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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2020-001497

The State, Respondent,

vs.

Theodore Jerry Bolick, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in proceeding with a trial in Appellant's absence without the appointment of counsel. (Appellant's Issues I and II).

II. The trial court did not err in refusing to sever Appellant's three burglary charges. Further, the trial court did not err in determining Appellant withdrew his motions based on his failure to appear.

III. The circuit court had jurisdiction to consider the State's Motion to Reconsider from the circuit court's grant of Appellant's motions for a mistrial and new trial.

IV. The circuit court did not exceed the authority provided by this Court's remand when it considered and granted the State's Motion to Reconsider.

STATEMENT OF THE CASE

This case has a long procedural history with numerous *pro se* filings at every level so only a portion of it will be summarized for the Statement of the Case. During the October and November 2016 terms, the Horry County Grand Jury indicted Appellant for a total of three counts of Burglary in the second degree. (Indictments; R.___). After several hearings, Appellant proceeded to trial July 22-24, 2019. (7/22T.1; 7; R.___). After the first day or pre-trial motions, Appellant failed to return, and his trial proceeded in his absence before the Honorable Larry B. Hyman and a jury. (7/22T.24-30; R.___). On July 24, 2019, the jury convicted him on all three charges, and he was sentenced to concurrent sentences of twelve years in prison. His sentence was sealed. (7/22T.155-156; 160-161; R.___)

On or about April 22, 2020, Appellant filed a Motion for Mistrial in the circuit court. (Motion for Mistrial; R.___). Thereafter in June 2020, he served and filed a Motion for New Trial. (Motion for New Trial; R.___). It appears several other motions were served and filed by Appellant prior to him being returned to court to be sentenced. On September 16, 2020, Judge William H. Seals read Appellant's sentence of twelve years on each charge with the sentences to run concurrent. (9/16T.5; R.___).

It appears Appellant timely served a Notice of Appeal, Request for Transcripts, Motion for Appointment of Counsel, and Motion to Reconsider on the solicitor's office and filed all with the Horry County Clerk of Court. After filing of the Notice of Appeal, the Honorable Steven H. John dismissed a number of outstanding motions, including Motion for Mistrial, Motion for New Trial, Motion for Standing and Continued Objections, Motion for Appointed Counsel, Motion for Transcripts, and a Motion to Reconsider. The motions were dismissed "until the jurisdiction is returned to the Court by the Appellate Court." (Order dated November 3, 2020; R.___). It appears

the Notice of Appeal and documents were forwarded to the South Carolina Supreme Court by the Horry County Clerk of Court. The appeal was subsequently transferred to this Court for consideration.

This Court requested memorandum regarding the appealability of the underlying appeal. After receiving responses from both Appellant and the State, this Court issued an Order on February 5, 2021, holding the appeal in abeyance and remanding to the circuit court for "consideration of all outstanding motions, including the Motion to Reconsider, Motion for Mistrial, and Motion for Appointment of Counsel." This Court required the State to provide updates "until the motions are resolved."

The Honorable R. Ferrell Cothran, Jr., held a hearing regarding Appellant's outstanding motions, including the Motion for Mistrial and Motion for New Trial. (4/15T.1-2; R.___). The circuit court issued orders granting some of Appellant's outstanding motions on April 16, 2021. (Orders of Judge Cothran dated April 16, 2021; R.___). The State served and filed a Motion to Reconsider along with a memorandum on April 23, 2021. (State's Motion to Reconsider with attachments; Memorandum Supporting Motion to Reconsider; R.___) The circuit court held a hearing on the State's Motion on June 8, 2021. (6/8T. 1;3; R.___). As a result of the hearing, the circuit court granted the State's Motion to Reconsider and ultimately denied all of Appellant's outstanding motions. (Order of Reconsideration filed June 10, 2021; R.____).

Appellant filed a Notice of Appeal from the denial of his motions. This Court relieved Appellant's counsel and allowed him to proceed *pro se* in this appeal. Appellant served and filed his brief and this brief follows.

