STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL LOPEZ,

APPELLANT

APPELLATE CASE NO. 2013-000903

INITIAL BRIEF OF APPELLANT

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2.

Did the trial court err in denying Appellant's motion for a continuance and proceeding with the trial in Appellant's absence in violation of his Sixth Amendment right under the Confrontation Clause to be present at trial where there was insufficient evidence Appellant received notice of the term of court in which his case would be tried or that he was adequately warned he would be tried in his absence if he did not appear?

STATEMENT OF THE CASE

On March 15, 2005, a Greenville County Grand Jury indicted Appellant for trafficking cocaine and possession of a firearm with an obliterated serial number. R. *. His case was called to trial on October 12, 2009 before the Honorable C. Victor Pyle, Jr. and a jury. Tr. 1. He was tried jointly with his co-defendant, Octavius Nelson. Id. Appellant was tried in his absence after he did not to appear and Judge Pyle refused to grant defense counsel's motion for a continuance. Tr. 6, l. 9 – 10, l. 16. Christopher D. Scalzo represented Appellant. Joyce K. Monts was the assistant solicitor. Tr. 1.

At the conclusion of the trial on October 15, 2009, the jury found Appellant guilty. Tr. 492, ll. 7-12. On May 7, 2013, the sealed sentence was read by the Honorable Letitia Verdin. Supp. Tr. 1. Judge Pyle sentenced Appellant to twenty-five years imprisonment and a $200,000 fine for trafficking cocaine and five years concurrent on the weapons charge. Supp. Tr. 4, ll. 15-24.

This appeal follows.

ARGUMENT

1.

The trial court erred in refusing to suppress the evidence found in the vehicle Appellant was driving at the time of his arrest where the officer's continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime nor Appellant's consent to detain him beyond the scope of the traffic stop.

Relevant Facts

On January 21, 2005, Chris Hines of the Greenville County Sheriff's Office stopped Appellant's vehicle on Interstate 85 for speeding. Tr. 122, l. 18 – 123, l. 15. After issuing Appellant a warning ticket, Hines eventually searched his car and allegedly found 504.48 grams of powdered cocaine in the trunk and a handgun with the serial number scratched off in the center console. Tr. 130, ll. 20-21; Tr. 134, ll. 5-14; Tr. 138, ll. 7-17; Tr. 360, ll. 14-16.

Motion to Suppress

Defense counsel moved pretrial to suppress the cocaine and handgun as the product of an illegal search in violation of the Fourth Amendment. Tr. 13, ll.2-3. In response to Appellant's motion, the state called Officer Chris Hines of the Greenville County Sheriff's Office to the stand. Tr. 15, ll. 15-20.

Hines explained that around 2:30 pm that afternoon he was turning around at the Greenville County line at Exit 40 when he observed Appellant standing next to a white Dodge Intrepid talking on a pay phone in the parking lot of a gas station. Without "think[ing] much about it," Hines proceeded back onto I-85 and pulled over on the side of

the interstate to finish some paperwork. A short time later, he "saw the same Dodge Intrepid pass by at a high rate of speed." Hines testified that because it was obvious the vehicle was speeding, he attempted to "overtake" the vehicle. He caught up to the car as it was exiting the interstate at White Horse Road, which is Exit 44. Hines claimed he measured the Intrepid's speed near the exit ramp at seventy two miles per hour, noting that the posted speed limit for that area was sixty miles per hour. Hines subsequently initiated his blue lights and siren and the Intrepid pulled over on the bridge on White Horse Road. Tr. 17, l. 4 – 19, l. 2.

