THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
DEC 3 0 2013
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

Appellate Case No.: 2013-000332

The State,

Respondent,

v.

Norris T. Steplight, Appellant.

FINAL BRIEF OF APPELLANT

Jerry N. Theos (Bar No.: 5518)
Barry Krell (Bar No.: 3573)
Jeff Buncher, Jr. (Bar No.: 78890)
Post Office Box 399
Charleston, South Carolina 29402
(843) 723-7491
Attorneys for Appellant

INDEX

TABLE OF AUTHORITIES

South Carolina Cases:

Federal Cases:

QUESTION PRESENTED

Whether Appellant's right to be present at all critical stages of the proceedings against him, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, was violated when the trial court, over objection, conducted all of jury selection and much of a pre-trial suppression hearing prior to his arrival at the courthouse?

STATEMENT OF THE CASE

1. Procedural History

Appellant Norris T. Steplight was arrested in Charleston County, South Carolina, on May 27, 2011, and charged with trafficking cocaine base, 10 grams or more, but less than 28 grams. The Charleston County grand jury indicted Appellant for trafficking in cocaine base (R.pp.1-2) and on February 4, 2013, a pretrial motion to suppress and jury selection in the Charleston County court of General Sessions came before Kristi L. Harrington, Resident Circuit Judge, presiding. Defendant was not present for the pretrial motion to suppress or for jury selection. On February 5, 2013, the jury convicted Appellant as charged, and the court sentenced him to twenty-five (25) years and to pay a fine of fifty thousand dollars ($50,000.00). (R.pp.5-6). Notice of this appeal was filed on February 14, 2013, and the transcript was received on June 25, 2013. The only issues before the Court of Appeals are: 1) whether Appellant's constitutional rights were violated when the entire jury selection process and most of the pretrial motion to suppress were conducted outside of Appellant's presence; and, 2) whether Appellant waived his right to be present. The relevant facts are as follows below.

2. Facts relevant to the violation of Appellant's right to be present

When the proceedings below began at 12:00 p.m. on Monday, February 4, 2013, defense counsel immediately advised the trial court that his client was not present, that he had "always been available" for past court appearances, and that affirmative efforts to contact him were already well under way. (R.p.7, lines 14-17; *id.* at R.p.8, lines 15-17) ("I called the bondsman at 8:30 this morning, who said, I'll go get him."). As the

discussion progressed, the trial court was apprised of a series of circumstances that explained Appellant's absence and indicated that it was both unintentional and unlikely to persist for long. Defense counsel explained that he had received "a text saying, 'You just got moved up; you might be going first thing,'" and that his ensuing efforts to summon Appellant had not succeeded due to a recent telephone number change. (R.p.8, lines 14-15) (internal quotation marks added). The solicitor indicated that Appellant had been sent a letter, which "just ha[d] them coming on Monday morning, and everything says nine o'clock tomorrow [Tuesday]," (R.p.9, lines 7-9), and defense counsel added that Appellant had "gotten a dozen letters over the last year and a half," and had "showed up every time," (R.p.9, lines 10-11 and 14-15). When the trial court inquired about the possibility of issuing a bench warrant, defense counsel answered that he did not "think it w[ould] speed up the process," and that Appellant was not "intentionally avoiding court." (R.p.9, line 25 – R.p.10, line 1). To the contrary, Appellant had "been anxious to have the case tried." (R.p. 10, lines 1-2). Neither the solicitor nor the trial court questioned or contradicted any of these representations. Instead, the discussion ended with the trial court's announcement of the lunch break, and declaration that "we're going to start [Appellant's suppression] motion at 1:30." (R.p.11, lines 6-10).

When the proceedings resumed after lunch, the trial court noted defense counsel's "vehement objection to continuing without [Appellant's] presence", and then immediately directed that the first witness be called. (R.p.11, lines 19-20). Defense counsel responded by reiterating that Appellant's presence was important, that he "ha[d] shown up at least a half dozen times" during the extended period the case had been on the

docket, and that he "kn[e]w Appellant want[ed] to be present." (R.p.12, lines 11-25). Counsel also continued to emphasize that the difficulty he was experiencing in attempting to reach Appellant was anomalous, and that counsel himself had been caught off guard, having "thought [the case was] going to be second th[at] week ...." (R.p.13, lines 9-10). Once again, counsel's representations were neither questioned nor contested.

