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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERBIAS JERROD GOFF,

APPELLANT

APPELLATE CASE NO. 2022-000112

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it denied Appellant's request for a continuance and tried Appellant *in absentia* where Appellant did not have actual notice of the trial date and therefore could not voluntarily waive his right to be present?

STATEMENT OF THE CASE

On June 17, 2020, Appellant was indicted by the Horry County grand jury for one count of failure to register as a sex offender, second offense. R. (Indictment). The State, represented by Crystal Andrews and Mary-Ellen Walter, called the case to trial before the Honorable Benjamin H. Culbertson and a jury on August 12, 2020. Appellant was represented by James Galmore. R. 1.

Prior to selecting a jury, the State informed the trial court that Appellant could not be found and moved to try Appellant *in absentia*. Counsel Galmore objected to proceeding with trial *in absentia* and requested a continuance. R. 5. Judge Culbertson ultimately granted the State's request, and Appellant was tried in his absence. R. 39-41. The jury found Appellant guilty as indicted. R. 133, l. 2-6. Appellant's sentence was sealed, and a bench warrant was issued for his arrest. On January 26, 2022, Appellant was brought before Judge Culbertson to have his sentence unsealed. R. 90. Appellant was sentenced to 366 days imprisonment with credit for timed served. R. 93-94

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Ravenell, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010). "An appellate court is bound by the trial court's factual findings unless they are clearly erroneous." Id.

ARGUMENT

The trial court erred when it denied Appellant's request for a continuance and tried Appellant *in absentia* where Appellant did not have actual notice of the trial date and therefore could not voluntarily waive his right to be present.

Relevant Facts

On May 23, 2016, Appellant pled guilty to one count of criminal sexual conduct in the third degree. He was sentenced to 343 days' time served and required to register as a sex offender. R. 98. In 2019, Appellant was charged with failure to register as a sex offender, first offense. He again pled guilty and was sentenced to time served. R. 111. On October 23, 2019, approximately a month after pleading guilty to failure to register, first offense, Appellant was charged with failure to register as a sex offender, second offense. R. 96. Appellant was indicted for one count of failure to register as a sex offender, second offense, during the June 2020 term of the Horry County grand jury. R. 94

On August 12, 2020, the State called the case to trial. R. 1. Prior to selecting a jury, the State informed the trial court that Appellant could not be found and that it wished to present evidence to proceed with his trial *in absentia.* R. 5, ll. 2-5. Counsel Galmore requested the case be continued, arguing that Appellant had not received notice of the trial date. R. 5, ll. 8-16. The State proceeded to call four witnesses to testify regarding the attempted service of notice of the trial date on Appellant.

Magdalena Salemno testified that she was employed as an assistant to two prosecutors at the Horry County Solicitor's office. R. 6, ll. 7-17. Salemno prepared a subpoena on July 22,

2020,[1] summoning Appellant to appear at the Horry County Judicial Building for the August 10-August 14, 2020, General Sessions term. R. 99. The subpoena was sent by standard U.S. Mail to the address that Appellant had provided on his bond form, public defender application, and a change of address form. R. 9, ll. 5-21; R. 10, ll. 15-18. The subpoena was returned to the Solicitor's office on August 1, 2020, with a notation that it was "not deliverable as addressed[2] unable to forward." R. 11, ll. 23-R. 12, l. 6; R. 13, ll. 10-18; R. 100. Salemno also prepared a second subpoena on August 3, 2020, summoning Appellant to the Horry County Judicial Building on August 6, 2020. R. 102. Salemno testified that a sheriff's deputy attempted to personally serve the August 6 subpoena on Appellant, but it was returned to the Solicitor's office with an affidavit of non-service. R. 12, ll. 8-23; R. 104.

Senior Assistant Solicitor Mary-Ellen Walter testified that the August 2020 trial roster, which listed Appellant's case as ready for trial, was published by the Solicitor's Office on July 22, 2020. R. 15, ll. 2-7. A meeting on the trial roster was held on August 3, 2020, at which point Counsel Galmore indicated he believed Appellant would plead guilty to the charge. The circuit court directed the State to subpoena Appellant to come to court on August 6, 2020, to enter a guilty plea. R. 15, ll. 15-24.