Hines said he approached the passenger side of the vehicle and explained the reason for the stop. He claimed that he immediately noticed a cell phone "which appeared to be on" sitting on the front passenger seat and a second cell phone sitting on the backseat of the vehicle. This "struck [him] as odd" since he had just seen Appellant on a pay phone. Tr. 19, ll. 2-23. Hines testified that while Appellant was retrieving his paperwork, he asked Appellant "where he was going" and "where he was coming from." Appellant allegedly told Hines he was travelling home to Georgia after visiting his son who was in the Army in North Carolina. Hines claimed Appellant was "actually travelling the opposite way going northbound toward North Carolina instead of actually going toward Georgia." Tr. 19, l. 25 – 20, l. 11.

Hines explained that Appellant had provided a valid Louisiana driver's license, registration, and proof of insurance that were all in Appellant's name. Tr. 29, l. 20 – 30, l. 7. However, Hines claimed that all three of these documents had a different address: Kenner, Louisiana on the driver's license; Gainesville, Georgia on the registration; and Tucker, Georgia on the insurance. In addition, Hines alleged that when he asked Appellant to verify

his address Appellant provided a Lawrenceville, Georgia address. Hines testified that this "raised a red flag" because it indicated "this guy doesn't have a steady place where he's laying his head at night." Tr. 20, l. 12 – 21, l. 11.

Hines eventually asked Appellant to get out of the car and had Appellant stand at the back of his car and in front of Hines' vehicle. Tr. 31, l. 23 – 32, l. 7. After Hines informed Appellant that he was going to write him a warning for speeding, the two "began to engage in casual conversation." Appellant allegedly told Hines that he worked for Gwinnett County. Hines claimed he thought Appellant was "trying to befriend me" and "trying to insinuate, in my mind, that he was a law enforcement officer or had an affiliation with law enforcement." Tr. 21, ll. 12-25.

Hines again asked Appellant where he was going and Appellant told him "home to Georgia." When asked what part of North Carolina Appellant was coming from, Appellant allegedly could not remember the name of the Army base where he had visited. Tr. 22, ll. 1-10. Interestingly, another officer later testified that Appellant told him he was coming from Fort Bragg. Tr. 189, ll. 15-17; Tr. 220, ll. 11-22. According to Hines, Appellant eventually divulged that it was actually his friend's son who lived in North Carolina and that Appellant had a six-year-old daughter who lived in California. Tr. 22, ll. 13-23. Additionally, Appellant said that he was stopping at eat at McDonald's which Hines thought "was kind of odd since there was a McDonald's at Exit 40 where he had just come from." Tr. 23, ll. 10-14.

Hines repeatedly stated that Appellant was nervous, "stumbling on his words," and would "not directly" make eye contact with him. Hines explained, "He kept on avoiding eye contact with me." Tr. 22, l. 24 – 23, l. 3. He said:

> He was very nervous. Even after I told him I was going to write him a warning, he was still - - his nervous level still remained constant, more so than the public that we deal with every day. After they, you know, realize they're going to get a warning - - you know, if you tell them they're going to get a ticket - - you know, after they realize what's coming, they - - you know, their sense of nervousness drops. His remained the same throughout the whole traffic stop.

Tr. 25, ll. 3-11.

When asked by the solicitor whether there was "any significance to the fact that this occurred on I-85," Hines testified, "I-85 is a pipeline between the Atlanta, Georgia area up to Charlotte, North Carolina, and the Raleigh-Durham area. Based on statistics provided by the DEA, it is a trans-shipment point for illegal narcotics up the east coast up into Charlotte, Greensboro, Raleigh-Durham, and on up into the - - up north into the New York area. So yeah, I-85 is a - - based on statistics and my experience, it is a main pipeline for drug trafficking." Tr. 24, ll. 1-10. Also when prompted by the solicitor, Hines explained, "every address minus his driver's license, are all, basically, in and around the Atlanta metro area, which is – like I say, once again, Atlanta is a known city for drug trafficking, or origins of drug trafficking and - - are coming from that area." Tr. 24, ll. 11-19.

