ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Bamberg County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

Jacqueline P. Bacon,

APPELLANT

APPELLATE CASE NO. 2014-001751

ANDERS BRIEF OF APPELLANT

LAURA R. BAER
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STATEMENT OF ISSUE ON APPEAL

Whether the Trial Court erred in denying defense counsel's motion to continue the case and conducting the trial of Appellant *in absentia* in violation of Appellant's Sixth Amendment right under the Confrontation Clause to be present at trial?

STATEMENT OF THE CASE

On or about January 28, 2013, the Grand Jury of Bamberg County indicted Appellant Jacqueline Bacon[1] for first degree burglary. R. 110 – 111 (Indictment).

Appellant's jury trial on this offense was set to proceed before the Honorable Doyet A. Early, III on June 24, 2014. Appellant was represented by Jason Price and the State was represented by Assistant Solicitors Jack Hammack and Susanna Ringler. R. 1.

Appellant did not appear and was tried *in absentia* after Judge Early denied defense counsel's motion to continue the case and made a finding that Appellant had notice of the right to be present at the trial and was warned that the trial would proceed in her absence if she failed to attend. R. 11, l. 4 – 17, l. 23. The jury found Appellant guilty of first degree burglary. R. 91, ll. 17-25; R. 117 (Verdict Sheet). Judge Early then sentenced Appellant and placed the sentencing sheet in a sealed envelope to be revealed to her once she was found. R. 93, ll. 14-20; R. 112 (Sentencing Sheet). Appellant appeared for sentencing on August 4, 2014, at which time Judge Early revealed Appellant's sentence to the mandatory minimum of fifteen years incarceration. R. 105 – 110.

Appellant timely filed and served her Notice of Appeal on August 14, 2014.

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[1] Appellant is also referenced as "Phoebe" during portions of the proceedings. R. 51, 15-19.

STATEMENT OF FACTS

Motion to Continue and Findings as to Waiver of Right to be Present

After selection of the jury, defense counsel made a motion to continue the case until Appellant could be located. R. 11, ll. 4-5. He indicated that he was appointed to represent Appellant on October 28, 2013, but had only met with her once at first appearance and not spoken to her about possible defenses in her case. R. 11, ll. 6-8; R. 11, l. 18 – 12, l. 2. He also stated that the bonding company indicated that they may be able to locate Appellant within a week, though the trial judge corrected him that they merely asked for an additional week to find her. R. 11, ll. 9-13. Defense counsel stated that he had made efforts to provide notice of the trial to Appellant but had been unable to make direct contact with her. R. 11, ll. 14-17. He indicated that he had made attempts to contact Appellant by speaking with her mother twice, mailing letters to her mother and to an address in Surfside Beach, e-mailing her, and calling the three phone numbers he had for her. R. 12, l. 3 – 13, l. 6.

The trial judge indicated that the day prior to the trial he met with counsel in chambers, who expressed their concern over whether Appellant would appear for the trial. The judge also had the bonding company come in and made them aware of the situation. R. 13, ll. 7-25. He also told defense counsel the day before trial to contact Appellant's mother and let her know that if Appellant appeared, the judge "could probably get the State to reduce the charges and the penalty would be substantially less." R. 13, ll. 17-24.

Defense counsel answered affirmatively that he made every effort he could to locate Appellant and advised her by letter, e-mail, and through her mother that the case would proceed even if she did not appear. R. 14, ll. 1-7; R. 15, ll. 1-4. The trial judge then placed

findings on the record pursuant to City of Aiken v. Koontz[2] that Appellant had either actual or constructive notice of her right to be present and was warned via letter and through her family "that the trial would proceed in her absence should she fail to attend." R. 14, l. 12 – 15, l. 12. The trial judge also noted that a bench warrant was issued for Appellant on January 27, 2014. R. 15, ll. 18-23. The solicitor indicated that while the surety company of record was notified of the bench warrant, the surety company made an error and did not notify Beach Bail Bonding until "a much later date." R. 15, l. 24 – 16, l. 6.

