed to the Court of Appeals and continued to be represented by Counsel on appeal. Following briefing, oral argument was held on April 11, 2018. On February 6, 2019, the Court of Appeals reversed and remanded the conviction and sentence in an unpublished opinion filed February 6, 2019. The State filed a petition for rehearing. On March 13, 2019, the Court of Appeals granted the State's petition for rehearing and dispensed with further briefing, withdrawing its opinion and substituting a new opinion which, nonetheless, still reversed the conviction and sentence.

The State now files its petition for writ of certiorari.

STATEMENT OF FACTS

At trial, the only witness was Officer Corbett, who also prosecuted the case. Officer Corbett testified he and Deputy Willhoit were serving a warrant on David Dukes, who was hiding underneath the truck Cooper and a passenger were sitting in. The two men were drinking beer. The Officers placed Dukes in the patrol car. Meanwhile, Cooper became verbally aggressive and used lots of profanity. Officer Corbett noticed ammunition on the dashboard and in the tail of the truck. Officer Corbett also noticed Cooper seemed defensive about a sweatshirt on the driver's seat next to him. Officer Corbett told Cooper he was going to check under the sweatshirt for possible weapons. When Officer Corbett reached for the sweatshirt, Cooper lunged for his arm. Officer Corbett told Cooper he was under arrest. Cooper responded with more profanity and exclaimed no one was taking him to jail, he was not going anywhere. A. pp. 70-72.

Cooper continued to refuse to cooperate despite Officer Corbett informing him he was under arrest several times. Finally, Officer Corbett put his shoulder on Cooper in an attempt to have Cooper exit the vehicle and be handcuffed. Cooper swung his elbows toward Officer Corbett and grabbed the steering wheel with both hands. Officer Corbett pried Cooper's hands loose and placed him on the ground. A. p. 72. Only at this point did Cooper complain he was a paraplegic and he had

two colostomy bags on him. A. p. 72.

Cooper complained one of the bags had broken and also claimed he was injured, but would not give any specific injury. Officer Corbett called EMS, but when EMS arrived, Cooper said he did not want medical care. Officer Corbett issued him a courtesy summons in lieu of taking him to jail. Officer Corbett left Cooper with an individual known as Bobo Jackson, Cooper said he was going to stay the night there because he was too drunk to drive home. A. pp. 72-73.

ARGUMENT

The Court of Appeals erred by reversing the conviction and sentence by relying on information never presented to the magistrate presiding over the trial and by relying on information outside the record supplied during oral argument.

This Court should grant the petition for writ of certiorari and vacate the Court of Appeals' opinion because it represents and encourages the complete breakdown of bedrock principles of appellate practice and appellate rules. The Court of Appeals' opinion premises its determination that the magistrate erred in declining to grant a new trial on representations made by Cooper's counsel at oral argument and a letter written by counsel that was never presented to the magistrate that tried the case but submitted to the Court of Common Pleas shortly before oral argument in Common Pleas.

The Court of Appeals, in a footnote, advises:

Appellate counsel provided the chronology of this case in his brief and at oral argument. Although some of this timeline is not detailed in the record, we accept counsel's representations to this court. See Elkachbendi v. Elkachbendi, 2014-MO-035 (S.C. Sup. Ct. filed Sept. 17, 2014) (reversing family court and Court of Appeals' findings of untimeliness based on counsel's representations to the family court); USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651-52, 661 S.E.2d 791, 795-96 (2008) (citing Rule 704(1), SCACR, in presuming counsel was being truthful when she told the circuit court that she filed a motion during the applicable time period); Rule 407(1), SCACR ("A lawyer, being a member of the legal profession is a representative of clients, an officer of the legal system and a

public system having special responsibility for the quality of justice.”); Rule 3.3(a)(1), RPC (“A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”); Rule 4.1(a), RPC (“in the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”); Rule 8.4(d), RPC (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”).

State v. Jeffrey Boyd Cooper, 2019-UP-049 (S.C. Ct. App. refiled March 13, 2019).

However, while the authorities cited do require honesty from members of the bar, the authority does not allow for an attorney to supplement the record with a personal factual account at oral argument. See Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal”); I’On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (“Imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant **facts**, law, and arguments”) (emphasis added); State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (excluding post-trial “Morris” letter not presented to the circuit court).

The rules do not authorize the Court of Appeals to become a court of record and had undersigned counsel replied in kind with information outside the record, the Court of Appeals would have been put in the position of making credibility determinations. The suspension of appellate practice and rules is particularly prejudicial in a situation where undersigned counsel was not present for the proceedings and occurrences, and whose knowledge is limited to matter within the record. In the instant case, undersigned counsel based his brief and argument on the record below.

In its opinion, the Court of Appeals noted the magistrate’s court mailed a summons to the same erroneous address the magistrate’s court allegedly used to send counsel the notice of trial. The Court of Appeals indicates Cooper’s counsel “learned the notice problem stemmed from address

‘syncing’ issue with the magistrate’s court’s computer program that prints envelopes.” Cooper, n.2.

