ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County

R. Markley Dennis, Jr., Circuit Court Judge

JOHN G. KIMBLE,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213572

BRIEF OF APPELLANT PURSUANT TO *WHITE V. STATE*

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in granting the State's motion to try Appellant in his absence on charges of armed robbery, first degree burglary, and possession of a weapon during the commission of a violent crime where no evidence was adduced on the record that Appellant received notice of the date of trial?

II. Did the trial judge err in denying Appellant's motion for a directed verdict on the charge of first degree burglary and holding the state adduced evidence sufficient to find Appellant guilty beyond a reasonable doubt when the State did not produce the resident of the home allegedly broken into to testify that Petitioner did not have consent to enter the home?

STATEMENT OF THE CASE

On April 13, 2010, a Greenville County grand jury indicted Appellant John Kimble on one count of first-degree burglary, two counts of armed robbery, and one count of possession of a weapon during the commission of a crime. App. 318-328. On June 8 and 9, 2010, Appellant's case proceeded to trial in absentia before The Honorable Edward W. Miller and a jury. App. 1; App. 6, line 8—App. 7, line 11. Chase Harbin represented Appellant, and Christy Sustakovitch and Lauren Price represented the State. *Id.*

The jury Appellant guilty on all four charges, and Judge Miller issued under seal concurrent sentences of thirty years' incarceration for first-degree burglary, thirty years for both counts of armed robbery, and five years for possession of a weapon during commission of a crime. App. 264, ll. 12-25; App. 267, ll. 20-22; App. 290, ll. 15-22.

On January 3, 2011, Appellant filed an application for post-conviction relief claiming ineffective assistance of trial counsel for failure to file an appeal. App. 269-278; App. 310. The State filed a return on April 12, 2011. App. 284-288; App. 310. Appellant filed an amendment to the application on June 6, 2011. App. 279-283. On October 30, 2012, Appellant appeared at an evidentiary hearing before The Honorable R. Markley Dennis. App. 289. On November 29, 2012, the PCR court issued an order of dismissal finding Appellant failed to prove trial counsel was ineffective for not filing an appeal. App. 310-317.

Petitioner timely filed with this Court a petition for writ of certiorari pursuant to Rule 243(i)(2), SCACR, which the Court granted before ordering the parties to file briefs on Appellant's direct appeal issues.

ARGUMENTS

I. THE TRIAL JUDGE ERRED IN TRYING APPELLANT IN HIS ABSENCE BECAUSE THE EVIDENCE IN THE RECORD ONLY SHOWED THAT PETITIONER RECEIVED NOTICE FROM A BOND AGENT OF A COURT DATE FOR SEPARATE CHARGES.

STATEMENT OF FACTS

Prior to trial, counsel for the State moved to try Appellant in his absence, stating the State was prepared for trial. App. 6, lines 8-21. The State presented testimony from Scott Willis, an employee of Palmetto Surety Corporation ("PSC"), which underwrote bail bonds for multiple bail bond companies in Greenville. App. 13, lines 5-15. Willis testified that PSC had underwritten a bond of $30,000 for Appellant through Cathy Stoddlemeyer from Alliance Bonding. In January of 2009, after one and a half months of work, PSC suspended Stoddlemeyer for violations of underwriting procedures. Her cases were transferred to Aces High bonding, another company PSC underwrote. Aces High was supposed to be receiving mail forwarded from Stoddlemeyer's address, including bond cards noticing court dates. App. 13, line 19—app. 15, line 9; App. 20, lines 2-4.

Willis then testified that he spoke that morning with a bail bond agent from Catch 22 bonding, another company PSC underwrote, which had filed bond of $65,000 for Appellant on separate charges. The Catch 22 agent reportedly spoke with Appellant at his residence on May 11, 2010 to verify his address. The agent also spoke to Appellant on the phone sometime after June 1, 2010 and informed him of a court date on June 8, 2010 for those charges. App. 15, line 10—App. 17, line 21: App. 19, line 4—App. 20, line 4.