The Solicitor also entered copies of the bonding documents executed by Appellant on September 21, 2012 and June 25, 2013. Appellant initialed the notices to appear during the terms of court beginning on December 6, 2012, September 12, 2013 and each succeeding term thereafter until a final disposition was made in her case. She also executed the "Acknowledgment by Defendant," which states that she understands and has been informed of her right and obligation to be present at trial and that should she fail to attend, the trial will proceed in her absence. R. 96 – 104 (Court's Ex. 1).

The trial judge instructed the jury at the outset of the case that it should not make any negative inference regarding Appellant's absence. Specifically he said:

> First of all, as you can see the Defendant is not present. She has chosen not to be here. Now, please – she has the right not to be here – do not infer anything from the fact that she's not here, do not discuss it in the jury room, the fact that she's not here, do not comment on it, and do not consider the fact that she was not here when, at the end of the case, you deliberate her guilt or innocence. She has the right not to show, so try the case just as if she were here. Please do not infer anything from the fact that she's not here. Fair enough?

[2] 368 S.C. 542, 629 S.E.2d 686 (Ct. App. 2006).

R. 19, ll. 2-12. The trial judge cautioned the jurors again during his final instructions, stating: "Let me emphasize once again under the laws of our State a Defendant may be tried even if the Defendant does not attend the trial, but the fact that the Defendant is not present may not be considered against the Defendant in any manner whatsoever." R. 87, l. 22 – 88, l. 1.

Testimony at Trial

Appellant was accused of burglarizing the home of her ex-husband, Wayne Bacon, on September 9, 2012, and taking several firearms, jewelry, and liquor. Mr. Bacon testified that he and Appellant resided in the home together for approximately five years and that she had not lived there in the past three years and did not retain any interest in the home after their divorce. R. 29, ll. 7-23. He testified that Appellant "texted" him before lunchtime on the day of the burglary inquiring as to where he was and asking to talk, to which he responded that he was on his way to Columbia to have dinner with his parents and could not talk. R. 30, ll. 4-24; R. 31, ll. 3-16.

He arrived home a little after nine o'clock that evening to discover that liquor and a pistol were missing from his kitchen cabinet, the door to which was open. R. 31, l. 19 – 32, l. 3. He then took his daughter outside and called the police, though he went through the house himself while waiting for police to arrive. R. 32, ll. 3-12. Mr. Bacon identified other missing items, including: seven pistols from a gun cabinet in the guest room, one pistol and one assault rifle from his closet, valuable jewelry from a hidden jewelry box in the dresser (numerous diamond necklaces, rings, diamond earrings, diamond rings, and five new Bravado watches), and a duffle bag. R. 32, ll. 11-17; R. 33, ll. 7-20; 34, l. 1 – 32, l. 4; R. 36, l. 13 – 37, l. 1. He noted that a dresser drawer where he used to keep cash during his

marriage to Appellant was also emptied; however, no cash was stolen because he had a new hiding place. R. 32, ll. 18-21.

Sergeant Franklin Bamberg, Jr. testified that he took over investigation of the case on September 10, 2012. R. 41, l. 23 – 42, l. 2. He confirmed that no fingerprint or DNA evidence linked Appellant to the scene. R. 45, ll. 17-21. Bamberg subpoenaed Appellant's phone records based on the phone number provided by Mr. Bacon and testified that the cell phone records showed a trail from Lexington to Denmark and then back to Columbia based on "texts" sent from Appellant's phone. R. 42, ll. 7-24. According to the witness, records confirmed that the phone was in Denmark from 4:43 p.m. to 4:47 p.m. on September 9, 2012. R. 42, l. 25 – 43, l. 6. Based on information contained in the text messages, he contacted Silas Roland, a friend of Appellant who sold a gun to Mr. Bacon a few weeks prior. R. 43, ll. 7-15. Officers recovered some of Mr. Bacon's weapons at Roland's residence and arrested him. R. 43, ll. 16-18. Roland later turned over more weapons in a black bag to police, claiming that Appellant had placed them in his vehicle. R. 43, l. 18 – 44, l. 18.

