

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Charleston County

Benjamin H. Culbertson, Circuit Court Judge

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APR 06 2015  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SAMUEL ROBINSON,

APPELLANT

APPELLATE CASE NO. 2014-001555

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by trying Appellant in his absence in violation of his rights under the Confrontation Clause of the Sixth Amendment where the court completely failed to make any findings of fact on the record that Appellant (1) received notice of his right to appear and (2) was warned he would be tried in his absence if he failed to attend court, and where there was insufficient evidence Appellant was adequately warned that he would be tried in his absence if he did not appear?

STATEMENT OF THE CASE

On April 7, 2014, a Charleston County Grand Jury indicted Appellant for pointing and presenting a firearm. R. \*. His case was called to trial on June 23, 2014 before the Honorable Benjamin H. Culbertson, Jr. and a jury. Tr. 1. Appellant was tried in his absence after he did not to appear for trial. Tr. 6, ll. 4-6. Assistant Solicitors Richard Waring and Burns Wetmore represented the state, and Annie E. Andrews and Lorelle Proctor represented Appellant. Tr. 1.

On June 24, 2014, the jury found Appellant guilty. Tr. 142, ll. 18-22. On July 19, 2014, the sealed sentence was read by the Honorable Roger M. Young. Sent. Tr. 1. Judge Culbertson sentenced Appellant to five years imprisonment. Sent. Tr. 2, ll. 24-25.

This appeal follows.

## ARGUMENT

The trial court erred by trying Appellant in his absence in violation of his rights under the Confrontation Clause of the Sixth Amendment where the court completely failed to make any findings of fact on the record that Appellant (1) received notice of his right to appear and (2) was warned he would be tried in his absence if he failed to attend court, and where there was insufficient evidence Appellant was adequately warned that he would be tried in his absence if he did not appear.

### **Relevant Facts**

On the night of October 14, 2013, Brittany Mishoe and her family were eating dinner on the front porch of their home. The state alleged at trial that Appellant and his girlfriend, Kelsie Ammons, approached the front porch sometime after dark. The witnesses claimed that Appellant pulled a firearm from his waistband and pointed it at the family while Ammons punctured all four tires on Mishoe's car that was parked in front of the porch with a hammer or a knife. Tr. 51, l. 18 – 57, l. 13; Tr. 70, l. 3 – 75, l. 22; Tr. 83, l. 14 – 88, l. 7.

Before jury selection, defense counsel, Annie Andrews, notified the court that Appellant was not present. She told the court that Appellant had received a letter from the solicitor's office indicating that his case would be called to trial during the week of June 16, 2014. However, this letter did not notify him that he could be tried in his absence if he did not appear. Tr. 4, ll. 9-17.

Counsel indicated that she spoke with Appellant over the telephone after he received this letter and told him that he had to attend a status conference on June 13, 2014. She also set up an appointment to meet with him at her office after the status

conference. However, Appellant did not appear for the status conference and did not come to the scheduled meeting. Defense counsel maintained that she spoke to Appellant again on the telephone after the status conference and told him that a bench warrant had been issued for his arrest because he had not appeared. She rescheduled her appointment to meet with him to June 16, 2014 to discuss his trial strategy, but he also did not attend this meeting. Tr. 4, l. 17 – 5, l. 16.

Defense counsel informed the court that she had not spoken to Appellant since the day of the status conference when she told him a bench warrant had been issued for his arrest. Tr. 5, ll. 18-20. She explained that while Appellant had “ample notice of the week that his case could be called to trial, being tried in his absence was not something that we had a discussion about. So he would not have received notice about that from me.” Tr. 5, l. 24 – 6, l. 3. She maintained that the only notice he would have received that he could be tried in his absence was from the “bond paperwork.” Tr. 5, ll. 22-24.

The court indicated that “[u]nless the State has some reservation, I’m comfortable going forward with the trial in his absence.” Tr. 6, ll. 4-6. After the assistant solicitor indicated he was fine trying Appellant in his absence, the case went forward with jury selection. Tr. 6, l. 7. The trial court made no findings of fact regarding whether Appellant received notice of his right to appear and was adequately warned that he could be tried in his absence if he failed to attend court.

### **Discussion**

The court erred by trying Appellant in his absence in violation of his Sixth Amendment right under the Confrontation Clause to be present at his trial where the court failed to make any findings of fact on the record that Appellant received notice of his right

to appear and was warned he would be tried in his absence if he failed to attend court. There was also insufficient evidence Appellant was adequately warned that he would be tried in his absence if he did not appear.

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 quotation marks omitted).

In this case, the trial judge failed to make any findings of fact on the record regarding whether Appellant (1) received notice of his right to be present and (2) was warned he would be tried in his absence if he failed to attend court. The court simply stated that it was “comfortable going forward with the trial in his [Appellant’s] absence,” unless the state had any reservations. Tr. 6, ll. 4-6. This was error. The court should have made the required findings of fact.

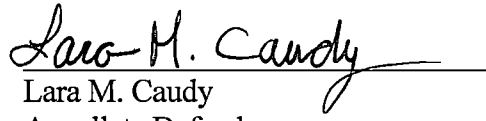
Furthermore, while defense counsel conceded that Appellant had “ample notice of the week that his case could be called to trial,” she expressed concern that he had not been adequately advised that he could be tried in his absence if he failed to appear. Tr. 5, l. 24 – 6, l. 3. She told the court that during her many conversations with Appellant she had never advised him that the court could go forward with the trial in his absence if he did not attend court. She also indicated that the letter the solicitor mailed Appellant did not mention that he could be tried in his absence if he failed to appear. Tr. 4, ll. 15-20. According to defense counsel, the only notice Appellant would have received was from the “bond paperwork” that states “he could be tried in his absence if he were not to appear for trial.” Tr. 5, ll. 22-24.

The state completely failed to present any evidence whatsoever that Appellant was adequately warned that he could be tried in his absence. The solicitor did not even present the “bond paperwork” that supposedly indicated Appellant could be tried in his absence if he did not attend court. Even if the bond paperwork did indicate Appellant could be tried in his absence, such notice was inadequate to properly warn Appellant. Therefore, this Court should reverse his conviction and sentence and remand for a new trial.

CONCLUSION

By reason of the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand this case to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of April, 2015.

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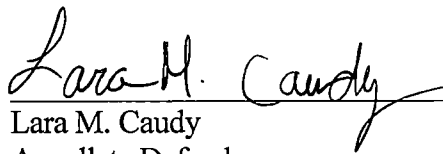
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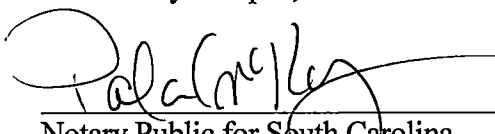
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

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 6th day of April, 2015.

  
\_\_\_\_\_  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 6th day of April, 2015.

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