Hines eventually issued Appellant the warning and returned all of his paperwork. He admitted that at that point he had no other tickets for Appellant. Hines testified he then asked Appellant for consent to search his vehicle. Hines claimed Appellant "shrugged" his shoulders, but failed to provide a yes or no answer. When Hines inquired "is that a 'yes' or a 'no,'" Appellant responded that "he just wanted to leave." Hines then told Appellant "you're free to go, but I'm going to hold your car." Hines admitted that he detained Appellant's car at this point because he wanted to run his dog around it. Tr. 34, l. 8 – 36, l. 3.

Deputy McBee, the backup officer who Hines had called sometime during the stop, finally arrived and stood with Appellant. Hines informed Appellant that he was going to run his dog around the car and, according to Hines, at that point Appellant said, "I could run my K9 around his car." Tr. 37, l. 8 – 39, l. 6. Hines admitted that Appellant "didn't have a say so at that point" because Hines "was going to run the dog around the car" regardless of whether Appellant gave consent which is why he told Appellant that he was detaining his vehicle. Tr. 40, ll. 12-18.

On cross-examination, Hines acknowledged that when Appellant exited I-85 at exit 44, he could have been turning around to get back on the interstate heading southbound toward Georgia. Tr. 26, l. 14- 27, l. 10. Hines also conceded that he did not question Appellant as to why he was using a pay phone when he had a cell phone in his car. Tr. 36, l. 4 – 37, l. 7. In essence, Hines did not attempt to clarify any of the alleged inconsistencies he perceived in Appellant's story. Additionally, Hines stated that he did not see any contraband in Appellant's vehicle before he searched the car. All he saw inside the vehicle were a couple of cell phones. Tr. 36, ll. 13-19.

In support of his motion to suppress, defense counsel argued, "the police officer only had the authority to pull him over and detain him for the ticket – the traffic ticket, which was speeding. That – once that was completed, the U.S. Supreme Court and the state court has said that you can't hold him any longer. Once he tried to gain consent and my client said, no, I'm not going to give consent, the police officer then tried to seize him by detaining his car. **The man is from out of state . . . And in seizing the car . . . he's seizing the person.** That taints any consent that he gave. And that's the only basis for them to ever search the car." Tr. 13, l. 21 – 14, l. 23 (emphasis added).

In support of defense counsel's argument, he cited State v. Williams 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005), and State v. Jones, 364 S.C. 51, 610 S.E.2d 846 (2005). Relying on this case law, defense counsel argued "an officer cannot detain somebody . . . longer than is necessary for the traffic stop in order to search the car using the K9. You can do it if - - while you're doing the speeding ticket or the warning ticket. If you run the dog around and the dog alerts, that's fine. But you can't detain them longer than it takes to do the stop. Well, that's what you have going on here."

Defense counsel further argued that Appellant only gave consent to run the K9 "when the officer says, I'm not going to let you go because I'm going to keep your car, which I think is the same as saying, before you leave, let me ask you a few questions. It's actually, even more serious, I think. The man is from another state. He can't get back. He can't leave the side of the road. At that point, I think that's an illegal detention to continue to hold him." Tr. 46, l. 13 – 48, l. 22.

The court found that Hines "had objectively, reasonable, and articulable suspicion of illegal activity" and therefore was permitted to detain Appellant for further questioning beyond that related to the initial stop. The court further found that Appellant had consented to further detention. Therefore, the court denied Appellant's motion to suppress the cocaine and gun. Tr. 49, l. 5 – 50, l. 3.

After the state presented several witnesses, defense counsel put additional grounds on the record in support of Appellant's motion to suppress. Defense counsel argued, "[B]oth Deputy Hines and Deputy McBee testified that when they encountered Mr. Lopez that they never tried to sort out any inconsistencies that they perceived him to have. This whole idea

that he was driving from North Carolina to Atlanta, they never got him to explain that. I think that gets pulled into the fact that they're creating - - they're trying to create a reasonable suspicion without ever making the simplest effort to kind of get a reasonable answer from the person." Defense counsel concluded that the officers did not have reasonable suspicion. Tr. 329, l. 7 – 330, l. 7.