Deputy Bobby Strickland testified that he was given a subpoena on August 3, 2020, to serve on Appellant. Deputy Strickland was familiar with Appellant and would know him on

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1 Salemno testified she sent the subpoena out on July 22, 2020, but the postmark on the envelope of State's Exhibit 1 indicates the subpoena was placed in the U.S. Mail on July 27, 2020. R. 11, ll. 20-22.

2 Appellant requests this Court take judicial notice pursuant to SCRE, Rule 201, of the definition of "not deliverable as addressed." According to the United States Postal Service Office of the Inspector General's website, "not deliverable as addressed" is defined as mail that did not reach its intended recipient because the address was incorrect, incomplete, or illegible.
See https://www.uspsoig.gov/blog/undeliverable-addressed-costs-more-you-think

sight. R. 17, ll. 11-25. When Deputy Strickland arrived at the address to serve Appellant, a man and woman, neither of whom were Appellant, opened the door. The man and woman informed Deputy Strickland that they had just moved into the apartment unit, and Appellant no longer lived there. The property manager told Deputy Strickland that Appellant had never been on the lease for the unit and that the woman who had previously leased the unit no longer lived there. R. 18, ll. 4-14.

The last witness the State called was Nicholas Alter, an employee of the Horry County Clerk of Court. R. 22, l. 20-R. 23, l. 19. Alter authenticated the bond paperwork that Appellant filled out prior to his release from jail. R. 105. Alter testified that Appellant had signed and initialed the paperwork. He further read two sections of the bond paperwork that generally advised a defendant of the right and obligation to be present at trial and that trial could proceed in his absence if he failed to attend. R. 24, l. 8-R. 25, l. 18. Alter further testified that the bond paperwork commanded Appellant to appear at the February 28, 2020, term of the Court of General Sessions. R. 27, ll. 8-18. No where on the bond paperwork was August 10-14, 2020, listed as a trial date. R. 27, l. 19-R. 28, l. 8.

The State argued that it had presented evidence that Appellant had notice that he was to appear in court for his trial. The State further argued that Appellant's charge of failure to register, second offense, was indicative of Appellant's propensity to receive notice of a legal duty and then continually fail to meet that duty. R. 31, l. 14-R. 32, l. 4. The court interjected to ask what the legal standard was in situations where "you have a defendant who does not have actual notice that their trial is being called this week, but it's because they haven't maintained and done what they were supposed to do?" R. 32, ll. 5-15. The State responded that the case of State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007), instructed that intentional

misconduct by the defendant to avoid the judicial process was waiver by misconduct, and that it applied to Appellant's case. R. 32, l. 16-R. 33, l. 10.

The court noted that Appellant's case was not like Fairey, in that Appellant had not given multiple addresses to avoid service. The State responded that Appellant had given a false address and had never lived at the address he had provided. The court clarified that the testimony was that Appellant had not been on the lease of the apartment, not that he had never lived at that address. The court asked, "is this a guy trying to avoid service or is this somebody who moved, didn't provide a forwarding address, and he can't be found, but at the time he filled out the paperwork it was not misconduct." The State then conceded that they did not know if Appellant had lived at that address. The State continued to argue that Appellant was on trial for a notification crime and that the court could consider that charge as evidence of a willful intentional effort by Appellate to avoid the judicial system. R. 33, l. 12-R. 36, l. 17.

Counsel Galmore responded that a bench warrant was the proper remedy in the that situation. He stated there was no indication that Appellant was intentionally attempting to avoid service, and the State was asking the court to assume Appellant's conduct was intentional. R. 36, ll. 21-25. Counsel Galmore further argued that pursuant to State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010) the court had to find that Appellant had received notice of the trial date and was aware that he would be tried in his absence. He noted that in Ravenell, the Court of Appeals stated that the bond paperwork given to a defendant may serve as the requisite warning that a defendant can be tried in their absence. However, there were other steps that had been taken in Ravenell to show the defendant was aware his trial date and of the potential for trial *in absentia* and that those other steps had not been taken in Appellant's case. R. 37, l. 4-R. 38, l. 6.