ARGUMENT

I. The trial court did not err in proceeding with a trial in Appellant's absence without the appointment of counsel. (Appellant's Issues I and II).

Appellant contends the trial court erred in going forward with a trial *in absentia* without him being represented by counsel. He contends the circuit court violated his right to counsel under the Sixth Amendment to the United States Constitution. Appellant sought to go forward *pro se*. The circuit court warned Appellant of the dangers of going forward without counsel and provided him the ability to consult with an attorney from the public defender's office regarding whether Appellant wanted counsel, wanted standby counsel, or wanted to continue *pro se* without any assistance. Instead of informing the circuit court of his decision, Appellant failed to return to court.

Standard of Review

The South Carolina Supreme Court articulated the standard of review to use when considering whether a proper Faretta hearing took place:

> Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo. Specifically, we review a circuit judge's findings of historical fact for clear error; however, we review the denial of the right of self-representation based upon those findings of fact de novo. In doing so, this Court must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request.

State v. Samuel, 422 S.C. 596, 813 S.E.2d 487, 490 (2018) (internal citations omitted). Additionally, this Court has explained: "A motion to relieve counsel is addressed to the discretion of the [circuit court] and will not be disturbed absent an abuse of discretion." State v. Childers, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007).

Merits

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). "Courts have recognized three ways in which a defendant may relinquish his right to counsel: (1) waiver by an affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009).

A defendant may voluntarily waive the right to counsel. "It is the trial court's responsibility to determine whether there was a knowing and intelligent wavier by the accused." State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009); see also, State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) ("It is beyond question that an accused person may waive counsel and represent himself. However, it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver."). "Any waiver, therefore, including a waiver of counsel by conduct, must be knowing and intelligent. For a waiver to be knowing and intelligent, the defendant should be made aware of the dangers and disadvantages of self-representation." Osbey v. State, 425 S.C. 615, 620, 825 S.E.2d 48, 50 (2019) (internal quotations omitted). "To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self representation." Bryant, 383 S.C. at 414, 680 S.E.2d at 13 (citing State v. McLauren, 349 S.C. 488, 493 94, 563 S.E.2d 346, 348 49 (Ct. App. 2002)); see also, Faretta, 422 U.S. at 835.

Faretta requires a defendant "be made aware of the dangers and disadvantages of self representation so that the record will establish he knows what he is doing and his choice is made with eyes open." Faretta, 422 U.S. at 835. "While a specific inquiry by the trial judge expressly

addressing the disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding." Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990).

Throughout the proceedings in circuit court, Appellant made it clear he sought to proceed *pro se*. In May 2018, he specifically indicated the magistrate tried to have him appointed counsel against his will. He told Judge John: "He actually violated my Sixth Amendment right, the counsel of my own choosing. I choose to represent myself and have done so for over 20 years, Your Honor." (5/18T.11; R.___).

Prior to trial, Judge Hyman noted Appellant was *pro se* and then conducted a discussion with him regarding his right to represent himself and the dangers of self-representation. (7/22T.11-12). As part of the discussion, Appellant indicated: "I would ask for counsel to assist and the reason I would is because I deem to be having a lot of problems getting my witnesses subpoenaed to court." (7/22T.12; R.___). The circuit court continued to discuss the right to counsel, the right to self-represent, and the dangers of self-representation with Appellant. (7/22T.12-19; R.___). Appellant responded: "I wish I had counsel. It don't seem like I have time to discuss the case and show the lawyer anything about my case now." The court asked if Appellant would want to discuss his case and representation overnight with an attorney. (7/22T.19; R.___). As a result, the circuit court arranged for Appellant to discuss representation and his case with an attorney from the public defender's office.