Discussion

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV; Mapp v. Ohio, 367 U.S. 643 (1961). "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). "Thus, the Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing United States v. Mendenhall, 446 U.S. 544 (1980).

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment." Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing Whren v. United States, 517 U.S. 806 (1996). Thus, an automobile stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Id. (citing Whren, 517 U.S. at 810). "Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable *per se*." Id.

However, a traffic stop typically ends when the police officer has "no further need to control the scene, and inform[s] the driver and passengers they are free to leave."

Arizona v. Johnson, 555 U.S. 323 (2009). Accordingly, "[o]nce the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention." Pichardo, 367 S.C. 84 at 98, 623 S.E.2d at 848; See Tindall, 388 S.C. 518, 522-23, 698 S.E.2d 203, 205-06 (2010) (finding "the officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment").

"Lengthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances. First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter." State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 848 (2005) (quoting United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998)).

Reasonable suspicion requires "'a particularized and objective basis that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). "In determining whether reasonable suspicion exists, the totality of the circumstances—the whole picture—must be considered." State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (quoting Cortez, 449 U.S. at 417). Reasonable suspicion also requires "something more than an inchoate and unparticularized suspicion or hunch." Id. (citing State v. Butler, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000).

Appellant does not challenge his initial detention for the traffic violation. However, once Hines continued to detain Appellant after issuing the warning ticket and sought consent to search the vehicle, Hines exceeded the scope of the traffic stop. After Appellant refused consent to search his vehicle and stated that he "just wanted to leave," Hines told Appellant that he was detaining his vehicle, thereby seizing Appellant. See Tr. 35, ll. 4-18. "The test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is whether in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Pichardo, 367 S.C. at 100-101, 623 S.E.2d at 849 (citing Michigan v. Chesternut, 486 U.S. 567 (1988) and United States v. Analla, 975 F.2d 119 (4th Cir. 1992)). A reasonable person in Appellant's position would not have believed he was free to leave. Appellant was from out of state and Hines had detained his vehicle. This prevented Appellant from leaving the scene for a reasonable person from out of state would not abandon his vehicle.

Because Hines exceeded the scope of the traffic stop and subsequently seized Appellant, he must have had objectively reasonable and articulable suspicion of criminal activity afoot or Appellant's consent. Since Hines had neither, Appellant was illegally detained and the evidence seized during the subsequent search should have been suppressed. See Wong Sun v. United States, 371 U.S. 471, 484 (1963) (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

Here, the state has failed to meet its burden to articulate facts, which are sufficient to support Hines' reasonable suspicion of a serious crime. See Tindall, 388 S.C. at 527, 698 S.E.2d at 208 ("[T]he nature of the reasonableness inquiry [in determining the

existence of reasonable suspicion] is highly fact-specific"). Based on Hines' speculation and opinion during a traffic stop, he labeled innocent facts as "suspicious:" (1) Appellant used a pay phone when he had two cell phones in his car; (2) Appellant provided multiple addresses; (3) Appellant was travelling northbound when he stated he was headed south to Georgia; (4) Appellant could not remember the name of the Army base in North Carolina that he visited; (5) Appellant stated he worked for Gwinnett County; (6) Appellant stated he was eating at McDonald's, but there was a McDonald's at the exit where Appellant used the pay phone; (7) Appellant was nervous and would not make direct eye contact; (8) Appellant stated he lived in a suburb of Atlanta, a known city for drug trafficking; (9) Appellant was traveling on I-85, a main pipeline for drug trafficking. See Foster, 634 F.3d at 248; Cf. United States v. Wilson, 951 F.2d 116, 124-25 (4th Cir. 1991) (finding "[a] suspect's arrival from a 'source city' is still noted by many courts as a factor lending support for a 'reasonable suspicion' finding, but **the vast number of persons coming from those 'source cities' relegates this factor to a relatively insignificant role**") (emphasis added).