After a brief recess the court issued its ruling stating,

> All right. I've reviewed the caselaw and I think, *by virtue of the fact that he signed the bond questionnaire, that's – it says that's adequate notice that he can be tried in his absence if he doesn't appear.* He provided them with the address, he provided a change of address that had the same address. Therefore, I think that is where he was telling them that – where you can notify me of the trial. *He changes the address without giving another forwarding address, and that's a voluntary wavier.* So, I'm gonna say you can go ahead and try him in his absence. I deny the motion for continuance.
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> . . .
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> All right. I find that *the state has satisfied the notice requirements, notified the defendant of the date and term of his trial, as well as that he would be tried in his absence. I acknowledge he doesn't have actual notice but that's due to his own actions. And as I understand the caselaw, if his -- and I'll term it misconduct is what causes the failure to receive notice and that constitutes a waiver of his -- he's waiving his right to be present.* We have the bond questionnaire that said you'll be tried in your absence. We've got him providing the address. We've got him providing the change of address. We've got them sending it to that address; and he's just not there. He never provided – I don't know whether he ever lived there or if he didn't live there, but the fact of the matter is he didn't live there when the notice was sent out and there was nothing to notify them that there was a change of address. And as I read the Fairey case, *that's a little bit more intent to deceive in the Fairey case, but the fact of the matter is, is in the Fairey case where he gave a change of address and it was the different address, there was an intent on his part to avoid it. Here, I'm not saying there was an attempt, but he certainly gave an address that was not accurate at the time that they* --- I'm gonna allow the trial in his absence to go forward.

R. 39, ll. 6-14.; R. 40, l. 4-R. 41, l. 1 (emphasis added).

At the close of the case, the court charged the jury that a defendant may be tried in his absence, but the fact that the defendant was not present at trial may not be considered against the defendant. R. 124, ll. 22-25.

Discussion

There is nothing in the record that supports the contention that Appellant had actual notice of his trial date and voluntarily waived his presence. The trial court even acknowledged that Appellant did not have actual notice of the trial date but stated that his "misconduct" amounted to wavier of his constitutional right to be present at his trial. There was no evidence of

misconduct on the part of Appellant that would justify waiver of such an important right. The trial court incorrectly allowed the case to proceed *in absentia.*

"It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence." State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010). However, "courts indulge *every reasonable presumption against waiver* of fundamental constitutional rights and ... *do not presume acquiescence* in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal quotations omitted) (emphasis added). Courts have recognized that a "wavier is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Id.

In determining whether there has been a valid, intelligent wavier of a constitutionally guaranteed right, courts consider the "particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." Id. Importantly, "[a] defendant's knowing and voluntary waiver of a . . . constitutional right *must be established by a complete record*; and may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993) (emphasis added).

Before a defendant may be tried *in absentia,* the trial court must first determine that the defendant voluntarily waived his right to be present as his trial. Additionally, "[t]he judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend." State v. Wrapp, 421 S.C. 531, 535, 808 S.E.2d 821 (Ct. App. 2017). The trial court's duty to determine a

voluntary waiver of the right to be present is also contained in Rule 16 of the South Carolina Rules of Criminal Procedure:

> Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

The appellate courts of this State have addressed the propriety of trials *in absentia* in numerous cases throughout the years. In Ellis v. State, 267 S.C. 257, 258, 227 S.E.2d 304 (1976), the defendant was tried in his absence on the misdemeanor charge of unlawful distribution of marijuana. The defendant had appeared at the county courthouse at the beginning of the jury trial term but was not present later in the term when his case was called for trial. At his PCR hearing, defendant testified that he knew he was required to be present at his trial, and that he had been present at the courthouse prior to the start of the trial. He testified that he deliberately left the State before his trial began because he did not want to face the presiding judge who was known for handing down harsh sentences. Id. at 258-59, 227 S.E.2d at 305

On appeal from the denial of his PCR application, the defendant argued that "his right to be present was violated because he was not aware that he could be tried in his absence and did not know the specific date of his trial." Id. at 259, 227 S.E.2d at 305. Our Supreme Court held that notice of the term of court during which a case will be tried, even if the defendant does not know the exact date of the trial, is sufficient notice to enable a defendant to make an effective wavier of his right to be present at trial. Our Supreme Court reasoned that Appellant admitted to knowing which term of court his case was scheduled to be tried during before he left the State. In finding that the defendant had voluntarily waived his right to be present at trial, this Court wrote "[t]he deliberate absence of a defendant who knows that he stands accused in a criminal

case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly process of justice." Id. at 261, S.E.2d at 306.