Chief Hay provided additional testimony, indicating that three guns were located inside a black bag in a car parked on Roland's property and additional guns were turned over later. R. 52, l. 5 – 53, l. 17. These guns were confirmed to be those stolen from Mr. Bacon's home. R. 43, l. 22 – 44, l. 1; R. 52, ll. 19-24. Hay admitted on cross-examination that all of the weapons recovered were obtained directly from Roland. R. 53, l. 25 – 54, l. 3.

The State's final witness was Silas Roland. He testified that Appellant "texted" him at approximately 10:00 a.m. on September 9, 2012, asking him to give her a ride. R. 55, ll. 15-18. He said that he arrived at his friend Frankie's house, where Appellant was staying, at

approximately 11:00 a.m. R. 55, l. 24 – 56, l. 7. Roland testified that he drove Appellant to either North or Denmark, where there was a white church with a red roof. R. 56, ll. 16-22. He said that they parked and drank a couple of beers before Appellant left in a black or dark blue car. R. 57, ll. 9-18. He testified that he went down the street for a Pepsi, and received a text message from Appellant asking where he was approximately twenty to thirty minutes later. R. 57, ll. 19-22; R. 57, l. 25 – 58, l. 7. He alleged that when he went back she was standing at the church with a black duffel bag and a drink in her hand. R. 57, ll. 22-24; R. 58, ll. 8-13.

Roland testified that they drove back to Frankie's house that night and he did not find out what was in the black bag until the next day, when Appellant asked if he could help her sell the five to six guns contained in the bag. R. 58, l. 14 – 59, l. 15. He said that he asked if the guns were stolen, to which Appellant replied "no." R. 59, l. 17-20. He called her the next day and said that he had someone who may be interested in a couple of the guns, that person being himself. R. 59, ll. 20-23. Roland claimed that Appellant brought four guns over and placed them in his Blazer, and that he never looked at them and locked them inside of the vehicle. R. 59, l. 24 – 60, l. 3.

He testified that he ended the consensual search of his residence and vehicles when the Lexington County officer accompanying the other officers alleged smelling marijuana. R. 61, 7-19. Officers returned with a warrant and found "the black bag" in the Blazer with the guns inside. R. 61, l. 20 – 62, l. 2. He testified that after he made bond he gave one additional gun to Sergeant Bamberg, which he had located behind a freezer in "the black bag" in a storage building at Frankie's house. R. 62, ll. 7-22. On cross-examination, Roland

testified that on the day he gave her a ride, Appellant was going to get "some stuff" from a friend of hers named Clarence, whom he never met. R. 65, l. 1-4.

The State did not enter any exhibits in its case. Defense counsel did not make any objections during the trial.

ARGUMENT

The Trial Court erred in denying defense counsel's motion to continue the case and conducting the trial of Appellant *in absentia* in violation of Appellant's Sixth Amendment right under the Confrontation Clause to be present at trial.

A criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at every stage of his or her 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.E.2d 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 her Sixth Amendment right to be present at trial. Defense counsel never made direct contact with Appellant to notify her of the date of the trial. While he sent Appellant an e-mail, sent letters to her mother and to an address in Surfside Beach, and called her mother, he did not indicate when or to which specific addresses the letters were sent or obtain any confirmation of delivery. Notably, a new address for defendant in West Columbia, South Carolina was listed on the bonding document executed on June 25, 2013. See R. 99 (portion of Court's Ex. 1). It is not clear from the record whether defense counsel attempted to communicate with Appellant at that address. Thus, the only person that the record reflects was provided actual notice of the trial date was Appellant's mother, who is not the individual that had a constitutional right to be present.