Without further inquiry, and without making any findings concerning either the information with which Appellant had been supplied or the voluntariness of his absence, the trial court went forward with a portion of the suppression hearing. (*See* R.pp.14-45). During a break, defense counsel noted for the record that he had requested a continuance due to Appellant's absence, and that the trial court had denied it. (R.p.46, lines 4-6). In response, the trial court gave defense counsel "continuing objection", and added that, "We are continuing without your client, but I have heard nothing that indicates to me that [Appellant] was not given notice of today." (R.p.46, lines 11-13). The court then proceeded with *voir dire* and jury selection, all of which occurred in Appellant's absence. (*See* R.pp.47-77).

Appellant entered the courtroom at 3:51 p.m. on Monday, February 4. Consistent with counsel's earlier representations to the trial court, Appellant's absence had been neither intentional nor voluntary. Rather, counsel explained:

> [Appellant] just didn't know. The bondsman found him; he came immediately. He apologizes, even though, I guess, technically, I needed to have gotten in touch with him. He did get a letter from me. But he'd gotten so many of them, he didn't realize this case would be first this morning. We apologize, your Honor.

(R.p.78, lines 12-17). In response, the trial court simply remarked, "All right," and

directed the prosecution to call its next witness. (R.p.78, lines 18-20). As with the prior discussions of Appellant's absence, the court made no findings, and expressed no concern for any constitutional implications generated by having proceeded without him. Appellant's suppression motion was denied later that day, and the following day the jury convicted him as charged. At sentencing, Appellant raised his own objection to the suppression motion and jury selection having been conducted in his absence. (*See* R.p.96, lines 4-12). Once again, the trial court did not respond.

ARGUMENT

APPELLANT'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 14 OF THE SOUTH CAROLINA CONSTITUTION, WAS VIOLATED WHEN THE TRIAL COURT, OVER OBJECTION, CONDUCTED ALL OF JURY SELECTION AND MUCH OF A PRE-TRIAL SUPPRESSION HEARING PRIOR TO HIS ARRIVAL AT THE COURTHOUSE.

1. Relevant legal principles

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *see also, e.g.*, *Rushen v. Spain*, 464 U.S. 114, 117 (1983); *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (citing *Allen*) ("[T]he Sixth

Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial, and is applicable to the States by reason of the Fourteenth Amendment. . . ."); S.C. Const. art. I, § 14 ("[A defendant has the right] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.").

The Supreme Court of the United States has made clear that a defendant's right to be present extends to jury selection, because his presence at that critical stage "bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) *overruled on other grounds by Mallory v. Hogan*, 378 U.S. 1 (1964); *see also id.* (observing that "it will be in [the defendant's] power, if present, to give advice or suggestion or even to supersede his lawyers altogether." (citing *Lewis v. United States,* 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)); *Gomez v. United States*, 490 U.S. 858, 873 (1989) (affirming that jury selection is "a critical stage of the criminal proceeding during which the defendant has a constitutional right to be present," and recognizing that it is "the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability."); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (observing that defendant's presence at jury selection has a "reasonably substantial" relation to his "opportunity to defend against the charge.").

It is equally well established that a proceeding on the admissibility of evidence against the accused constitutes a critical stage at which the defendant's presence is guaranteed. *See, e.g., Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004) ("The Sixth Amendment

safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process."); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (Sixth Amendment right to effective assistance of counsel mandates competent representation in connection with motions to suppress unlawfully obtained evidence); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.").[1]

Finally, while the right to be present may be waived, *see*, *Allen*, 397 U.S. at 342; *State v. Fairey*, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007), the existence of a valid waiver may not be presumed, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) *overruled in part on other grounds by Edwards* v. *Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981) (quoting *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 307 (1937)) ("We 'do not presume acquiescence in the loss of fundamental rights.'"). On the contrary, "courts must indulge every reasonable presumption *against* the loss of constitutional rights," including the right of a defendant to be present at all critical stages of a criminal proceeding. *Allen*, 397 U.S. at 343 (citing *Zerbst*, *supra*) (emphasis added). Consistent with this mandate, Rule 16, SCRCrimP, provides that a non-capital felony defendant "may voluntarily waive his right to be present," but makes clear that such a waiver can occur only "upon a finding by the court

[1] *See also, e.g.*, *Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 374, 983 N.E.2d 1227 (2013) (citing *Stincer*, *supra*) ("The United States Supreme Court has made clear that when a hearing involves evidence that is going to be used against the defendant at trial to prove his guilt, he has the right to a fair and just hearing under due process and his presence assures that result -- because he can consult with his lawyer, listen to the evidence, and assess the credibility of the witnesses (and the evidence) against him. In addition, his ability to have the full assistance of counsel may turn on his opportunity to see the evidence against him, with counsel, and to consult with counsel about the evidence and to better defend himself at trial.").

