

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Saluda County
The Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case No. 2013-002745

THE STATE,

Respondent,

v.

MICHAEL McCRAW,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly proceeded with the trial in Appellant's absence when Appellant had notice he would be tried in his absence if he did not appear for trial, he appeared for the first day of trial and knew it was continuing the next day, and hospital personnel advised the court there was no medical reason Appellant could not be in court for the trial.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF THE FACTS

The Saluda County Grand Jury indicted Appellant Michael McCraw on one count of manufacturing methamphetamine. The case was called for a jury trial on October 8, 2013, before the Honorable Donald B. Hocker, Circuit Court Judge. Appellant was present in the courtroom when the case was called.

After the jury was selected, but before it was sworn, Appellant's counsel advised the court he learned in July 2013 that he previously prosecuted Appellant on an unrelated charge while counsel was working at the Solicitor's Office, and the State intended to use the conviction for sentence enhancement purposes. He further stated he discussed the issue with Appellant at that time, and Appellant indicated he wanted to waive the potential conflict. Prior to the case being called for trial in October, counsel sent Appellant him a letter reminding him about the issue. (Trial Transcript [TT], p. 30; Record on Appeal [R.], p. 30).

Appellant then moved *pro se* to relieve counsel, stating he did not know about the conflict until he received counsel's letter a week and a half before trial, and he was not satisfied with counsel's performance to date. He denied discussing it with counsel in July, and stated he did not trust counsel. (TT, pp. 30-33; R., pp. 30-33).

The assistant solicitor informed the court Appellant's counsel advised him in July about his discussion with Appellant regarding the potential conflict, and said Appellant wanted to waive it at that time. He stated the State did not object to Appellant's motion to relieve counsel if he was prepared to proceed *pro se* that day. In response to the court's inquiry, Appellant stated he wanted a continuance if counsel was relieved. (TT, pp. 33-35; R., pp. 33-35).

The court took the motion under advisement overnight. Before recessing for the day, however, the court stated:

It's the Court's opinion that this motion that you have made is intended to delay these proceedings. That's my opinion. And it's - - it's only the Court's opinion.

And I'll certainly take that into consideration, along with everything else in - - in ruling on - - on your motion.

The court then recessed until 9:30 a.m. the next morning. (TT, pp. 36-37; R., pp. 36-37).

Appellant did not appear in court the next morning, and counsel advised the court he attempted to reach Appellant "at all numbers" without success. After denying Appellant's motion to relieve counsel, the court conducted a hearing to determine if the trial should continue in Appellant's absence, and found Appellant's bond documents, as well as the court's instructions to be back in court at 9:30 that morning, provided Appellant adequate notice he would be tried in his absence if he failed to appear for trial, and ordered the trial to proceed. (TT, pp. 36-44; R., pp. 36-44).

The court then ruled on some pre-trial motions, and the jury was sworn at 11:07 a.m. Prior to opening statements, the court instructed the jury it could not hold Appellant's absence from the courtroom against him in any way. (TT, p. 92; R., p. 45).

When court reconvened after the lunch break, Appellant's counsel advised the court the clerk's office received a fax indicating Appellant was treated at Lexington Medical Center that morning for broken ribs, and given a prescription for oxycodone. A note written on the generic fax cover sheet, and purportedly signed by Appellant, stated he did not show up for court because he had three broken ribs, and asked to be advised what he needed to do, but did not provide any specific contact information for him. (Court's Exhibit 1; R., pp. 87). Counsel stated he had not been able to contact Appellant,

but someone claiming to be Appellant called the Solicitor's Office with the same information. Counsel then moved for a mistrial. (TT, pp. 115-116; R., pp. 68-69).

The Solicitor's Office reported someone did call claiming to be Appellant, and asked them to relay something about his ribs to his counsel. When they asked the caller to give a telephone number for confirmation purposes, he refused to state where he was or give a telephone number. (TT, p. 116; R., p. 69).

To further investigate the circumstances of Appellant's condition, the court and counsel conducted a conference call with the supervisor of the physician's group in the emergency room at Lexington Medical Center, who confirmed Appellant was admitted to the emergency room at 10:45 a.m. that morning (over an hour after court was scheduled to convene), and discharged at 11:58 a.m. The emergency room records indicated Appellant sustained rib fractures in an altercation the previous day (the first day of trial), and the supervisor stated there were no physical or medication issues preventing Appellant from attending court. (TT, pp. 119-120; R., pp. 72-73).