Counsel for Appellant asked the judge to deny the State's motion for a trial in absence and issue a bench warrant on grounds that the testimony did not establish that Appellant was notified of trial for the charges at issue and that his expectation would likely be that if he missed a roll call, the

court would issue a bench warrant. Counsel informed the judge that Appellant had previously reported for every roll call during the long-running case. App. 23, line 11—App. 24, line 8. Nevertheless, the judge summarily granted the motion for trial in absence:

> Normally, I would, uh,—I'm not in favor of trials in absence, but under these unusual circumstances, I'm going to allow this case to move forward. It has previously been reported to me that he was . . . notified of this trial date on these charges—I certainly would not—by his attorney, speaking to the Court as an officer of the court. He knew he was supposed to be here and he didn't show up. He will just have to face the consequences.

App. 24, lines 9-19.

DISCUSSION

The trial judge erred in granting the State's motion to try Appellant in his absence because the evidence in the record only showed that petitioner received notice from a bond agent of a court date for separate charges. "[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." *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (per curiam); s*ee also State v. Patterson*, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006) ("Apodictically, a criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial.").[1]

The State has a very stringent burden to prove a valid waiver of this right.

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[1] *See generally Snyder v. Com. of Mass.*, 291 U.S. 97 (1934) (Accused has a right under "Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," and "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself.").

> [C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal quotations omitted). Thus, "'[t]he right at issue is the right to be present, and the question becomes whether that right was effectively waived by his voluntary absence.'" *Ellis* at 260-61, 227 S.E.2d at 305-306 (quoting *Taylor v. U.S.*, 414 U.S. 17 (1973)). *See also Patterson* at 229, 625 S.E.2d at 244 ("While Rule 16 permits a knowing and intelligent waiver of the right to be present, such a waiver is permitted only in limited circumstances. A trial judge must determine a defendant voluntarily waived his right to be present at trial in order to try the case in absentia." (internal quotations omitted)).

"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). "The 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. Castineira*, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct. App. 2000).

In this case, the trial judge erred in granting the State's motion to try Appellant in his absence because Willis's testimony only established that Appellant received notice from a bond agent of a court date for the separate charges. For the charges at issue, Willis testified that PSC had underwritten a bond of $30,000 through Aces High. Aces High was supposed to be receiving

mail forwarded from Stoddlemeyer's accounts; however, Willis did not aver that any bond cards or court notifications were successfully sent to Appellant's residence. He only testified that understood an agent from Catch 22 spoke with Appellant about a court date of June 8, 2010 for separate charges.

Additionally, the trial judge pointed to no evidence in the record to support a determination that Appellant was aware he would be tried in his absence. Counsel for Appellant informed the judge that Appellant had previously reported for every roll call during the long-running case, and he believed that Appellant likely expected the court to issue a bench warrant if circumstances caused him to miss a roll call.

II. THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT BECAUSE THE STATE DID NOT PRODUCE THE RESIDENT OF THE HOME ALLEGEDLY BROKEN INTO TO TESTIFY THAT PETITIONER DID NOT HAVE CONSENT TO ENTER THE HOME.

STATEMENT OF FACTS

The State alleged that on May 30, 2008, Appellant approached Omar Arcos standing in an area of a mobile homes occupied by seasonal workers of Family Farm and Beachwood Farm in Marietta. App. 62, ll. 1-6; App. 111, line 13—App. 113, line 4. Appellant allegedly held Mr. Arcos at gunpoint, demanded his money, and walked him into the trailer, and once inside he robbed a second individual, Juan Garcia. App. 62, ll. 10-14. Neither Arcos nor Garcia were residents of the mobile home. App. 115, lines 3-25.

After the State presented its case, trial counsel moved for a directed verdict on the jury charge: "[T]here's been no evidence from the proprietor, the owner of the dwelling, the person that actually lives in the dwelling, that Mr. Kimble did not have permission to go into the dwelling." App. 201, ll. 10-21. In fact, not only was Mr. Garcia not called at the trial, but also the State did not

elicit from any other witness that Petitioner did anything other than walk unimpeded into Mr. Garcia's open front door. Mr. Arcos did not testify to any more than "going inside" the house:

> Q: So what happens? He tells you to walk towards the trailer. Does he have the gun pointed at your head, your back where is it? Do you recall?
>
> A: Still with the pistol to my head.
>
> Q: Do you go inside the trailer at this point?
>
> A: Yes.
>
> Q: When you get inside the trailer, what happened?
>
> A: When we got inside, he threw me against the refrigerator . . . .