Additionally, the solicitor's office made no effort to have a law enforcement agency serve Appellant with a subpoena or with the active bench warrant that had been issued on January 27, 2014. The solicitor also acknowledged that the bonding company was not promptly notified by the surety company about the bench warrant. The bonding company had even appeared before the trial judge the day prior and requested an additional week to locate Appellant. Appellant was ultimately located, and though her sentencing hearing did not occur until August 4, 2014, the South Carolina Department of Corrections records reflect that Appellant has been incarcerated since June 25, 2014. That is just one day after the trial *in absentia*, illustrating the ability to locate Appellant once a ***real*** effort was made to do so.

Further, unlike Ravenell, Appellant was never verbally warned on the record by a judge that if she did not appear, she would be tried in her absence. The state relied on a single sentence on the "bond sheets" signed by Appellant, the most recent of which was signed one year prior to her trial. This form is similar to that of an adhesion contract, such that all defendants must sign such an acknowledgment in order to be released on bond but seldom appreciate the content of what they are signing. See generally State v. Wills, 409 S.C. 183, 201, 762 S.E.2d 3, 12 (2014) (Beatty, J. dissenting) (citing the United States Supreme Court dissent in United States v. Mezzanatto, 513 U.S. 196 (1995), which noted the danger that "defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice.").

Appellant was prejudiced by the trial court not granting a continuance because she was not present to assist in her own defense, and by defense counsel's admission never had the opportunity to discuss any of her defenses with defense counsel. The case against her was entirely circumstantial and based primarily on the testimony of Bacon's unreliable co-defendant, Silas Roland.[3] A review of his testimony as a whole makes clear that his main concern was demonstrating his own lack of involvement in any illegality. It is also very likely that if Appellant had been properly noticed, she would have appeared and worked out

[3] Notably, Roland testified to seeing Appellant with only one black bag in front of the church. However, he testified both that the black bag was located in and seized from his Blazer and that he later found it behind the freezer in Frankie's storage building. Compare R. 61, l. 25 – 62, l. 2, with R. 62, ll. 17-19. The officers were also inconsistent about where the black bag was found. Compare R. 44, ll. 10-18, with R. 52, ll. 16-19. Additionally, Roland's testimony that the subsequent weapon(s) turned over to law enforcement were found in the shed contradicted his prior statement to Sergeant Bamberg that Appellant put the weapon(s) in his car. Compare R. 62, ll. 17-19, with R. 43, ll. 16-21.

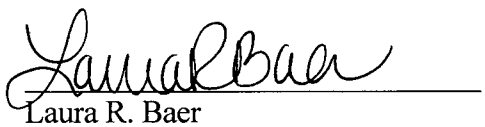
a plea deal to a lesser offense. The trial judge even stated that after their discussion the day before the trial, he instructed defense counsel to contact Appellant's mother and let her know that if Appellant would appear at trial, the judge "could probably get the State to reduce the charges and the penalty would be substantially less." R. 13, ll. 17-24.

Therefore, the trial judge erred in denying defense counsel's motion for a continuance because the notice provided to Appellant's mother was insufficient to provide notice to Appellant herself of the trial. The bond documents presented as evidence were executed a year prior to the trial and are not sufficient to show that Appellant was noticed of when to appear or sufficiently warned that she would be tried in her absence if she failed to appear. Consequently, there was insufficient evidence Appellant voluntarily waived her constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial.

CONCLUSION

For the reasons set forth herein, Appellant Jacqueline Bacon respectfully requests this Court to reverse her convictions and remand for new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2015.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jacqueline Bacon 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 Doyet A. Early, III, which was held on August 4, 2014, 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 Jacqueline Bacon.

Respectfully submitted,

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

This 5th day of March, 2015.

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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(s);
(2) Transcript of trial held June 24, 2014;
(3) Transcript of sentencing hearing held August 4, 2014; and
(4) Court's Exhibit 1 (Bonding Documents).

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

March 5th, 2015

Laura R. Baer
Appellate Defender

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PO Box 11589
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Attorney for Appellant

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."

March 5, 2015

Laura R. Baer
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Jacqueline Bacon, #285709 at Graham Correctional Institution, this 5th day of March, 2015.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of March, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.