Appellant's co-defendant advised the court (through counsel) he saw evidence of injuries on Appellant after court the previous day, and indicated he believed Appellant sustained the injuries prior to trial. The court noted Appellant's counsel "made every diligent effort that he could in trying to reach [Appellant] and been unable to," and Appellant had initiated no communication with his counsel. Based on the information received, the court denied Appellant's mistrial motion, issued a bench warrant for Appellant's arrest for failure to appear, and the trial proceeded in Appellant's absence. (TT, pp. 120-122; R., pp. 73-75).

Appellant did not appear when trial continued the next day. The assistant solicitor advised the court the person who spoke with the caller purporting to be Appellant the previous day told the caller the trial was going forward and he needed to be in court. (TT, p. 233; R., p. 76).

The jury convicted Appellant of manufacturing methamphetamine, and the court imposed a sealed sentence. (TT, pp. 381, 389-390; R., pp. 77, 85-86). Appellant was arrested on the bench warrant several days later, and the sealed sentence of thirty years incarceration was imposed on December 2, 2013. (Sentencing Hearing Transcript [SHT], pp. 1-10; R., pp. 93-103).

Appellant moved for reconsideration of the sentence, which the circuit court denied by Order filed December 20, 2013. (Motion to Reconsider Sentence filed December 3, 2013, Affidavit of Ola Johnson filed December 13, 2013, Order filed December 20, 2013; R., pp. 104-116, 117-120). This appeal followed.

ARGUMENT

The circuit court properly proceeded with the trial in Appellant's absence when Appellant had notice he would be tried in his absence if he did not appear for trial, he appeared for the first day of trial and knew it was continuing the next day, and hospital personnel advised the court there was no medical reason Appellant could not be in court for the trial.

Appellant contends the evidence does not support the circuit court's determination he voluntarily waived his right to be present during trial, asserting there was no evidence Appellant was medically able to attend the trial, and the court erred in denying his mistrial motion. In support of this contention, Appellant conveniently ignores the sequence of events leading to Appellant's absence, as well as critical evidence before the circuit court.

In criminal cases, the appellate court sits to review errors of law only. State v. Banda, 371 S.C. 245, 639 S.E.2d 36, 39 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.; *see also* State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554, 557 (Ct. App. 2010)(same). Whether to grant or deny a mistrial is within the discretion of the trial court, which will not be reversed on appeal absent an abuse of discretion, and the extreme measure of granting a mistrial should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way. State v. Herring, 387 S.C. 201, 692 S.E.2d 490, 498 (2009)

"It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence." Ravenell, 692 S.E.2d at 557. The trial judge must determine a criminal defendant voluntarily waived his right to be present at trial before proceeding in the defendant's absence, and 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. Id. at 557-558; *see also State v. Castineira*, 341 S.C. 619, 535 S.E.2d 449, 451 (Ct. App. 2000) aff'd, 351 S.C. 635, 572 S.E.2d 263 (2002)(same); Rule 16, SCRCrimP(“Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies 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 the court.”).

A. Right to be Present

Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at trial. Ravenell, 692 S.E.2d at 556; *see also Ellis v. State*, 267 S.C. 257, 227 S.E.2d 304, 306 (1976)(same); State v. Fairey, 374 S.C. 92, 646 S.E.2d 445, 448 (Ct. App. 2007)(same). The fact a defendant is present for the first day of trial when the jury is drawn indicates the defendant had notice of his right to appear. Ravenell, 692 S.E.2d at 457.

Appellant was present for the first day of trial in this case, and after the jury was selected, he moved *pro se* to relieve his counsel based on a potential conflict of interest. Counsel informed the court he discussed the potential conflict with Appellant in July, then sent him a letter reiterating it prior to trial, and Appellant never indicated he wanted to have counsel relieved prior to that day. The assistant solicitor stated counsel told him in July about the discussion with Appellant regarding the potential conflict and indicated Appellant waived any conflict.

