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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Circuit Court

Honorable R. Keith Kelly, Judge

Trial Court Case No. 2021-CP-11-00609
Appellate Case No. 2022-000687

Benjamin Paul Hannon, _____, Appellant,

v.

State of South Carolina, _____ Respondent.

FINAL BRIEF OF APPELLANT

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III. **Did The Circuit Court err in ruling the Appellant knowingly, intelligently, and voluntarily waived his right to a jury trial?**

STATEMENT OF CASE

On June 13, 2020, the Appellant, Benjamin Paul Hannon, was issued traffic tickets for Speeding, 10 mph or less over the speed limit, Seatbelt Violation, Operating Vehicle on Highway Without Registration and License Due to Delinquency, and Operating Motor Vehicle Without License in Possession. This matter was originally set for trial on July 20, 2020. The Appellant appeared and requested a jury trial. His continuance was granted and his trial was set for August 20, 2021. The Appellant appeared *Pro Se* for his hearing August, 20, 2021, but was denied entry into the courtroom for failure to wear a mask. The Court informed the Appellant he would not be allowed to enter the courtroom pursuant to South Carolina Supreme Court Order 2020-07-30-01 (July 30, 2020) [hereinafter "Supreme Court Order"]. That same day, the Appellant was tried in his absence and found guilty at a bench trial on all four UTTs as fine only no jail time. On September 3, 2021, the Appellant received notice of his convictions and an appeal was filed with the Court of Common Pleas and served on September 13, 2021. A hearing for the appeal was held on January 19, 2022 before the Honorable R. Keith Kelly. At said hearing, the Appellant made three main arguments: 1) were reasonable accommodations, or an alternative to a mask, offered to allow the Appellant to appear in court; 2) is a bench trial in absence appropriate where a defendant appears but is denied

access for not wearing a mask; 3) did the Appellant waive his right to a jury trial? As to the third argument, the Appellant contended he had a recording of the conversation that took place that was the basis of the Return. At the hearing, Appellant informed the Judge he would submit the recording as an exhibit once the Assistant Solicitor, Matt Kendall, had an opportunity to review. (Tr. p. 18 l. 10 – p. 20 l. 4; R. 31-33). Mr. Kendall reviewed the recording and a copy was provided to the Circuit Court. The recording was never entered in as an exhibit prior to the Circuit Court's Order. The Magistrate's ruling was affirmed by an Order dated January 25, 2022 which was received by Appellant's counsel on January 26, 2022. Specifically, among other things, the Circuit Court ruled the record is the Return and the Defendant knowingly and voluntarily waived his right to a jury trial by his words and actions. On February 2, 2022, the Appellant moved for an Order of the Circuit Court to alter or amend its Order dated January 25, 2022, pursuant to Rule 59(e) of the S.C. Rule of Civil Procedure. This motion was served on the Respondent on February 3, 2022. The Appellant based his motion on several grounds, but specifically asked whether the recording provided to the Circuit Court was considered in the Judgement. Said motion was denied, without further argument, by an Order dated April 19, 2022. The Circuit Court, in denying the motion, stated: "Moreover, the appellant requested clarification regarding a recording taken by the defendant. As this was not made part of the record from the magistrate's court, this recording was not considered on appeal." (Judge Kelly's Order dated April 19, 2022; R. 4)

Appellant served Notice of Appeal on May 17, 2022 and this appeal follows.

STANDARD OF REVIEW

In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. *Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011). The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70 (Supp.2011). "The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors or law." *State v. Johnson,* 396 S.C. 182, 186, 720 S.E.2d 516, 518 (Ct. App. 2011).

STATEMENT OF THE FACTS

Appellant was issued traffic tickets for Speeding, 10 mph or less over the speed limit, Seatbelt Violation, Operating Vehicle on Highway without Registration and License Due to Delinquency, and Operating Motor Vehicle without License in Possession. There is no disagreement between the Appellant and Respondent that the Appellant would not wear a mask and no disagreement he requested a jury trial. The Appellant and Respondent do have different versions of a conversation that took place August 20, 2021, in the lobby of the Sheriff's Office prior to the Appellant's court date. The Appellant asserts at no time was he offered any reasonable accommodations to appear in court without a mask, which includes but is not limited to wearing a face shield. Further, the Appellant asserts at no time did he make any statements concerning waiving his right to a jury trial. The Appellant has a recording he believes encompasses the whole conversation between himself and the Court on August 20, 2021, where the Court never offers a face shield as

an alternative and the Appellant never makes any statements concerning a jury trial. The Court asserts a conversation took place where the Appellant was offered a face shield and, in response, said "I don't have to wear shit." Further, the Magistrate Judge in his Return stated the following exchange took place:

> "This Court informed the Appellant that since this was his second court appearance for trial and he is willfully refusing to comply with a South Carolina Supreme Court Order, this court would have no other option than to call his case and try him in his absence for his charges. And furthermore, these UTT's would be found guilty, fine only, no jail time and reported to the State Department of Motor Vehicles as nonpaid.
>
> The Appellant responded 'So I'm not going to jail?' This Court responded 'No sir.'
>
> The Appellant stated on his way out the front door of the building 'Well if I'm not going to jail I don't need no damn jury trial.'
>
> This Court took the Appellant statement as his waiver to a jury trial and the Appellant was tried in his absence and found guilty on all three UTTs as fine only no jail time."

(Magistrate's Return; R. 10-11)

There is no disagreement that everything contained in the Return occurred outside of the courtroom in the lobby of the Sheriff's Office.

ARGUMENT

I. The Circuit Court erred in ruling a bench trial in absence is appropriate where a defendant appears but is denied access for not wearing a mask?

A criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial. *See* U.S. Const. amend. VI. However, Rule 16, SCRCrimP provides:

> 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 court.

While Rule 16 permits a knowing and intelligent waiver of the right to be present, such a waiver is only permitted in limited circumstances. *State v. Patterson*, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006). A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the case in absentia. *State v. Ritch*, 292 S.C. 75, 354 S.E.2d 909 (1987); *State v. Jackson*, 288 S.C. 94, 341 S.E.2d 375 (1986); *State v. Castineira*, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000). Additionally, the trial 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 that the trial court would proceed in his absence should he fail to attend. *Jackson*, 288 S.C. at 96, 341 S.E.2d at 375; *Castineira*, 341 S.C. at 623, 535 S.E.2d at 451.

In the Supreme Court Order dated July 30, 2020, the Court relied on to deny the Appellant access to the courtroom during his trial states: "**IT IS ORDERED** all persons employed in, conducting business in, or otherwise visiting or present for any reason in county and municipal courthouses statewide are **required** to wear a protective mask or ***other facial covering*** while inside the courthouse . . . ." Supreme Court Order 2020-07-30-01 (July 30, 2020) (third emphasis added). The Supreme Court Order further states: "Any person who refuses to comply with these directives is subject to contempt for violation of this order." *Id*.

A. The Trial Court did not meet all the conditions to try the Appellant's case in absentia.

The Appellant did receive notice of his right to be present and was warned his case would go forward in his absence. However, the Court did not meet the requirement that the Appellant voluntarily waived his right to be present. Voluntary is defined as done by design or intention. *Black's Law Dictionary* 764 (3rd pocket ed. 2006). The Appellant appeared and requested the Court allow him to attend his hearing, but he was denied entry to the courtroom during his trial. The trial went forward without his consent and despite his objection. Therefore, Appellant did not intentionally waive his right to be present at his trial.

B. Reasonable accommodations or an alternative to a mask should have been offered to allow Appellant to appear in Court.

The Supreme Court Order allows for other facial coverings to be used to attend court. Also, courts have the capability to make reasonable accommodations for necessary parties to a matter. The Appellant maintains that he was never offered the option to wear an alternative facial covering. Had an alternative facial covering or reasonable accommodations been made the Appellant could have appeared at his trial. Instead, the court took the extreme step to try him in his absence. The court should have offered him the opportunity to wear an alternative facial covering, which is allowed by the Supreme Court Order.

C. The Supreme Court Order does not address whether failure to comply with the order constitutes a waiver to appear at trial.

The Supreme Court Order only provides one remedy for any person who fails to comply with the order … "Any person who refuses to comply with these directives is subject to contempt for violation of this order." *Id.* The Supreme Court Order does not

address whether failure to wear a mask constitutes a voluntary waiver of an individual's right to appear in court. Nor, does the order allow a litigant to be denied access to their hearing for failure to comply. In fact, reading the order would indicate the Supreme Court anticipated some might not comply and provides only one remedy available to the court, contempt of court.

II. The Circuit Court Judge should have considered evidence not in the Return?

Generally, an issue must be presented to the trial court or it is not persevered for appellate review. *See State v. Dial* 429 S.C. 128, 132, 838 S.E.2d 501, 503 (S.C. 2020) ("It is firmly established law that, ordinarily, an issue must be presented to the trial court or it is not preserved for appellate review"). This established rule applies in appeals from magistrates court to circuit court. *See Id.* ("As the court of appeals recognized, this established rule applies in appeals from magistrates court to circuit court"); *See State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) ("In criminal appeals from magistrate ... court, the circuit court ... reviews for preserved error raised to it by appropriate [object]tion." (citing *City of Columbia v. Felder,* 274 S.C. 12, 13, 260 S.E.2d 453, 454 (1979))). However, this rule does not apply in all situations and does not apply when the first opportunity the defendant has to raise an issue is on appeal *State v.* White, 305 S.C. 455, 409 S.E.2d 397 (S.C. 1991). In certain circumstances, an evidentiary hearing may be appropriate to determine whether a defendant made a knowingly and intelligently wavier of one of his rights. *See Dial*, 429 S.C. at 135, 838 S.E.2d at 505 ("In the absence of evidence of a knowing and intelligent waiver of the right to counsel, a defendant is entitled to a remand to the trial court for a

factual determination as to whether the waiver was knowingly and intelligently made." (citing *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977))).

Here the Appellant was tried in his absence. He never had an opportunity to make any contemporaneous objections on the record concerning his right to a jury trial or on any other issues. The first time the Appellant had an opportunity to challenge the Magistrate's ruling or findings was on appeal to the Circuit Court. The Circuit Court in its Order dated January 25, 2022, ruled "Under South Carolina law, the Return prepared by the trial judge is the record on appeal and this Court is without authority to examine witnesses or receive evidence not in the Return." (Judge Kelly's Order dated January 25, 2022; R. 1-3). Further, the Circuit Court in its Order denying appellants motion to reconsider ruled, "Moreover, the appellant requested clarification regarding a recording taken by the defendant. As this was not made part of the record from the magistrate's court, this recording was not considered on appeal." (Judge Kelly's Order dated April 19, 2022; R. 4). The Appellant asserts the Circuit Court erred in this ruling considering the Appellant could not have placed anything on the record during his trial, because he was unrepresented and tried in his absence. The Appellant believes the Circuit Court should have considered the recording in making a determination whether he waived his right to a jury trial.

To establish a blanket rule, the Return is the record that cannot be challenged, would create a rule where any defendant tried in their absence could never present any evidence to challenge a Return. This would violate a defendant's due process. Therefore, Appellant should have been given an opportunity to introduce

evidence on whether he made any statements concerning his waiver of a jury trial.

III. The Circuit Court erred in ruling the Appellant knowingly, intelligently, and voluntarily waived his right to a jury trial?

Section § 22-2-150 of the South Carolina Code provides defendants in magistrate's courts the right to trial by jury. *See* S.C. Code Ann. § 22-2-150 ("Every person arrested and brought before a magistrate charged with an offense within his jurisdiction shall be entitled on demand to trial by jury which shall be selected as provided in this chapter.") A defendant's waiver of the right to a jury trial must be knowingly, voluntary, and intelligent. *Moore v. State*, 399 S.C. 641, 732 S.E.2d 871, 873 (S.C. 2012) (citing *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930), *overruled on other grounds by Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both. *Id.* (citing *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (S.C. 2000)). It is not essential that the waiver appear "on-the-record." *Brown v. State*, 317 S.C. 270, 272, 453 S.E. 2d 251, 252 (S.C. 1995). However, the court has been troubled in cases where there is an absence of any finding whatsoever of a defendant knowingly and voluntarily relinquishing his right to a hearing. *State v. Brannon*, 407 S.C. 293, 295-96, 755 S.E.2d 117, 118 (Ct. App. 2014). In order to determine whether a waiver is knowing and voluntary, the court examines the background, experience and conduct of the accused. *Spoone v. State*, 379 S.C. 138, 142, 665 S.E.2d 605, 607 (S.C. 2008). When the magistrate court prepares a return, the court must explain the steps it took to reach the conclusion that a defendant