The following morning, Appellant did not return to court. The circuit court placed an extensive ruling on the record regarding the discussions he had with Appellant, the court's belief Appellant intended to proceed *pro se*, the court's understanding of the discussions between Appellant and the public defender, and the court's understanding Appellant sought standby counsel

but not full representation. (7/22T.24-25; R.___). The public defender noted for the court he had discussion with Appellant regarding "the potential scope of representation" including counsel operating as standby counsel. (7/22T.28; R.___). The court again acknowledged Appellant did not ask the public defender to represent him, and the public defender agreed and indicated he would be available should the court need or wish to appoint standby counsel. (7/22T.29; R.___).

The trial court properly informed Appellant of his right to counsel. He warned him of the dangers of self-representation by not only indicating the standard to which Appellant would be held, but by also utilizing specific examples of issues such as hearsay which may arise, and which could be better handled and understood by an attorney. The court succinctly summarized its warning by stating: "I personally believe that anyone who goes to trial should have the benefit of an attorney and it's foolish not to exercise that right." (7/22T.17). It is clear Appellant understood his rights and the dangers of proceeding without counsel.

The circuit court also went an additional step and provided counsel with whom Appellant could discuss possible representation or standby representation. Appellant did not request representation by the public defender even when offered and given the ability to discuss it with the public defender. As a result, the trial court properly found Appellant knowingly, intelligently, and voluntarily waived his right to counsel and, as a result, correctly proceeded to trial without representation on behalf of Appellant.

II. The trial court did not err in refusing to sever Appellant's three burglary charges. Further, the trial court did not err in determining Appellant withdrew his motions based on his failure to appear.

Appellant maintains the trial court erred in refusing to sever the three burglary charges. He asserts they are separate and unique crimes, and he was prejudiced by having to face all three in one trial. The circumstances of the crimes were all substantially similar, many of the same witnesses would have testified in each trial, and Appellant was not prejudiced by the trial of all three charges jointly.

Standard of Review

"In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). "A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996) (citing State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995)).

Merits[1]

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." State v. Beekman, 415 S.C.

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[1] It is questionable whether this issue is preserved for review on appeal. Appellant raised the issue prior to trial. However, the circuit court never ruled on Appellant's motion to sever. Instead, after Appellant failed to be present for trial, the court found Appellant waived and withdrew his motions by his conduct. This ruling has not been challenged on appeal. See State v. Brewton, 437 S.C. 44, 59, 876 S.E.2d 141, 149 (Ct. App. 2022) (quoting Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

632, 636, 785 S.E.2d 202, 204 (2016) (quoting State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996)).

The Courts of South Carolina do not require a "restrictive reading of the phrase 'a single chain of circumstances'." Beekman, 415 S.C. at 636, 785 S.E.2d at 204. The Supreme Court discussed this explaining:

> In other cases, even though the charges did not arise out of a single, isolated incident, this Court and the court of appeals have allowed joinder when the crimes "involv[ed] connected transactions closely related in kind, place, and character." State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005) (footnote and citations omitted); see, e.g., id. at 373–75, 618 S.E.2d at 894–95 (finding no abuse of discretion in denying a motion to sever charges involving multiple victims of Shaken Baby Syndrome even though the charges stemmed from separate occurrences); Tucker, 324 S.C. at 163–65, 478 S.E.2d at 264–65 (permitting joinder of charges stemming from a multi-day crime spree that included a murder and multiple break-ins); State v. McGaha, 404 S.C. 289, 291–99, 744 S.E.2d 602, 603–07 (Ct. App. 2013) (affirming, under facts almost identical to the present case, joinder of CSC with a minor and lewd act upon a child charges arising from the abuse of two sisters who were both abused by an individual in the same manner, in the same place, and during the same time frame); State v. Jones, 325 S.C. 310, 314–16, 479 S.E.2d 517, 519–20 (Ct. App. 1996) (finding no abuse of discretion in consolidating child sexual molestation charges, even though the charges concerned two victims, when the offenses "were of the same general nature" and arose from the same "pattern of sexual abuse"); see also City of Greenville v. Chapman, 210 S.C. 157, 161–62, 41 S.E.2d 865, 867 (1947) (explaining that courts should avoid the "inflexible application" of the rule that charges must arise out of the same set of circumstances to warrant joinder and noting that if "it does not appear that any real right of the defendant has been jeopardized, [then] it would be a refinement not demanded by the law or by justice to require in all instances a separate trial").

