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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court Of General Sessions
The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2019-001517

THE STATE,

Respondent,

v.

JOHN W. THOMASSON, SR.

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse his discretion in denying Appellant's motion to continue.

STATEMENT OF THE CASE

Appellant was indicted in July 2018 for possession of methamphetamine. Appellant proceeded to a jury trial on August 20, 2019, in the York County Court of General Sessions before the Honorable Robert E. Hood. The State was represented by Assistant Solicitors Austin Dargan Newman and Marina Bender Hamilton. Jeffrey Baldwin Zuschke represented the Appellant. The jury found Appellant guilty and he was sentenced to five years' imprisonment. This appeal follows.

STATEMENT OF FACTS

On May 23, 2018, Appellant was pulled over for speeding by Matthew Earls and Christopher Laurencio of the York County Sherriff's Office Drug Enforcement Unit. (R. 15). Appellant admitted to speeding before Earls could even address him. (R. 15). Appellant did not consent to a search of his vehicle, but did consent to a search of his person. (R. 21).

During a search of Appellant's person, Laurencio found a small bag with white substance inside Appellant's pocket. (R. 21). The white substance was later determined to be methamphetamine. (R. 32). After finding this substance, Laurencio and Earls requested a K-9 unit. (R. 18).

Dustin Sierra, an expert in K-9 narcotics detection, arrived on scene to conduct a free-air sniff around the vehicle. (R. 18). The dog alerted to the presence of drugs in the vehicle, thus giving the officers probable cause to conduct a warrantless search of the vehicle. (R. 20). During the search of the vehicle, Laurencio found a folded up piece of tin foil in Appellant's wallet. (R. 25). Upon opening the folded piece of tin foil, Laurencio discovered burn marks on the inside. (R. 26). Based on his experience, this indicated that "someone is putting narcotics on top of the tin foil and lighting the bottom with a cigarette lighter or a heat source and inhaling the fumes that come off the narcotic that's being heated up." (R. 26) Appellant was subsequently arrested for possession of meth. (R. 26). The residue in the tin foil was later determined to be methamphetamine. (R. 33).

Appellant's trial began on August 20, 2019. (R. 2). Appellant was not present at the beginning of trial and trial counsel made a motion to continue because of his absence. (R. 5). In discussing proceeding to trial in Appellant's absence, Assistant Solicitor Newman informed the court that Appellant had previously failed to show up to an appointment and a bench warrant was issued. (R. 4). Newman told the court that at the hearing on the bench warrant two weeks before

the trial, Newman informed Appellant in court that he would be tried at the next term of court. (R. 4). The trial judge then denied trial counsel's motion to continue based on Appellant's absence. (R. 6). A jury was then selected. (R. 7). Appellant ultimately arrived at court later that afternoon after the jury had been selected, but prior to the jury being sworn. (R. 8). He requested a continuance based on his inability to prepare and his belief that his attorney had misrepresented him. (R. 10-13). His motion was denied. (R. 13). This appeal follows.

STANDARD OF REVIEW

“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. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). “Reversals of refusal of a continuance are about as rare as the proverbial hens’ teeth.” State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). “In order for an error to warrant reversal, the error must result in prejudice to the appellant.” State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005).

ARGUMENT

The trial judge did not abuse his discretion in denying Appellant's motion to continue.

Appellant argues that the trial court erred when it denied Appellant's motion for a continuance. Specifically, Appellant argues he should have been allowed to obtain new representation because trial counsel allegedly made multiple mistakes leading Appellant to believe he had been misrepresented. Appellant's argument lacks merit. Appellant's pro se motion to continue should not have even been considered by the trial judge because Appellant was already represented by counsel. However, the trial judge did not abuse his broad discretion in denying Appellant's motion to continue.