In City of Aiken v. David Michael Koontz, 368 S.C. 542, 544-45, 629 S.E.2d 686, 687 (Ct. App. 2006), the defendant was charged by a Uniform Traffic Ticket (UTT) with driving under suspension, third offense, on May 8, 2004. The UTT set a trial date of June 28, 2004, in the Aiken City Municipal court. Id. Prior to the trial date, the defendant hired private counsel. Upon being hired, counsel requested a jury trial on behalf of the defendant and requested that notice of all court dates be sent to him. The municipal court continued the case from the original June date and informed counsel that the defendant would be tried during either the August 3, September 21, or October 19, 2004, municipal court jury term. Id. at 545, 629 S.E.2d at 687-88.

The case was eventually called to trial during the October 19, 2004, jury term. At the start of that term of court, counsel for the defendant moved to be relieved, citing the defendant's failure to maintain communication, pay his fees, and assist in preparing the defense of the case as reasons to terminate the representation. In moving to be relieved, counsel for the defendant specifically stated that he mailed the defendant notice of his trial date at the address defendant had provided him but had not received a response. The municipal court relieved counsel and proceeded to try the defendant in his absence. Id., 629 S.E.2d at 688.

On appeal, the defendant argued that the trial court erred in trying him in his absence when it did not make factual findings concerning whether he had received notice of the trial date and whether he had in fact waived his right to be present for trial. Id. at 546, 629 S.E.2d at 688. This Court, relying on established precedent, wrote "[n]otice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present. If the record, however, does not include evidence to support a finding

that the defendant was afforded notice of his trial, the resulting conviction cannot stand." Id. at 547, 629 S.E.2d at 689 (internal citations omitted).

This Court cited to the defendant's bond form and the "Checklist for Magistrates and Municipal judges" as evidence that the defendant was informed of his obligation to be present at trial and that trial would proceed in his absence should he fail to appear. Id. at 547-548, 629 S.E.2d at 689. Further, counsel for the defendant had definitively informed the court that the defendant was aware of the October court term and knew that he was required to appear. Id. at 548, 629 S.E.2d at 689. Based on these factual assertions, this Court held that the record was "replete" with evidence that the defendant had notice of his court date and that his failure to appear meant he could be tried in his absence. This Court found the lower court fully complied with the mandates of Rule 16, SCRCrimP, and correctly proceed to try the defendant in his absence. Id. at 548-549, 629 S.E.2d at 689-690.

In arguing that it was proper to try Appellant in his absence, the State relied heavily on State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007). Fairey was arrested in January 1998 and charged with obtaining goods and monies under false pretenses. Id. at 96, 646 S.E.2d at 446. Fairey signed a bond sheet wherein it indicated that he understood a trial would proceed in his absence if he failed to appear. In July 1998, notice was sent to Fairey's attorney that the charge had been dismissed. Id. In June 2001, the State directly indicted Fairey on the original 1998 charge. A year later, counsel for Fairey moved to be relieved, citing to substantial disagreement with Fairey regarding trial strategy, Fairey's failure to pay his fees, and Fairey's desire to proceed *pro se* as reasons to terminate his representation. The court granted the motion to be relieved in an order dated July 23, 2002. Id. In the order, the court specifically instructed Fairey that he was responsible for keeping the court informed as to where papers should be

served, that he had the obligation to retain counsel and if he did not retain counsel, he had the responsibility to prepare for his trial as a *pro se* litigant. Id. at 96, 646 S.E.2d at 447.