Hines did not have reasonable and articulable suspicion that criminal activity had occurred or was occurring. A fair reading of the record indicates that Hines was purposefully intending to create some sort of reasonable suspicion. For example, Hines never asked Appellant to explain the various addresses that were on his license, registration, or insurance. He also never asked Appellant to explain why it appeared he was travelling northbound when he stated he was travelling home to Georgia or why he used a payphone when he had a cell phone in his vehicle. All of these perceived inconsistencies could have been logically explained by Appellant if he had been provided the opportunity. For

example, Appellant could have simply gotten on the wrong direction of I-85 when he got back on the interstate at Exit 40 and was turning around at Exit 44 to proceed southbound after he realized his mistake.

Additionally, the prosecution failed to carry its burden of showing Appellant gave voluntary consent to search the car. See State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)); State v. Dorce, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995). The court must consider the totality of the circumstances to determine if consent was voluntary, or even given. Wallace, 269 S.C. at 550, 238 S.E.2d at 676. Under the totality of the circumstances, Appellant's consent to run the K9 was not voluntary because at the time he gave consent, Appellant had already been unlawfully seized by Hines, who had detained Appellant's vehicle signifying that he was not free to leave, without the required reasonable suspicion. Any consent Appellant may have given was invalid as "an exploitation of the unlawful detention." Tindall, 388 S.C. at 523-24, 698 S.E.2d at 206 (quoting Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275).

Notably, the evidence was not discovered until ***after***: (1) the purpose of the traffic stop had been accomplished; (2) Appellant had declined Hines' request to search the vehicle; and (3) Appellant was unlawfully detained. Because Hines did not have an objectively reasonable and articulable suspicion that illegal activity was occurring and because any consent Appellant allegedly gave was tainted by his unlawful seizure, the evidence obtained by Hines, specifically the cocaine and the handgun, should have been suppressed by the trial court.

2.

The trial court erred in denying Appellant's motion for a continuance and proceeding with the trial in Appellant's absence in violation of his Sixth Amendment right under the Confrontation Clause to be present at trial where there was insufficient evidence Appellant received notice of the term of court in which his case would be tried or that he was adequately warned he would be tried in his absence if he did not appear.

Relevant Facts

Immediately after the case was called, defense counsel moved for a continuance due to Appellant's absence. Defense counsel noted that there was an active bench warrant for Appellant that had been issued sometime in 2008, the year before the case was tried.[1] Defense counsel stated, "[M]y first motion would be that you wait until he's found to try him so that he, obviously, could be present." Tr. 6, ll. 15-22.

The court held a hearing to determine whether Appellant received proper notice. The state called Sonia Bass, an investigator with the Sixteenth Circuit Solicitor's Office. Bass testified that "bond cards" addressed to Appellant where sent to three addresses in an attempt to notify Appellant of the date and time of his trial. Two of these addresses were in Lawrenceville, Georgia and the third was in Lilburn, Georgia. Bass noted that the address for Appellant listed on his "bond sheet" was one of the Lawrenceville addresses where a "bond card" was mailed.[2] On cross-examination by defense counsel, Bass testified that the "bond cards" were sent through the U.S. Postal Service. She conceded that Appellant was

[1] Presumably, Appellant had appeared in court up until 2008 since a bench warrant was not issued until that year.

[2] The "bond sheet" also contained a telephone number for Appellant. There is no evidence in the record that the state attempted to contact Appellant by telephone.

never sent a subpoena and that she did not contact any law enforcement agencies in Georgia to have a subpoena served on Appellant. Instead, her office relied solely on these "bond cards" to provide Appellant with notice. Tr. 7, l. 15 – 9, l. 6.