Id. at 637, 785 S.E.2d 205.

Beekman is a case which involves similar considerations, though significantly different crimes. Beekman molested his two stepchildren. The Court found:

> [The] victims were siblings and the molestation occurred (1) at the same place—the victims' home; (2) over the same period of time—the eight-month period between November 2007 and July 2008; and (3) with the same modus operandi—Beekman taking advantage of the children's habit of watching television with him.

Beekman, 415 S.C. at 637–38, 785 S.E.2d at 205.

In the instant case, all three burglaries were of businesses in the same general area of the south end of Myrtle Beach—all were within a half a mile and two were next door. The three burglaries occurred within a week from August 18 to August 27, 2016—two of them being on back-to-back nights on August 26 and August 27, 2016. All three burglaries occurred at night with the burglar entering through a vent or other roof access into the building—as a result the *modus operandi* of each burglary was remarkably similar. Accordingly, there is the required "interconnectedness" of the crimes to support joinder.

As to the second factor, all three would require much of the same evidence be presented. Appellant was identified via pictures, videos, tattoos, and most significantly the DNA from a glove left at one of the crime scenes. All of the witnesses, related to the admission of this evidence would be required to testify in the other trials in order to establish the means by which Appellant was identified and connected to the three burglaries. The glove was found at one location, so the manager who located the glove would be required to testify in each case to explain the significance of the glove. Additionally, the matching glove was located during the execution of a search warrant at the location where Appellant was staying, so all witnesses related to the search warrant and who participated in the execution of the warrant would be required to testify in each case. Further, evidence left at another crime scene—a knife—matched evidence taken from Appellant's person during his arrest. As a result, the manager of that second location who found the knife would be required to testify in each of the other trials. While identical evidence would not be

presented to prove each case, identity of proof is not the standard required. See Beekman, 415 S.C. at 638, 785 S.E.2d at 205. There would be significant overlap in the presentation of evidence, especially evidence being used to identify Appellant as the burglar which was the main issue present at trial. Accordingly, the second factor for joinder is met.

The crimes here are certainly of the same general nature. All three charges are burglaries in the second degree in which Appellant entered businesses in the same general area, at night, and with the same *modus operandi*.

Finally, none of Appellant's substantial rights were prejudiced by the joinder. As discussed, significant evidence from several of the burglaries would have been required in order to establish identity in each of the other burglaries. Further, the facts of the underlying burglaries—and their unique *modus operandi* of entering through vents or other accesses in the roofs—would have likely been admitted pursuant to State v. Perry, 430 S.C. 24, 824 S.E.2d 654 (2020) and State v. Durant, 430 S.C. 98, 844 S.E.2d 49 (2020), as a common scheme or plan. Accordingly, the trial court did not abuse its wide discretion by joining the three burglary charges for a single trial.

III. The circuit court had jurisdiction to consider the State's Motion to Reconsider from the circuit court's grant of Appellant's motions for a mistrial and new trial.

Appellant contends the trial court erred in granting the State's Motion to Reconsider because it lost jurisdiction over the motions once the term of court ended. The State's motion was not an inappropriate successive motion and was filed within the time limits required by Rule 29, SCRCrimP. As a result, the end of the term of court did not preclude the circuit court from having jurisdiction over the State's motion.

In the instant case, Appellant filed a Motion for Mistrial in April 2020 and a Motion for New Trial in June 2020.[2] He was not sentenced until September 20, 2020. On or about September 24, 2020, Appellant filed a Notice of Appeal depriving the circuit court of jurisdiction until this Court remanded for consideration. On April 16, 2021, the circuit court issued orders granting some of Appellant's motions and denying others. On April 23, 2021, the State served and filed the Motion to Reconsider along with memorandum and attachments. This is the motion Appellant contends the circuit court did not have jurisdiction to consider when it reversed its prior decision and denied all of Appellant's motions in June 2021.