In August of 2002, Fairey notified the State that his permanent address was now in California and requested that all notices, pleadings, and other papers be served on him at the California address. After receiving a subpoena via fax that had been sent to his previous Florida address, Fairey again wrote the State in September 2002 to inform it of his permanent address in California. Id. at 96-97, 646 S.E.2d at 447. On March 10, 2003, Fairey filed a motion to quash, and he listed an address in Florida as his temporary address. Fairey appeared *pro se* at a hearing on the motion to quash on March 24, 2003. During the hearing, Fairey made an oral motion to dismiss the case, and he subsequently filed a written motion to dismiss which also listed the temporary Florida address. Id. at 97-98, 646 S.E.2d at 447.

On March 31, 2003, the court denied the motion to quash by written order that was sent to Fairey's temporary address in Florida. In the order, the court also reinstated Fairey's original 1998 bond and again instructed Fairey to keep the State advised of any changes to his address. Id. at 98, 646 S.E.2d at 447-448. The State subpoenaed Fairey to appear for trial from July 9-23, 2004. The case was called to trial on July 21, 2004, but Fairey did not appear. The State elicited testimony that the subpoena was sent to Fairey's listed permanent address in California, as well as a Myrtle Beach address that had that had been provided on the original 1998 bond form. The lower court found that the solicitor had made an adequate showing that Fairey received notice of his trial date, and the case proceed in his absence. Id. at 98, 646 S.E.2d at 448.

Fairey was apprehended in Florida and brought before the lower court for sentencing on October 21, 2004. Fairey's counsel at sentencing moved for a vacation of the sentence and new trial, arguing Fairey had not received notice and was tried without counsel. The lower court

denied the motion, finding that Fairey adequately and legally waived his right to counsel and his right to be present. Id. at 98, 646 S.E.2d at 448. On appeal, Fairey argued that he was not given notice of his trial date or warned of possible trial *in absentia*, that he was not cautioned against proceedings *pro se* and was thereby wrongfully denied the right to counsel, and that the trial court erred in refusing to give him access to grand jury documents. Id. at. 95, 646 S.E.2d at 445

Fairey argued that he had not received notice of his trial date because the State had "inexplicably" failed to send notice of his trial date to the Florida address, even though the State had sent legal mail to him in Florida since the motion to quash in 2003. However, Fairey had changed his permanent address to California and had only used the Florida address as a temporary address in 2003. This Court reasoned that Fairey had been repeatedly warned that he had the burden of informing the State of any change of address and that his last listed permanent address was California. The use of the temporary Florida address on a motion to quash over a year before the case was called to trial did "not notify the court and solicitor of a change of address so as to direct where all notices, pleadings and other papers may be served." Thus, this Court found notice was properly sent to the last permanent address in California, and as such, Fairey was on notice of his right to be present at the July 2004 trial. Id. at 100-101; 646 S.E.2d 448-449.

This Court also found that Fairey was warned he could be tried in his absence based on the 1998 bond form. Relying on the holding in Koontz, *supra*, this Court noted that a bond form that provides notice that a defendant can be tried *in absentia* may serve as the requisite notice. This Court went on to write that Fairey's signature under the "Acknowledge by Defendant" showed that Fairey had received and understood the warning about trial *in absentia*. Id. at 101-02, 646 S.E.2d at 449-50.

This Court also addressed Fairey's claim that he was denied the right to counsel. This Court noted that Fairey was represented by counsel, and it was his own conduct and failure to cooperate with his counsel, along with his desire to proceed *pro se*, that resulted in him being unrepresented at the time of his trial. Further, the record supported that Fairey was aware of his duties and obligations as a *pro se* litigant based on his communication with the court and solicitor, his requests for production, his various *pro se* motions, and the way he conducted himself during the hearings proceeding his trial. However, despite being aware of his obligations as a *pro se* litigant, Fairey "engaged in delay tactics" by moving throughout the country, making service and notice difficult for the State. When the State was able to "track Fairey's whereabouts" and serve notice, Fairey made motions to continue based on the inconvenience of appearing in South Carolina, to which the State agreed. Fairey further failed to send back acknowledgement of receipt of his indictment and a consent order for a personal recognizance bond. Based on the totality of his actions, this Court held that "Fairey engaged in deliberate and dilatory conduct sufficient to waive his right to counsel." Id. at 105-106, 646 S.E.2d at 451-52.