The three "bond cards" and the "bond sheet" were made part of the record and marked as Court's Exhibit No. 1. The solicitor noted that the "bond sheet does have a sentence in there stating that . . . the trial may continue in the Defendant's absence." Tr. 8, ll. 7-16.

In support of his motion for a continuance, defense counsel argued that a "bond card is not a subpoena. It's not an official court document. It's a convenience that the Solicitor's Office uses." He further argued that there is "no proof" that Appellant received a "bond card" at any of the three addresses or that Appellant actually received notice of the date and time of his trial. Tr. 9, ll. 11-17.

Noting that a "bond card" was sent to the address listed for Appellant on the "bond sheet" and that the "bond sheet" contained the language that Appellant would be tried in his absence if he failed to appear, the court ultimately denied Appellant's motion for a continuance and thus Appellant was tried in his absence and was unable to assist in his defense. Tr. 10, ll. 5-16. Notably, the court did not make any specific findings that Appellant actually received notice of his right to be present and voluntarily waived his right to appear.

Discussion

A criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at every stage of his trial. U.S. Const. Amend. VI; Illinois v. Allen, 397 U.S. 337, 338 (1970). However, a defendant "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." State v. Patterson, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (2006); State v. Ravenell, 387 S.C. 449, 455, 692 S.Ed.2d 554, 557 (Ct. App. 2010); Rule 16, SCRCrimP (2005).

A waiver of this important right is permitted only in limited circumstances. Patterson, 367 S.C. at 229, 625 S.E.2d at 244. In order to try the case in the defendant's absence, the trial judge must determine a defendant voluntarily waived his right to be present at trial. State v. Ritch, 292 S.C. 75, 76, 354 S.E.2d 909, 909 (1987); State v. Jackson, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986); State v. Truesdale, 345 S.C. 542, 549, n. 5, 548 S.E.2d 896, 899, n. 5 (Ct.App.2001); State v. Castineira, 341 S.C. 619, 622, 535 S.E.2d 449, 451 (Ct.App.2000). Furthermore, the trial judge must make findings of fact on the record that the defendant (1) received notice of the right to be present and (2) was warned he would be tried in his absence should he failed to attend. Jackson, 288 S.C. at 95, 341 S.E.2d at 375; Ravenell, 387 S.C. at 456, 692 S.E.2d at 558. "If the record does not reveal that the defendant was afforded notice of his trial, the resulting conviction in absentia cannot stand." State v. Fairey, 374 S.C. 92, 100, 646 S.E.2d 445, 448-449 (Ct. App. 2007) (citing State v. Jackson, 290 S.C. 435, 436, 351 S.E.2d 167, 167 (1986).

In Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006), our Supreme Court held trial counsel was ineffective for failing to request a continuance when the defendant did not appear for trial because the defendant had the opportunity to enter a guilty plea to a lesser charge. The Court wrote that the trial court would have committed an abuse of discretion if the court had refused to grant a continuance. Id. at 283, 639 S.E.2d at 56.

In Ravenell, the defendant appeared on the first day of trial when the jury was drawn. The trial judge allowed Ravenell to remain out on bond that evening to assist his trial counsel in locating a witness who he hoped would testify in his defense. The next day, Ravenell failed to appear and the trial court denied counsel's motion for a continuance noting that Ravenell had been admonished the day before that he would be tried in his absence if he failed to appear. There was also evidence that Ravenell had been noticed by subpoena that his trial was taking place, and he was to appear during that term of court. Ravenell, 387 S.C. at 452-453, 692 S.C. at 556.

This Court held "Ravenell clearly received notice of his right to be present at trial" since the record showed Ravenell was subpoenaed to appear for that particular week of court and because "the very fact that Ravenell was present for the first day of trial . . . indicates Ravenell had notice of his right to appear." This Court further found that it was "equally clear Ravenell was warned he would be tried in his absence should he fail to appear" since the trial judge warned him the previous day. Id. at 457, 692 S.E.2d at 558. This Court concluded that Ravenell deliberately failed to appear "indicating nothing less than an intention to obstruct the orderly processes of justice." Id. at 458, 692 S.C. at 559 (quoting Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976)) (internal quotations omitted).