Appellant was not entitled to a pro se motion

Our Supreme Court has previously held that substantive documents filed pro se by a person represented by counsel could not be considered. State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998). "Since there is no right to 'hybrid representation' that is partially pro se and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed pro se by a person represented by counsel are not to be accepted unless submitted by counsel." Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010). "Because petitioner was represented by counsel, the pro se motion was not proper, should not have been accepted, and should not have been ruled upon." Id. In State v. Devore, 416 S.C. 115, 784 S.E.2d 690 (Ct. App. 2016), the Court of Appeals, relying on Miller, dismissed Devore's appeal after determining it lacked appellate jurisdiction to consider defendant's appeal because his pro se letter, sent seven days after his conviction, was not a proper notice of appeal pursuant to Rule 203, SCACR or a post-

trial motion as described in Rule 29, SCRCrimP. Noting Devore was represented by counsel at the time he sent the letter, the court found the document could not qualify as a proper motion or notice of appeal because it was “essentially, a nullity.” Id. at 122, 784 S.E.2d at 694. The court in Miller emphasized “We also take this opportunity to remind judges and clerks of court of our directing in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed pro se by a party who is represented by counsel. Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010). In the present case, Appellant admitted to the trial court he was represented by counsel when he told the judge he “got a call from my lawyer yesterday” and “I have a lawyer.” (R. 10, 12). Since he was represented by counsel he could not make any motions pro se with the exception of a motion to relieve counsel.¹ Even though the Motion to Continue should not have been ruled upon, the decision to deny a motion to continue is within the discretion of the judge.

Discretion of the trial judge

“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. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). “Reversals of refusal of a continuance are about as rare as the proverbial hens’ teeth.” State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). Appellant requested a continuance based on two main

¹ In order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial judge. Rule 59(e), SCRCrP. A motion to relieve counsel was never made by Appellant himself. Although he states that he feels “misrepresented” he never asked to relieve counsel and the court could not and did not rule on that issue. Therefore Appellant was represented.

arguments (1) he was only recently notified of trial and wasn't prepared and (2) he felt misrepresented by his lawyer.

Notice of Trial

Appellant argues that a continuance should have been granted because he did not receive notice of the trial until the day before trial. He told the trial judge "I mean I just found out I was going to trial yesterday and it didn't give me much time to do nothing." (R. 12). The court in State v. Williams held that a criminal defendant may be tried in his absence only upon a trial court's finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 304, 306 (1976). Additionally, notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976). Appellant had ample notice of his impending trial when he was told in court two weeks prior by the assistant solicitor that he would be tried during the next term of court. (R. 4). If notice of a term of court is sufficient to then proceed in his absence, it is certainly sufficient to deny a motion to continue based on lack of notice. Further, denying a motion to continue is within the discretion of the judge. The trial judge did not abuse his discretion in denying Appellant's motion based on lack of notice of trial.

"Misrepresentations" by trial counsel

Appellant argues trial counsel made multiple misrepresentations to him. The misrepresentations that Appellant alleges include trial counsel's failure to test the plastic bag that was found during Appellant's arrest and trial counsel's delayed handling of Appellant's bond paperwork which resulted in Appellant spending seven extra days in jail. In regard to the drug

testing Appellant stated “I got one test done that’s it. I know they requested for another test and they told me it can’t be done now.” (R. 12). Appellant did not provide any proof that he requested an independent drug test nor did he provide any evidence that there was a problem with the original testing. Further, Appellant did not suffer any prejudice from the lack of a second test, because he had the opportunity to cross examine the chemical analyst who testified that the substance found in Appellant’s possession was methamphetamine. (R. 28-33).

Appellant’s argument regarding a delay in bond paperwork is irrelevant to the question of whether Appellant was prepared to proceed to trial. The trial judge did not abuse his discretion in denying Appellant’s motion to continue because of a delay in completing bond paperwork or a failure by trial counsel to conduct an additional drug test. Even if these were valid misrepresentations by trial counsel, the denial of a motion to continue is within the discretion of the trial judge and the misrepresentations are an issue that can be remedied in PCR.

In order to receive relief for ineffective assistance of counsel, a defendant must make two showings. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). First, he must show that his trial counsel’s performance was deficient. Id. Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial. Id. “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). The court in Smalls v. State, refers directly to the PCR court showing that ineffective assistance of counsel is an issue that should be remedied in PCR and not in direct appeal.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL


The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

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