In State v. Ravenell, 384 S.C 449, 692 S.E.2d 554 (Ct. App. 2010) this Court again was tasked with reviewing the propriety of a trial *in absentia*. In this case, the defendant was present on January 13, 1998, when his case was called for trial and actively participated in jury selection. After jury selection, the defendant moved for a continuance based on the inability to locate a vital witness. The lower court denied the motion for continuance, noting that the defendant had failed to subpoena the witness, but allowed the case to start later the next morning to give the defendant additional time to find the witness. The following day, the defendant did not appear for trial. Id. at 452-453, 692 S.E.2d at 556.

Counsel for the defendant acknowledged that his client had "opted" to not be present at trial, and that the case needed to proceed whether or not the defendant was present but still requested a continuance in the matter. The lower court denied the continuance, finding that the defendant had been present in court the day before, had been admonished that if he did not appear the case would go forward without him, had been subpoenaed for the term of court and had signed a bond form acknowledging his duty to appear and the potential for trial in his absence. Id. at 453-454, 692 S.E.2d at 556. The trial proceeded and the defendant was convicted. In July 2006, the defendant was arrested in Florida and brought before the court in November 2006 to be sentenced. Id. at 454, 692 S.E.2d at 557.

This Court held that the record showed the defendant had "clearly received notice of his right to be present at trial" evinced by the uncontested findings of the lower court that he had admonished the defendant of his right and duty to be present, combined with the fact that the defendant had appeared for the first day of trial. Additionally, this Court found that the defendant was aware that he could be tried *in absentia* based upon the facts, that the lower court specifically noted for the record that it had informed the defendant that if he did not appear the trial would go forward without him, and that his signed bond form had provided him with the requisite notice that he could be tried in his absence. Id. at 457-458, 692 S.E.2d at 558. Relying on State v. Wright, 304 S.C 529, 532, 405 S.E.2d 825, 827 (1991), this Court held that there was no abuse of discretion "where the record clearly revealed the defendant was aware of the term of court and knew he would be tried in absentia should he fail to appear." Id. at 458-459, 692 S.E.2d at 559.

Appellant's case is readily distinguishable from Ellis, Koontz, Fairey, and Ravenell, *supra*. As the lower court found, Appellant never received notice of the term of court in which

his case was set to be tried. Critically, the subpoena that was sent to Appellant notifying him of the term of court where his case would be tried was returned to the solicitor's office as "not deliverable as addressed." That notation meant that the address placed on the envelope by the solicitor's office was either incorrect, incomplete, or illegible. Here, actual notice was not received because the notice was not properly addressed. This failing of the State to properly address the subpoena cannot be imputed to Appellant.

Unlike the defendants in Ellis and Ravenell, Appellant was not present at the start of the term of court and then voluntarily absented himself from trial. Instead, Appellant never received notice of the term of court because the State failed to correctly address the subpoena. Without notice of the term of court in which he was set to be tried, Appellant could not voluntarily waive his presence. Unlike the defendant Koontz, whose counsel specifically informed the court that the defendant was aware of his trial date, Counsel Galmore repeatedly and adamantly informed the trial court that Appellant had never received any notice to be present for trial during the August 2020 term of court. The holding in Fairey, that notice was properly sent to the defendant's permanent address and therefore the defendant was on notice, is inapplicable here. In this case, notice was not sent to Appellant's proper address, as it was returned undeliverable. Factually, based on the record, the State failed to properly notice Appellant for trial and lacking actual notice, Appellant could not voluntarily waive his presence.

The lower court misapplied Fairey and found that Appellant's "misconduct" in failing to provide a forwarding address was wavier of his right to be present by conduct. Fairey did not address *waiver of presence* by conduct but addressed *waiver of counsel by conduct.* The holding in Fairey, as it pertained to notice, was that the State sent the subpoena to the permanent address that the defendant had provided and had therefore satisfied notice. The question of Fairey's

"deliberate and dilatory" misconduct only went to the analysis of whether he was denied the right to counsel. Further, in Fairey, the court found there was intent on the part of the defendant to delay the case ever coming to trial. In the matter *sub judice*, the lower court explicitly stated that it was not saying there was an attempt to deceive or delay the case ever coming to trial on the part of Appellant, only that his address did not appear to be accurate at the time the State went to serve him.