In this case, there is no evidence that Appellant intentionally did not appear thereby waiving his Sixth Amendment right to be present at trial. There is likewise no evidence that Appellant actually received notice of the term of court in which his case would be tried. Unlike Ravenell, Appellant was never served with a subpoena and never made an appearance during the term of court in which his case was tried. Instead, the solicitor's

office merely sent Appellant "bond cards" through the U.S. Postal Service. Interestingly, the solicitor's office sent the "bond cards" to three different addresses indicating that the office had no idea where Appellant lived or whether those addresses were still correct. In all likelihood, these addresses were no longer accurate as nearly five years had passed since Appellant was arrested. The solicitor's office made no effort to have a law enforcement agency in Georgia serve Appellant with a subpoena or with the active bench warrant that had been issued the previous year.

Additionally, unlike Ravenell, Appellant was never verbally warned on the record by a judge that if he did not appear, he would be tried in his absence. The state relied on a single sentence on the "bond sheet" signed by Appellant nearly five years before trial. This single sentence failed to properly warn Appellant that he would be tried in his absence if he failed to appear in court for his trial.

Appellant was prejudiced by the trial court not granting a continuance because he was not present to assist in his own defense. It is also very likely that if Appellant was properly noticed, he would have appeared and worked out a plea deal with the state in exchange for his testimony against his co-defendant, Nelson. The record indicates that at the time of his arrest, Appellant informed law enforcement that he was supposed to be delivering the cocaine to a buyer in Greenville in exchange for ten thousand five hundred dollars. While in custody, Appellant called the buyer at the direction of the narcotics unit, explained the delay in arriving, and set up a meeting location for the drug deal. Tr. 141, l. 6 – 143, 10; Tr. 248, l. 1 – 252, l. 22. As a result, Nelson was eventually apprehended and similarly charged with trafficking cocaine. Since Appellant had thoroughly cooperated with law enforcement at the time of his arrest to assist in the apprehension of Nelson, he

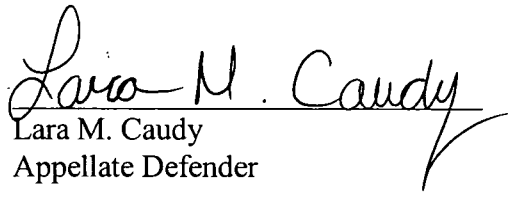
presumably would have done the same with the solicitor in exchange for a favorable plea deal.

Therefore, the trial judge erred in denying defense counsel's motion for a continuance because the bond cards were insufficient to provide Appellant with notice of the term of court in which his case would be tried and because there is no evidence that Appellant was sufficiently warned that he would be tried in his absence if he failed to appear. Consequently, there was insufficient evidence Appellant voluntarily waived his constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial. Thus, this Court should reverse Appellant's convictions and remand this case for a new trial.

CONCLUSION

By reason of the foregoing arguments, Appellant's convictions should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of February, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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DANIEL LOPEZ,

APPELLANT

APPELLATE CASE NO. 2013-000903

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictments;
(2) Tr. 1-10; Tr. 13-50; Tr. 78-79; Tr. 111-183; Tr. 185-192; Tr. 194-274; Tr. 276-321; Tr. 323-327; Tr. 329-371; Tr. 375-414; Tr. 420-477; Tr. 492-494;
(3) Court's Exhibit No. 1 (Notification of trial and bond cards);
(4) Entire transcript of sentencing hearing held on May 7, 2013.

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

February 20th, 2014

Lara M. Caudy

Lara M. Caudy
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1343

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
FEB 20 2014
SC Court of Appeals

Appeal from Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL LOPEZ,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of February, 2014.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of February, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.