App. 92, ll. 12-21. Similarly, when the State called one of Appellant's alleged accomplices, it did nothing to clarify what the witness saw when Appellant was allegedly "forcing the other guy into the trailer." App. 125, ll. 12-16. The most detailed description of Appellant's alleged entry into the trailer came from Judy Rogers, another alleged accomplice whom the State called.

> Q: So you pull up and you see a man outside that you didn't know. Go ahead.
>
> A: And once I got out of the car, I approached him and I asked . . . if he wanted to trade sex for money. He said no. . . .
>
> I went and knocked on the door. Juan was inside. He said come in. Well, I discussed the situation with him. I asked him if he wanted to, you know, do business, which trading sex for money, and he said yes. Well, we go to shut the door. And as I go and we shut the door, buster and [Petitioner] had got out of the car and [Petitioner] had the gentleman that was standing outside . . . on the ground with a gun to his back. . . .
>
> . . .
>
> Q: Did you have any idea that that was going to happen when you came over that day?

A: No, ma'am. No, ma'am.

Q: Go ahead.

A: I – as we seen them outside, well, Juan, he, they come into the house. They seen us and we seen them. They forced Juan into the house.

Q: I'm sorry. They forced the man that was outside?

A: Yes, ma'am. Excuse me. I'm nervous. But Omar outside, they forced him in the house with the gun and then Buster had Omar up against the wall with a knife. . . .

App. 142, ll. 15 – App. 144, ll. 2.

Nevertheless, the judge held sufficient evidence existed to prove the charge and denied the motion. App. 202, ll. 9-12. The defense then rested. App. 203, ll. 12-20.

DISCUSSION

The trial judge erred in denying Appellant's motion for a directed verdict because the State did not produce the resident of the home allegedly broken into to testify that Petitioner did not have consent to enter the home. South Carolina code section 16-11-311(A)(3) defines first degree burglary to include entering a dwelling during the nighttime, without consent, and with intent to commit a crime therein. "First degree burglary requires the entry of a dwelling without consent with the intent to commit a crime therein, as well as the existence of an aggravating circumstance." *State v. Cross*, 323 S.C.41, 44, 448 S.E.2d 569, 569 (Ct. App. 1994) (citing S.C. Code Ann. § 16-11-311 (Supp. 1993)).

The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *see also State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395.

Our Supreme Court "has repeatedly affirmed the principle that when the State fails to produce *substantial circumstantial evidence* that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (emphasis added). In *Odems*, the Court cited *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011) and *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001) as "jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence." *Id.* Specifically, the trial court "should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty." *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted).

"Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *Lollis*, 343 S.C. 580, 541 S.E.2d 254). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only "if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777 (citing *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

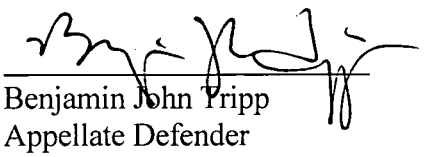
In this case, neither Arcos nor Garcia were residents of the mobile home. The State did not produce the resident of the home allegedly broken into to testify that Petitioner did not have consent

to enter the home. The State also did not elicit from any other witness that Petitioner did anything other than walk unimpeded into the open front door of the trailer. Indeed, Rogers's testimony that Garcia invited her in when she knocked suggests that Appellant was completely free to enter as well. Accordingly, the State only adduced evidence amounting to a suspicion of guilt, and the trial judge erred in denying the motion for a directed verdict.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of March, 2015

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JOHN G. KIMBLE,

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RESPONDENT

APPELLATE CASE NO. 2012-213572

CERTIFICATE OF SERVICE

I certify that a true copy of the Brief of Appellant Pursuant to *White v. State* in this case has been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of March, 2015.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 19th day
of March, 2015.

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