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Aug 28 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES D. MAJOR,

APPELLANT

APPELLATE CASE NO. 2023-001076

ANDERS BRIEF OF APPELLANT

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred when it denied Appellant's motion for a continuance and tried Appellant *in absentia*?

STATEMENT OF THE CASE

Appellant was indicted during the April 2023 term of the Charleston County grand jury for one count of burglary second degree (violent). R. 205. On June 5, 2023, the State, represented by Mallory V. Haliena and R. Hunt Russell, called the case to trial before the Honorable Jennifer B. McCoy and a jury. Appellant was represented by Melisa W. Gay and Sarah H. L. Norton. R. 1.

Prior to jury selection, Counsel Gay moved for a continuance on behalf of Appellant because he was not present in court. The State opposed the motion, arguing that Appellant had received notice of the date and should be tried *in absentia*. Judge McCoy determined that the State could proceed with trial *in absentia*. R. 6, l. 17-R. 10, l. 19; R. 47, ll. 9-19. The jury found Appellant guilty as indicted. R. 180, ll. 12-15. On June 22, 2023, the parties reconvened before Judge McCoy to have Appellant's sentence unsealed. R. 195. Appellant was sentenced to six years imprisonment. R. 202, ll. 7-15.

This appeal follows.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Wrapp, 421 S.C 531, 535, 808 S.E.2d 821, 823 (2017) *citing* 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 circuit court erred when it denied Appellant's motion for a continuance and tried Appellant *in absentia*.

Relevant Facts

Appellant was arrested on November 9, 2017, for the burglary of The Daily, a local coffee shop and restaurant in Charleston, SC. R. 75, ll. 4-22; R. 94, ll. 3-5. Approximately five and a half years later the State called the case to trial in June 2023. Prior to jury selection Counsel Gay informed the circuit court that Appellant had "chosen not to come to court." It was Counsel Gay's understanding and belief that Appellant had been notified of his court date by Michael Little (Little), his bondsman, however she had never directly spoken to Little or Appellant. Counsel Gay requested a continuance to locate Appellant and see if there was an emergency preventing him from appearing in court. R. 6, l. 17-R. 7, l. 7.

The State opposed the motion for a continuance and argued that ample notice had been provided to Appellant. The State provided four dates, prior to the trial date, where Appellant had failed to appear over the last five years. Additionally, the State argued that Judge Young had told Counsel Norton during a status conference that if Appellant did not show up for the June 2023 trial date that the parties would proceed with a trial *in absentia*. Finally, the State argued that Little had informed the State that he had told Appellant when his court date was and that he was required to show up. R. 7, l. 12-R. 8, l. 1. In support of its argument, the State entered the transcript of the hearing before Judge Young, the Charleston County CourtPlus docket, an email chain between Assistant Solicitor Haliena and Little, and Appellant's bond paperwork as Court's Exhibits. R. 209-214; R. 215-221.

The circuit court denied the motion for continuance and the case proceeded to jury selection with the trial to start the following morning. The trial court requested that Little appear to provide the court with a record of his attempted contact with Appellant. Counsel Gay also informed the court that she lacked a way to contact Appellant. The mail she had sent him had been returned to sender. She had spoken to him by phone in early May 2023 and he had told her to not call that cellphone number ever again. Counsel Gay had sent text messages to the number in an attempt to inform Appellant of his court date. R. 8, l. 18-R. 10, l. 10.

The following day Appellant was not present for court and Counsel Gay renewed her motion for a continuance. She informed the court that Appellant had stopped speaking with her about a month prior to trial and was not responding to her attempts to contact him. Counsel Gay stated that she, as his attorney and an officer of the court, had never been able to confirm that Appellant knew that his trial date was June 5 and that if he did not appear it would be a trial *in absentia*. R. 43, l. 12-R. 44, l. 8. The State relied on its arguments and exhibits from the previous day. The State also cited City of Aiken v. Koontz, 368 S.C. 542, 629 S.E.2d 686 (Ct. App. 2006), for the proposition that Appellant's bond paperwork put him on sufficient notice of the possibility of a trial *in absentia*. R. 44, l. 11-R. 45, l. 8. The circuit court also heard testimony from Little regarding his contact with Appellant.

Little informed the court that he had spoken with Appellant on May 23, 2023, at 5:22 PM, and reminded him that he must appear in court on June 5, 2023, or he would be arrested. According to Little, Appellant confirmed that his lawyer had already advised him he needed to appear on June 5, 2023. Little also made attempts to contact Appellant after he did not appear on June 5. He went to the address on file for Appellant and was informed that Appellant did not live there anymore. The gentleman living at the address knew Appellant and stated he could get

in touch with him. Little left his number and requested Appellant contact him as soon as possible. Little also drove to a secondary address for Appellant but the home was vacant. R. 45, l. 15-R. 46, l. 25.

The circuit court ruled that the State had met its notice requirements through publication, through the initial bond paperwork which informs defendants of the possibility of trial *in absentia*, and through Appellant's bondsman. The court recognized Counsel Gay had made unsuccessful attempts to contact Appellant as well. The circuit court determined the trial would proceed in Appellant's absence. R. 47, ll. 9-19. When Appellant was brought to court to have his sentence unsealed, he contended that Counsel Gay told him the trial date was July 9, 2023. He stated he had been working at the Oyster House and only learned of his trial when it was on the news. Counsel Gay responded by reading a text message sent on to the last known number she had for Appellant on May 30, 2023, telling him trial was on June 5, 2023. R. 201, l.18-R. 203, l. 17.