The solicitor also advised the court the State was ready to proceed with trial, and did not object to Appellant proceeding *pro se* in the trial if he was prepared to move forward immediately. Appellant told the court he was not prepared to go forward *pro se*, and asked for a continuance. The court took Appellant's motions under advisement overnight, but stated a belief the motions were an attempt to delay the trial. Before recessing for the day, the court advised the parties, **including Appellant**, the trial would resume at 9:30 a.m. the next morning. (TT, pp. 30-36; R., pp. 30-36).

When Appellant did not appear in court the next morning as scheduled, counsel informed the court he unsuccessfully attempted to reach Appellant "at all numbers." The court found Appellant had notice the trial would resume at 9:30 a.m., his bond paperwork put him on notice he would be tried in his absence if he failed to appear in court, and the trial would proceed without him.¹ (TT, pp. 36-42; R., pp. 36-42).

Appellant's presence on the first day of trial and during jury selection conclusively establishes he had notice of the session of court during which his case would be heard, and the exact time the trial would resume the next day. Therefore, the record amply supports the circuit court's finding Appellant had sufficient notice of his right to be present.²

B. Trial In Absentia

¹The court also denied Appellant's motion to relieve counsel, which Appellant does not challenge on appeal.

²Appellant's notice is further substantiated by the note faxed to the clerk's office, which stated Appellant's broken ribs were the reason "I haven't shown up." Assuming Appellant authored the note, it clearly demonstrates Appellant knew he was supposed to be in court that morning.

A defendant's signature on a bond form acknowledging he was informed of his right to be present at trial, and trial will proceed in his absence if he does not appear, is evidence the defendant had notice he could be tried *in absentia* if he did not appear for trial. City of Aiken v. David Michael Koontz, 368 S.C. 542, 629 S.E.2d 686, 689-90 (Ct. App. 2006); Ravenell, 692 S.E.2d at 558(same); Fairey, 646 S.E.2d, 448-450(same). The circuit court found Appellant's bond form sufficiently notified him he would be tried in his absence if he failed to come to court.

The bond form Appellant signed in December 2010 stated: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial **will proceed in my absence.**" (Court's Exhibit 1, p. 2; R., p. 88) (emphasis added). The form clearly afforded Appellant notice of the perils he faced if he did not appear in court, and supported the circuit court's finding on the issue.

C. Voluntary Waiver

Appellant asserts the "medical" evidence he purportedly faxed to the clerk of court's office rebutted the circuit court's finding he voluntarily waived his right to be present at trial. As support for this assertion, Appellant contorts the evidence in the record, presenting speculation as fact.

While acknowledging the hospital did not give him a work/school excuse when he was discharged from the emergency room, Appellant contends his injury and medication precluded him traveling to the courtroom and participating in his defense. As a threshold matter, Appellant did not make those claims in the circuit court, but merely faxed a note stating he was not in court that morning because he had three broken ribs, which the court determined Appellant apparently sustained before the trial began. Nothing in the note, or

anything else presented to the circuit court, indicated Appellant was unable to travel, or even unable to assist in his defense.³ To the contrary, Appellant was able to travel to the hospital, then to the place from which he purportedly sent the fax, and ultimately to a location where law enforcement could not find him, so his claims are suspect at best.

Appellant also asserts the medical record from the hospital showed he “was given standard discharge instructions for broken ribs, which in all reasonable likelihood advised him to restrict his movement and physical activity.” (Brief of Appellant, p. 11). The fallacy of this assertion is demonstrated by the fact the discharge instructions on the form faxed to the clerk’s office were **blacked out before** the clerk’s office received it, leading to a reasonable inference the actual instructions were **not** helpful for Appellant’s effort to delay the trial. If anything regarding Appellant’s condition would have precluded his appearance in court, in all reasonable likelihood the hospital would have willingly provided him with a document stating that fact.⁴

³Appellant claims the note and hospital record indicated he was “*at the hospital receiving serious medical treatment,*” and the hospital “directed” him to take a prescription strength narcotic drug for pain management. (Brief of Appellant, p. 10) (emphasis in original). This grossly overstates the evidence. Appellant was admitted to the hospital emergency room over an hour after court resumed, stayed there approximately one hour, and was given a prescription for percocet to take “as needed for pain.” While broken ribs are no doubt painful, the treatment Appellant received can hardly be classified as “serious,” which was substantiated by the emergency room supervisor. Further, there is no indication Appellant filled the prescription, or took any of the pills if he did. Rather, Appellant wants this Court to ignore the actual facts established by the evidence, and accept his self-serving assertions as fact.