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." *See, e.g., City of Aiken v. Koontz*, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006) ("While Rule 16 permits a knowing and intelligent waiver of the right to be present, such a waiver is permitted only in limited circumstances."). Thus, absent factual findings by the trial court that a defendant both (1) received notice of his right to be present, and (2) was warned that the trial would proceed in his absence upon his failure to attend, there can be no voluntary waiver.

2. Discussion

The violation of Appellant's right to be present in this case is self-evident. Despite full awareness that he was not in the courtroom, the trial court insisted upon pressing ahead without him through all of jury selection, and a substantial portion of a motion to suppress key prosecution evidence. Both proceedings constituted critical stages of the prosecution against Appellant, such that he had a fundamental right – guaranteed by both the United States and South Carolina Constitutions – to be in the courtroom when they took place.

While the right to be present may be waived, the record in this case contains neither an actual finding of waiver, nor any information from which such a finding could have been made. For its part, the trial court said nothing that could be construed either as an application of *Illinois v. Allen*, *Johnson v. Zerbst*, and Rule 16, or as a determination that Appellant had validly and voluntarily waived his right to be present. Instead, the court proceeded as if Appellant's absence alone – regardless of its cause or likely

duration – was reason enough to move on without him.

Moreover, even if the trial court had attempted to observe the settled rules for waiver of the right to be present, all of the relevant information available to it pointed the other way. From the very beginning of the proceedings, defense counsel repeatedly advised the trial court that his client's absence was uncharacteristic, unintentional, and temporary. Counsel explained that Appellant had consistently appeared when notified in the past, that he had expressed his unequivocal desire to be present when the case went to trial, and that his absence on the day the case was finally called was attributable to a combination of communication difficulties and a last-minute schedule change by which counsel himself had been caught off guard. None of these representations were contradicted by the prosecution or questioned by the trial judge, and none of them suggested Appellant had voluntarily chosen not to appear, had received adequate notice that the case had been called to trial on that date and time, or had been informed that critical stages of the proceedings would go forward without him. Under such circumstances, there could have been no finding that Appellant validly waived his right to be present.

In sum, the trial court's insistence upon proceeding in Appellant's absence, under circumstances that gave no suggestion of a valid waiver, violated the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, § 14 of the South Carolina Constitution. Thus, absent proof by the State that the error was harmless beyond a reasonable doubt, the judgment against Appellant must be reversed, and the case must be remanded for a new trial. *See, e.g., Arizona v Fulminante*, 499 U.S. 279,

295-96 (1991) ("*Chapman v. California*, 386 U.S. 18, 24 (1967), made clear that 'before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' ... In so doing, it must be determined whether the State has met its burden of demonstrating that the [error] did not contribute to [the] conviction."); *O'Neal v. McAninch*, 513 U.S. 432, 438-39 (1995) (describing *Chapman* as "placing the risk of doubt" about harmlessness on the State); *State v. Watts*, 321 S.C. 158, 165, 361, 467 S.E.2d 272, 277 (Ct. App. 1996) (citing and relying upon *Chapman*).

CONCLUSION

As a result of the circuit court's failure to allow Appellant to be present for much of his pretrial motion to suppress and for the entire jury selection process, his federal and state constitutional rights were violated. Appellant respectfully submits that this Court reverse judgment and remand this case to the circuit court and order a new trial.

Respectfully submitted,

Jerry N. Thebs (Bar No.: 5518)
Barry Krell (Bar No.: 3573)
Jeff Buncher, Jr. (Bar No.: 78890)
Post Office Box 399
Charleston, South Carolina 29402
(843) 723-7491
Attorneys for Appellant

December 20, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

Appellate Case No.: 2013-000332

The State,

Respondent,

v.

Norris T. Steplight, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 20, 2013

Jerry N. Theos
Barry Krell
Jeff Buncher, Jr.
URICCHIO HOWE KRELL JACOBSON
TOPOREK THEOS & KEITH, P.A.
Post Office Box 399
Charleston, South Carolina 29402
(843) 723-7491
Attorneys for Appellant