Discussion

"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). Courts have recognized that a "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Id.

In determining whether there has been a valid, intelligent waiver 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).

Before a defendant may be tried *in absentia*, the trial court must first determine that the defendant voluntarily waived his right to be present at 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 at trial 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.

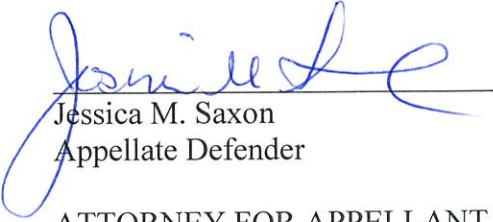
The circuit court erred in trying Appellant *in absentia* because the record did not support a finding that Appellant had actual notice of his trial date and he could not voluntarily waive his right to be present without such notice. Appellant did not have notice of his June trial date. He informed the circuit court that he was told his trial was in July, not June. Counsel Gay admitted as an officer of the court that she had not been able to fulfill her notice requirement to Appellant and she did not know why he was absent from court. Little informed the court that he had told

Appellant that he would be arrested if he did not appear in court, not that his trial would proceed without him. Additionally, the email chain included between the State and Little in Court's Exhibit 2 showed that notice was given to a friend of Appellant and not to Appellant himself. Appellant was not present at the status hearing before Judge Young where the case was set for a date certain trial, so he did not receive notice to appear from the court. Finally, his bond paperwork, while containing the notice of a possible trial *in absentia*, was almost six years old and had no information regarding the actual date of his trial. Outside of the statements of Little that he spoke to Appellant on May 30, 2023, there was nothing in the record to support a finding that Appellant had actual notice of his trial date.

Additionally, the circuit court did not make a finding that Appellant was voluntarily absent. The court only ruled that the State had met its notice requirements and that Appellant had knowledge he could be tried *in absentia*. Counsel Gay informed the court that she did not know why Appellant was absent from court. Considering Appellant lacked notice of his court date, his absence was not voluntary. As this Court wrote in Wrapp, *supra*, “[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

CONCLUSION

Based on the foregoing argument, 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 Charleston County Court of General Sessions for a new trial.


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

This 28th day of August, 2024.

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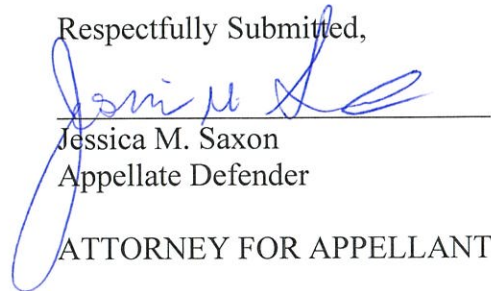
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James D. Major states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. She has reviewed the record of appellant’s trial before Judge Jennifer B. McCoy, which was held on June 5-6, 2023, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for James D. Major.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

This 28th day of August, 2024.

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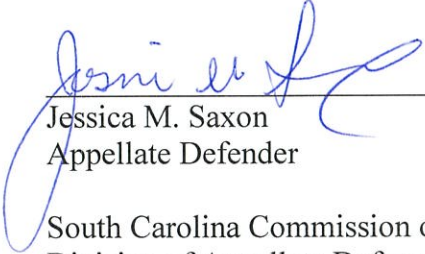
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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True Billed Indictment 2023-GS-10-02029 and Sentencing Sheet
- (2) Trial Transcript dated June 5, 6 2023
- (3) Sentencing Transcript dated June 22, 2023
- (4) Court's Exhibits 1 and Court's Exhibit 2

I certify that this designation contains no matter which is irrelevant to this appeal.



Jessica M. Saxon
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ATTORNEY FOR APPELLANT

This 28th day of August, 2024.

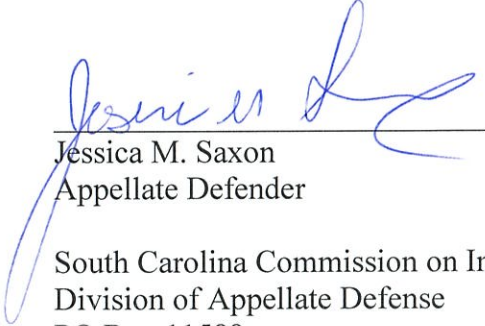
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."



Jessica M. Saxon
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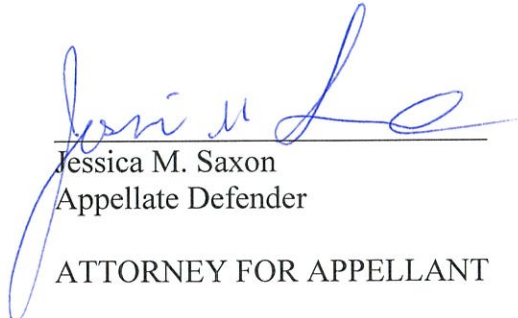
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APPELLATE CASE NO. 2023-001076

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on James D. Major, 318906, at Turbeville Correctional Institution, 1578 Clarence Coker Hwy, Turbeville, SC 29162, this 28th day of August, 2024.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT