STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Saluda County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL MCCRAW,

APPELLANT

APPELLATE CASE NO. 2013-002745

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the record supports the trial judge's finding that Appellant was medically able to attend and participate in his trial but voluntarily waived his constitutional right to do so where on the second morning of his trial, Appellant faxed to the court an emergency room record showing he had just been treated for three broken ribs; where the record identified the examining doctor and showed that Appellant was prescribed painkillers; where a hospital employee confirmed to the court over the phone that the record was accurate and genuine; and where Appellant included in the fax two phone numbers for contacting him and called the court later the same day to follow up on the fax?

STATEMENT OF THE CASE

On October 1, 2013, the Saluda County Grand Jury indicted Appellant Michael William McCraw for manufacturing methamphetamine. R. 121. On October 8, 2013, Appellant proceeded to trial before The Honorable Donald B. Hocker and a jury. Ola Johnson represented Appellant, and Ervin Maye and Michael Ross represented the State. R. 1. From October 9, 2013 to October 10, 2013, the trial proceeded in absentia. R. 1; R. 36, lines 5-20. At the conclusion, the jury found Appellant guilty, and the trial judge entered a sealed sentence. R. 77, lines 20-25; R. 85, lines 22-24.

On December 2, 2013, Appellant appeared at a sentencing hearing before The Honorable Thomas A. Russo. Again, Ola Johnson represented Appellant and Ervin Maye represented the State. R. 93. The judge unsealed a sentence of thirty years' incarceration. R. 96, lines 7-19.

ARGUMENT

THE TRIAL JUDGE ABUSED HIS DISCRETION IN DETERMINING APPELLANT VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHT TO BE PRESENT AND PARTICIPATE AT TRIAL BECAUSE THE RECORD DOES NOT SUPPORT HIS FINDING THAT APPELLANT WAS MEDICALLY ABLE TO DO SO.

STATEMENT OF FACTS

The State alleged that on the night of December 2, 2010, Appellant and a codefendant were manufacturing methamphetamine in a mobile home on Lake Murray when police arrived based on a tip. The defendants fled on foot but were apprehended within a short distance by noon the next day. R. 45, line 24—R. 47, line 15.

On the first day of trial, Appellant appeared and, after jury selection, moved to relieve his appointed counsel on grounds that counsel had not kept timely contact with him. R. 30, line 23—R. 35, line 10. The trial judge delayed ruling and recessed court for the day. R. 35, line 18—R. 36, line 5. At the beginning of the second day of trial, the trial judge denied Appellant's motion. R. 36, line 6—R. 37, line 16. At that point, Appellant had not appeared in the courtroom. Counsel therefore moved for a continuance in Appellant's absence. Concluding that Appellant received adequate notice to appear, the trial judge denied the motion. R. 40, line 2—R. 44, line 13.

Later on the second day of trial, Appellant faxed the clerk of court a statement from Lexington Medical Center indicating that he was treated for rib fractures that day. R. 72, lines 11-15. The cover sheet listed two hand-written telephone numbers. Under "Subject," the following was written by hand:

> I have 3 broken ribs. This is why I haven't shown up. The following sheet is proof of this. Please let me know what to do next. Sorry for the inconvenience. Thank you

R. 91. On the following page, an "LMC Emergency Department" records form Michael W McCraw listed a visit date of October 9, 2013 and a diagnosis of "Fracture of multiple ribs. 3." The examining doctor was Dr. Andrew Donato, MD. The form stated Appellant was given "RIB FRACTURE DISCHARGE INSTRUCTIONS (ENGLISH)" and was directed to take one to two Percocet tablets every four hours as needed for pain. R. 92.

The trial judge called the hospital and made a report on the record:

> [T]he Court, in the presence of the solicitor's office and defense counsel, was able to talk with Kelly Harnett, . . . who is the supervisor for the physician's group at the emergency room. And she pulled up all of the records in the emergency room and indicated that she saw nothing in those records, from either a physical standpoint, a medication standpoint, that would prevent Mr. McCraw from attending court today.
>
> She indicated that he sustained, based on the history given to the emergency room from Mr. McCraw, that he sustained the rib fractures in an altercation that took place on October 8th.
>
> He was not given any work or school excuse. He was admitted into the emergency room at 10:45 a.m. and discharged at 11:58 a.m.

R. 72, line 16—R. 73, line 1. The trial judge decided to proceed in Defendant's absence. R. 73, lines 2-5. In response, counsel for Appellant stated for the record his motion for a mistrial:

> [T]he fact that the person that we spoke to, from the hospital was not the treating physician, but the fact that she did confirm, however, that he did receive these prescriptions, I believe for oxycodone, and being under . . . the influence of drugs, I think would be a situation where my client wouldn't be able to show up and . . . function at a trial and [we] ask for a mistrial or continuance at this point.

R. 73, lines 8-15. The trial judge replied that counsel for Appellant "has made every diligent effort that he could in trying to reach [Appellant] and has been unable to [and] [counsel] has had no communication initiated by [Appellant] . . . ." R. 75, lines 2-6. Later that afternoon, Appellant called the clerk of court to follow up on the fax. R. 76, lines 3-14.

After the verdict, counsel moved again for a mistrial based on Appellant's absence, and the trial judge again denied the motion. R. 81, line 21—R. 82, line 8. Just a few days after the conclusion of his trial, Appellant entered police custody. R. 86, lines 23-24. On December 3, 2013, Appellant moved for the trial judge to reconsider his sentence. R. 104. On December 20, 2013, the trial judge denied the motion. R. 117.

DISCUSSION

The trial judge abused his discretion in determining Appellant voluntarily waived his Constitutional right to be present and participate at trial because the record does not support his finding that Appellant was medically able to do so. "[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]

[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.").

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

> [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)).

In *State v. Queen*, the South Carolina Supreme Court held that the trial court did not abuse its discretion in concluding that the defendant could adequately participate in his defense despite his claim that he was mentally incapacitated by taking a prescription narcotic drug. *State v. Queen*, 264 S.C. 5151, 518, 216 S.E.2d 182, 183-84 (1975). The defendant in that case offered the trial court a note from a doctor that he had second and third degree burns on his hand and had a follow-up appointment. Upon speaking with the doctor, the doctor told the trial court he did not know of any reason why the defendant would be endangered by attending trial. The defendant also submitted a note from a

second doctor containing essentially the same information contained in the first note. *Id.* at 518, 216 S.E.2d at 183. The Supreme Court stated that the this evidence in no way supported the defendant's claim that he was taking two times the prescribed dosage of a narcotic drug and was therefore unable to meaningfully participate in his defense. The Supreme Court further stated that to the contrary, the record showed the defendant ably participated at trial:

> The record shows that the [defendant] fully participated in the trial, testified in his own behalf, denied the charge against him, and related his own version of what happened. There is nothing in this record to indicate that [defendant] lacked the capacity to participate in his own defense . . . .

Id. at 518-19, 216 S.E.2d at 184. Similarly, in *State v. Bellue*, the South Carolina Supreme Court held that the trial court did not err in denying the defendant's motion for a mistrial because no evidence showed he was incapable of completing the trial:

> We find no merit in the charge that the court erred in refusing to grant a mistrial when counsel 'noted,' as the basis for the motion, that the defendant attempted to commit suicide on the night before the last day of the lengthy trial. The record simply does not show that the defendant was incapable of completing the trial. The dialogue between him and the court indicates to the contrary. The court did not err by refusing the motion.

State v. Bellue, 260 S.C. 39, 43, 194 S.E.2d 193, 195 (1973).

The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. *State v. Patterson*, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006). "An abuse of discretion occurs when the trial court's ruling is based upon factual conclusions . . . without evidentiary support . . . ." *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

In this case, the trial judge's initial ruling on the second day of trial to proceed in Appellant's absence was based on a finding that Appellant voluntarily waived his right to be present. This finding was supported by information before the judge that Appellant appeared the day before, had adequate notice of the proceedings on the second day, and no information indicated Appellant's absence was involuntary.

However, by counsel's motion for a mistrial based on Appellant's absence on the third day of trial, the information before the trial judge had changed significantly. On the second day of trial, Appellant represented to the court in unequivocal, handwritten terms that he did not appear that morning because he was *at the hospital receiving serious medical treatment*. His communication with the court was timely, direct, and supported by a medical record on letterhead from Lexington Medical Center. The information and detail of the purported medical record was entirely consistent with the type and extent of information that a medical service provider would amass in treating a patient. Moreover, the medical record plainly showed that Appellant was directed, among other unspecified discharge instructions, to take dosages of a prescription strength narcotic drug for pain management. Finally, over a telephone conversation, a nurse on duty confirmed the information in the medical record, and the employee specifically confirmed that Appellant suffered his injury the day before and received the painkiller prescriptions.

Thus, by the time of the motion to dismiss on the last day of trial, unlike in *State v. Queen*, Appellant presented the court with evidence showing both that he was receiving treatment *during trial* on the second morning and that he was under the influence of a narcotic drug during the remainder of the trial. Based on the gravity of the right at issue, Appellant's showing that he was medically unable to attend or participate

at trial was constitutionally sufficient to rebut a preliminary finding of a voluntary waiver based solely on his absence despite notice.

In ruling against Appellant, the trial judge did not find Appellant credible or his claims made in good faith. However, the evidence cited for these conclusions does not support them. First, the judge relied on communication with the supervisor for the physician's group at the emergency room. She found no emergency room records indicating that Appellant could not attend court, such as a work or school excuse. Nevertheless, Appellant's claim was not that he could not physically sit in the courtroom. Rather, he claimed that he could not travel to the courtroom and meaningfully participate in his trial based on his injury and medication. Additionally, the medical record showed Appellant was given standard discharge instructions for broken ribs, which in all reasonable likelihood advised him to restrict his movement and physical activity. Finally, insofar as Appellant availed a detailed record of treatment for a plainly serious injury, the lack of an indication the hospital's records that the treating doctor filled out for Appellant a school-type excuse note was not reliable information from which to infer that Appellant was truly fine to participate in the courtroom for the next two days.

Secondly, the trial judge inferred that Appellant intentionally stayed incommunicado to thwart investigation into his claims. Specifically, the judge found that counsel made every diligent effort to reach Appellant, and Appellant initiated no contact with him. However, the record shows Appellant made reasonable efforts under the apparent circumstances to communicate *with the court itself.* The cover sheet on his fax listed two telephone numbers that he specifically wrote by hand. He asked the court, "Please let me know what to do next." He included the name of his examining doctor at the hospital,

whom the court reasonably could have contacted. Later in the afternoon of the second day, Appellant called the clerk of court to follow up on the fax. While the trial judge correctly observed that nothing showed Appellant was in effective contact with counsel, under the circumstances, far more likely explanations existed than his highly prejudicial presumption of bad faith avoidance. Appellant had informed the judge of prior communication problems with counsel during his motion to relieve him. Nothing in the record indicates Appellant had a means to initiate contact with counsel other than in writing. No grounds whatsoever existed in the record to infer Appellant had appointed counsel's personal cell phone number.

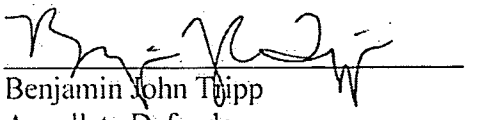
Thus, unlike in *Queen*, the judge's investigation extended only to communicating with an on-duty nurse in the emergency room, and he did not speak with the treating doctor. Moreover, unlike in *Queen* and *Bellue*, the record does not show Appellant was able to actually appear in the courtroom and address the court or otherwise participate in the trial to any extent.

Appellant adduced sufficient evidence—without the help of any special indulgence—to establish that his absence from court was due to medical incapacity, and he therefore did not voluntary waive his constitutional right to be present and participate. The trial judge's inferences in contravention were unsupported by the record, and he therefore abused his discretion in denying Appellant's motion for a mistrial.

CONCLUSION

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

Respectfully submitted,



Benjamin John Tipp
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ATTORNEY FOR APPELLANT

This 21st Day of April, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

April 21st, 2015

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