knowingly and voluntarily waived their right to a constitutional or statutory right. *See Dial*, 429 S.C. at 135, 838 S.E.2d at 136 n.1. ("When a magistrates court prepares a return in a case in which the court conducted a hearing to determine whether a defendant knowingly and voluntarily waived right to counsel, the court must explain in the return the steps it took to comply with the requirements of *Faretta* and *Prince*, including the court's explanation to the defendant of the dangers of self-representation and the court's findings as to whether the defendant understood those dangers.") The burden to demonstrate the validity of a defendant's waiver is on the State. *See Id.*, 429 S.C. at 133, 838 S.E.2d at 504 ("The burden is on the State to demonstrate the validity of a defendant's waiver of his right to counsel.")

There is no disagreement that the Appellant requested his statutory right to a jury trial on July 20, 2020. In *Moore*, the court concluded a defendant's knowing and voluntary waiver of a statutory right must be established by a complete record and may be accomplished by a colloquy between the court and defendant. In *Moore*, Chief Justice Toal noted:

> A "colloquy" is defined as "any formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights." *Black Law Dictionary* 221 (8th ed.2005). Colloquy has also been defined as a "high-level serious discussion." *Webster's Ninth New Collegiate Dictionary* 260 (9th ed.1989); *see New World Dictionary* 280 (2d ed.1976) (defining colloquy as a "conversation, esp. a formal discussion; conference".) The exchange which took place in the instant case does not meet even a banal definition of colloquy, and falls far short of the "high-level serious discussion necessary to support the waiver of a defendant's constitutional right to a jury of his peers.

Moore, 399 S.C. 641, 732 S.E.2d at 876 n.1.

In the present case, the exchange between the Appellant and Court, like in *Moore*, falls short of the required colloquy that must take place before a judge can determine whether the defendant waived his right to a jury trial. Here, the conversation occurred in the lobby of the Sheriff's Office. There was never a high-level serious discussion to support a waiver of Appellant's right to a jury trial. The Magistrate Judge told Appellant **he would be found guilty** prior to Appellant making any statement about not needing a jury trial. The Return does not contain any analysis into the Appellant's background or experience required by *Spoone*. The Court did not make any inquiries into the Appellant's education or understanding of the consequences of waving his right to a jury trial. The Court only considered the Appellant's conduct and one statement made in response to being told he would be found guilty: "well if I'm not going to jail I don't need no damn jury trial." In *Dial*, the South Carolina Supreme Court took issue with the return not containing an explanation of the steps taken to inform the defendant of the danger of self-representation and whether the defendant understood the dangers. This is similar to the case at hand where the Appellant was never informed of the implications of proceeding forward without a jury trial. The Appellant was never informed he could have a jury trial if he failed to appear and was never informed a jury could find him not guilty. In fact, based on the Return, it appears the Appellant was found guilty prior to a trial or any statement concerning a jury trial. The Return lacks any findings during or before the trial that the Appellant knowingly, intelligently, and voluntarily waived his right to a jury trial.

Like *Moore*, the limited exchange here was not a colloquy and there is not

a sufficient record to support the Magistrate's Court determination the Appellant waived his right to a jury trial. Even if the exchange is considered a colloquy, the Court still failed to consider all of the circumstances required by *Spoone* and the Return failed to explain the steps taken to ensure the Appellant understood the implications of waving his right to a jury trial as required by *Dial*. Therefore, this statement alone cannot be considered a knowing, intelligent, and voluntary wavier of Appellant's statutory right to a jury trial and the Cricut Court erred in finding the Magistrate Judge made such a finding.

CONCLUSION

For the reasons set forth herein, the Appellant asks this Honorable Court to grant the relief sought and reverse the judgements on the four UTTs and remand them for a new trial.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellant filed April 17, 2023 complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E. 2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 17th day of April, 2023.

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