The Court of Appeals, relying solely on Counsel’s representations made at oral argument, found Counsel “contacted the magistrate to discuss notice issues and had two meetings with the then-chief magistrate.”

The Court of Appeals’ opinion then quotes extensively and further details facts alleged by Counsel in a July 2, 2014 letter to the then-chief magistrate. The Court of Appeals bolds language from the letter that claims Counsel spoke with a county attorney who complained of similar problems and other attorneys had similar problems. The opinion also references a claim in the same letter that Counsel failed to receive notice of hearings in seven other cases. All this matter was never presented to the magistrate that actually tried the case.

The Court of Appeals then references Counsel’s representations at oral argument in the Court of Appeals that appellate counsel had a meeting with the chief magistrate at the chief magistrate’s office and that the chief magistrate acknowledged the magistrate’s court experienced issues with envelope printing software. This is matter outside the record.

Despite the above representations being made outside the record before the magistrate, the Court of Appeals complains, “It is unclear what, if any, other action the magistrate’s court then took following this chambers meeting.” The Court of Appeals concludes no action was taken to rectify the alleged notice problem prior to Cooper’s conviction and that, “It is difficult to understand why. . . .” However, this conclusion is based on the assumption of facts presented either at oral argument or in the July 2, 2014 letter that was not made part of the record until shortly before oral argument at the Court of Common Pleas.

It was highly improper for the Court of Appeals to consider these matters, especially the facts alleged for the first time at oral argument in the Court of Appeals. Further, the complete suspension

of the rules of appellate practice was unnecessary as Cooper still could pursue relief through post-conviction relief, in which these allegations and the rest of the story could be provided through sworn testimony of appellate counsel, the magistrates, and any other witnesses with knowledge.

The Court of Appeals opinion concludes, “Moreover we decline to accept the State’s preservation argument here because as soon as trial counsel became aware of the notice issues, the Firm brought them to the attention of the magistrate’s court and attempted to rectify them.” However, the record fails to reflect that any of these problems were presented to the magistrate who tried the case. This is why the Court of Appeals’ reliance on the doctrine of futility is not appropriate in this case. See State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) (recognizing the limits of the futility doctrine and affirming 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.”).

The magistrate’s court did not abuse its discretion in denying the motion for a new trial

At the hearing on motion to vacate, counsel noted it appeared the Magistrate sent notice for trial to the right address on January 31, 2014, but attested the office did not receive notice. Counsel surmised the next door neighbor may not have been passing on the mail. A. pp. 23-24. No explanation was provided to the Magistrate why Cooper failed to appear: Counsel indicated he was unaware whether or not his client received the paperwork and argued it did not matter because counsel needs to be served with notice. A. p. 22, lines 13-19. Magistrate Davis ruled on the record as follows: “After consideration and after hearing the Motion from Mr. Butcher, this is going to be my ruling: Mr. Butcher, I think the Court has met their obligation of sending this information to your law firm, so I’m going to respectfully deny your Motion, Sir.” A. p. 24, lines 16-23.

At oral argument before Judge Cooper, Counsel admitted his client received notice, explaining: “My client was in the hospital at the time. He is a paraplegic. He has bed sores, and he didn’t give me – he didn’t tell me that he had gotten notice.” A. p. 38, lines 9-11.

In criminal cases the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Parker, 391 S.C. 606, 611, 707 S.E.2d 799, 801 (2011); State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge’s ruling is supported by any evidence. Parker at 611-12, 707 S.E.2d at 801. A defendant may waive the right to be present and tried in the defendant’s absence if the defendant receives notice of the right to be present. State v. Goode, 299 S.C. 479, 385 S.E.2d 844 (1989).

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

In the instant case, the evidence before the Magistrate showed Cooper was personally provided notice and no explanation was provided why he was not present. Further, the evidence before the Magistrate indicated notice was properly sent to Counsel and Counsel offered no explanation during the motion hearing for why he did not receive notice. A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). In the instant case, the Magistrate’s decision to deny the motion to vacate judgment was supported by

evidence and not controlled by an error of law.

Counsel alleged in a supplemental notice of appeal to circuit court that the Magistrate's Office was using an old address on the envelopes and that counsel failed to receive notice in several other cases. The only evidentiary basis for this is a letter Counsel wrote to Chief Magistrate Roderick Todd, not Magistrate Davis, who presided over trial. A. pp. 32-35. The supplemental notice of appeal was not supported by affidavits or any other acknowledgement of the error by the Magistrate's Office. Further, this explanation was never brought to Magistrate Davis' attention at the motion to vacate and counsel did not seek a remand or leave for the Magistrate to consider this argument. The ground asserted on appeal must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993). Given that Magistrate Davis was never confronted with the contention that the Magistrate's Office was sending notice to the wrong address, Judge Cooper was constrained by the standard of review to affirm the Magistrate's denial of the motion to vacate.

CONCLUSION

For all of the foregoing reasons, this Court should grant the petition for writ of certiorari, and the Court of Appeals' opinion should be vacated. The magistrate's court conviction and sentence should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, S.C. 29202-1987
(803) 576-1800

BY: 

DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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