On August 3, 2020, the State attempted to personally serve Appellant at his listed home address with notice to appear in court on August 6 for a plea. However, the State was unable to effect service because new tenants had just moved into the apartment unit where Appellant had been living. Notably, the State was aware on August 3, 2020, that Appellant had not received notice of his trial date or plea date, yet it did nothing in the intervening week to attempt to locate Appellant or work with Counsel Galmore to ensure Appellant received notice. Unlike the defendant in Fairey, who changed his address repeatedly and sometimes used a temporary address, Appellant had maintained the same address on his documentation. The record reflects that the new tenants had just moved into the unit, presumably at the start of the month, and therefore it can be logically concluded that if the State had properly addressed the original subpoena that it sent to Appellant in July, he would have received the required notice of his trial date.

Appellant's case is most analogous to that of the defendant in State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017). In Wrapp, the case was called for trial and counsel moved for a continuance based on his client's absence. Id. at 534, 808 S.E.2d at 822. Counsel for Wrapp acknowledge that he did not know if Wrapp's absence was voluntary or involuntary. The State contended Wrapp had notice based on a conversation that occurred after the grant of a prior

continuance in which the solicitor told Wrapp that "his case would be called for trial the next time we [the State] could get to it." The State also asserted that, three weeks prior to trial, it was contacted by a private attorney that Wrapp had spoken to about potentially handling his case. According to the State, the private attorney "declined to get involved due to the fact that [the case] was up for trial." Counsel for Wrapp did not know whether the private attorney had informed Wrapp of the upcoming trial date. Id.

The trial court ultimately ruled that, although it did not know if Wrapp's absence was voluntary or involuntary, it appeared that Wrapp had notice to be present and that he was not. The court reasoned the defendant could not make himself unavailable and then use that as a basis for a continuance. Counsel for Wrapp objected to the trial proceeding in Wrapp's absence and specifically stated that he did not feel that Wrapp had adequate notice of the trial date. Id. at 534-535, 808 S.E.2d at 822-23.

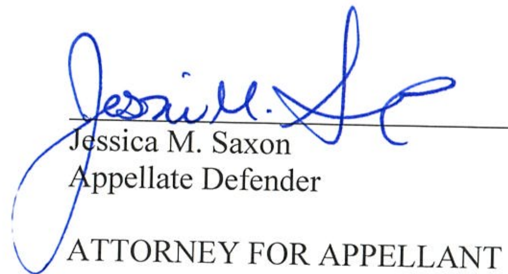
This Court held that the trial court erred in trying Wrapp *in absentia* where the court did not make the requisite findings of fact that Wrapp had received notice of his right to be present and notice of the term of court for which he needed to be present, and that he knew he would be tried *in absentia* if he failed to appear. Id. at 536, 808 S.E.2d at 823. Further, the record in Wrapp was "devoid of *any fact indicating Wrapp had actual notice of the term of court in which his trial would occur.*" Id., 808 S.E.2d at 824 (emphasis added). This Court wrote "[i]t seems logical that for one to voluntarily fail to attend trial or otherwise waive his trial appearance, one must actually know when the trial is to occur." Id. at 537, 808 S.E.2d at 824.

Much like in Wrapp, *supra*, the record in Appellant's case is wholly devoid of evidence that Appellant ever received actual notice of the term of court in which his trial would occur. The opposite is in fact true, because the trial court directly acknowledge that Appellant had not

received actual notice of the term of court in which his case would be tried. Without actual notice, Appellant could not voluntarily waive his presence. Further, the lower court erred in finding that Appellant waived his presence by "misconduct" where the trial court misapplied the holding in Fairey, *supra*, and there was no evidence of intentional misconduct in the record that would support the waiver of Appellant's constitutionally protected right to present at his own trial.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court find the trial court erred in holding Appellant's trial *in absentia,* overturn his conviction and sentence, and remand the case to the Horry County Court of General Sessions for a new trial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of March, 2023