⁴Appellant’s attempt to classify the lack of an excuse type note as “not reliable” overlooks the circuit court’s discussion with the emergency room supervisor, who stated Appellant’s record did not indicate any physical or medication reason he could not be in court, and nothing in the record refutes that information.

Appellant further contends the record does not support the circuit court's finding he "intentionally stayed incommunicado to thwart investigation into his claims," because he made reasonable efforts to communicate with the court. To the contrary, the court's finding is the only reasonable inference from the evidence.

Appellant does not dispute the circuit court's finding Appellant's counsel diligently tried to reach him, and Appellant did not initiate communication with his counsel. He asserts, however, there were "far more likely explanations" for his failure to even attempt contacting his counsel rather than intentional conduct on his part, such as prior communication problems with counsel and lack of a way to contact counsel directly. These assertions are self-serving on their face, and require rank speculation.

Appellant points to the note faxed to the clerk's office as evidence of his efforts to communicate with the court, specifically the phone numbers written on the note and the request for instructions about what he needed to do next. The handwritten numbers on the note, however, appear to be written by people other than the author of the note itself. Further, it is reasonable to infer counsel's diligent efforts to reach Appellant included calling those numbers, particularly since counsel had the note before he moved for a mistrial, and stated he had not been able to contact Appellant.

Appellant claims he informed the circuit court of communication issues with counsel when he moved to relieve him. Contrary to this claim, Appellant actually **admitted** counsel communicated with him, but indicated he was dissatisfied with counsel's performance because counsel had not asked for a plea deal.⁵ (TT, pp. 32-33;

⁵Significantly, counsel later represented Appellant at the sentencing hearing and filed a motion to reduce the sentence, so Appellant's issues with counsel clearly were not substantial. (SHT, pp. 3-4, Motion to Reconsider Sentence filed December 3, 2013; R.,

R., pp. 32-33). Moreover, there is no indication Appellant even attempted to contact counsel's office that morning, and he failed and/or refused to give good contact information in the limited communication with the clerk's office and the Solicitor's Office.

Appellant's absence from the trial must be viewed in light of all the evidence before the circuit court. First, Appellant knew court was scheduled to resume at 9:30 a.m., and he was not admitted to the emergency room until 10:45 a.m., over an hour after court resumed. Second, the injuries for which he went to the hospital apparently occurred prior to the first day of trial, but did not preclude Appellant from appearing on the first day, and he never indicated he was in pain or distress while in court. Third, the person who called the Solicitor's Office claiming to be Appellant refused to provide contact information, but was apprised the trial was proceeding and Appellant needed to get to court. Fourth, counsel represented to the court he had called every number he had in an attempt to locate Appellant, but had not been able to reach him. Fifth, after the circuit court issued a bench warrant, law enforcement was unable to locate Appellant to serve the warrant and bring him to court.⁶

““The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice.” Ravenell, 692 S.E.2d at 456 (*quoting Ellis*, 227 S.E. 2d at 306). The evidence in this case indicates

pp. 95-96, 104-116). This supports the circuit court's stated opinion Appellant's motion to relieve counsel was nothing more than an attempt to delay the trial.

⁶Law enforcement finally found Appellant and arrested him on the bench warrant several days after the trial concluded. (SHT, p. 5; R., p. 97).

Appellant simply wanted to prevent the trial from going forward, and when his efforts to delay it on the first day of trial failed, he engaged in conduct designed “to obstruct the orderly processes of justice,” which should not be rewarded. The circuit court’s finding Appellant voluntarily waived his right to be present during trial, and denial of Appellant’s mistrial motion, are amply supported by the evidence, and the circuit court’s rulings should be affirmed.⁷

⁷The circuit court explicitly instructed the jury it could not consider Appellant’s absence in any way, which adequately mitigated any prejudice to Appellant from a situation of his own making. (TT, p. 92; R., p. 45).

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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April 7, 2015

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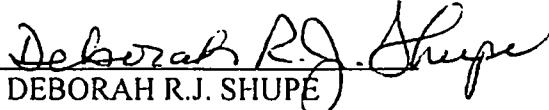
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, Order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.:

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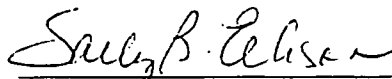
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 7th day of April, 2015.



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