"It is a long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expires." State v. Hinson, 303 S.C. 92, 94, 399 S.E.2d 422, 422 (1990) (citing State v. Mixon, 275 S.C. 575, 274 S.E.2d 406 (1981); State v. Patterson, 272 S.C. 2, 249 S.E.2d 770 (1978); State v. Best, 257 S.C. 361, 186 S.E.2d 272 (1972)). The rule has two exceptions: a timely post-trial motion and a motion for a new trial based on after-discovered evidence. State v. Campbell, 376 S.C. 212, 215, 656

[2] It is questionable whether the motions were proper, especially the Motion for New Trial, since they were both filed prior to Appellant being returned to court to be sentenced after he absconded prior to trial. As a result, neither motion was actually a post-trial motion under Rule 29, SCRCrimP.

S.E.2d 371, 373 (2008) (citing Rule 29, SCRCrimP). Rule 29 provides: "The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term." As a result, a party may make a timely post-trial motion even after a term of court has ended and the circuit court retains jurisdiction until completion and final ruling on the timely filed post-trial motion.

Additionally, the Supreme Court has explained:

> Successive Rule 29(a) motions are generally not permitted. However, where a second Rule 29(a) motion is related to the disposition of the first Rule 29(a) motion, the trial court retains authority to hear and dispose of the subsequent motion, provided the subsequent motion is filed within ten days of the disposition of the prior post-trial motion.

State v. Pfeiffer, 427 S.C. 10, 13, 828 S.E.2d 764, 766 (2019). In the instant case, the State's Motion to Reconsider was in response to the trial court's ruling on Appellant's motions. It was properly made within ten days of the circuit court's ruling on Appellant's motions. As a result, the circuit court could properly consider the State's Motion to Reconsider pursuant to Pfeiffer even though the consideration occurred after the end of the term of court.

IV. The circuit court did not exceed the authority provided by this Court's remand when it considered and granted the State's Motion to Reconsider.

Appellant contends the trial court erred in considering the State's Motion to Reconsider because it was not contemplated by this Court's Order remanding for consideration of Appellant's motions. The remand order clearly contemplates reaching a final decision on Appellant's motions. A final decision was not reached until the circuit court considered and ruled on the State's Motion to Reconsider. As a result, the determination was within the authority provided by this Court's Order remanding the case.

"[T]he circuit court on remand has only the jurisdiction and authority mandated by the appellate court." State v. Slocumb, 412 S.C. 88, 92, 770 S.E.2d 436, 439 (Ct. App. 2015). This Court has also provided: "a trial court has no authority to exceed the mandate of the appellate court on remand." S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 250–51, 551 S.E.2d 274, 279 (Ct. App. 2001) (citing 5 Am.Jur.2d Appellate Review § 784, at 453 (1995) (Once a mandate is issued from an appellate court to a trial court, the trial court "is vested with jurisdiction only to the extent conferred by the appellate court's opinion and mandate.")); cf., Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) ("It is the duty of the trial court to follow the decision of the appellate court.").

This Court's Order provided:

> After reviewing the parties' appealability memoranda, this appeal is held in abeyance and the case is remanded to the circuit court for consideration of all outstanding motions, including the Motion to Reconsider, Motion for Mistrial, and Motion for the Appointment of Counsel. Respondent shall provide this court will status updates every thirty days **until the motions are resolved.**

(Remand Order Feb 5, 2021; R.___) (emphasis added). This Court's Order clearly contemplated consideration of Appellant's motions so as to reach finality on the motions. It specifically required

updates of proceedings in the circuit court "until the motions are resolved." The motions in the instant case could not be considered resolved until the State's Motion to Reconsider the judge's initial rulings was also decided. Only after the State's Motion was heard and ruled upon did the rulings on the outstanding motions become final. Accordingly, the circuit court did not improperly exceed the authority provided by this Court in its Order on remand by ruling on the State's Motion and rendering the decision on Appellant's Motion for a Mistrial and Motion for New Trial final rulings.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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