

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 14 2016

SC SUPREME COURT

Appeal From Saluda County
The Honorable Donald B. Hooker, Circuit Court Judge
(Unpublished Opinion No. 2015-UP-540, S.C. Ct. App., filed 11/25/2015)
Appellate Case No. 2016-000280

THE STATE,

Respondent,

v.

MICHAEL McCRAW,

Petitioner.

**RESPONDENT'S RETURN TO PETITION FOR WRIT
OF CERTIORARI TO THE COURT OF APPEALS**

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

205 E. Main Street, 3rd Floor
Lexington, SC 29072
(803) 785-8532

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTIONS PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT10

 The Court of Appeals properly affirmed the circuit court's determination
 Petitioner voluntarily waived his right to be present at trial when the
 evidence established Petitioner 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 Petitioner could not be in court for the trial..... 15

CONCLUSION..... 20

STATEMENT OF QUESTIONS ON APPEAL

Did the Court of Appeals properly affirm the circuit court's determination Petitioner voluntarily waived his right to be present at trial when the evidence established Petitioner 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 circuit court there was no medical reason Petitioner could not be in court for the trial?

STATEMENT OF THE CASE

The Saluda County Grand Jury indicted Petitioner 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. Petitioner was present in the courtroom when the case was called.

After the jury was selected, but before it was sworn, Petitioner's counsel advised the court he learned in July 2013 that he previously prosecuted Petitioner 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 Petitioner at that time, and Petitioner indicated he wanted to waive the potential conflict. Prior to the case being called for trial in October, counsel sent Petitioner him a letter reminding him about the issue. (Record on Appeal [R.], p. 30).

Petitioner 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. (R., pp. 30-33).

The assistant solicitor informed the court Petitioner's counsel advised him in July about his discussion with Petitioner regarding the potential conflict, and said Petitioner wanted to waive it at that time. He stated the State did not object to Petitioner's motion to relieve counsel if he was prepared to proceed *pro se* that day. In response to the court's inquiry, Petitioner stated he wanted a continuance if counsel was relieved. (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. (R., pp. 36-37).

Petitioner did not appear in court the next morning, and counsel advised the court he attempted to reach Petitioner "at all numbers" without success. After denying Petitioner's motion to relieve counsel, the court conducted a hearing to determine if the trial should continue in Petitioner's absence, and found Petitioner's bond documents, as well as the court's instructions to be back in court at 9:30 that morning, provided Petitioner adequate notice he would be tried in his absence if he failed to appear for trial, and ordered the trial to proceed. (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 Petitioner's absence from the courtroom against him in any way. (R., p. 45).

When court reconvened after the lunch break, Petitioner's counsel advised the court the clerk's office received a fax indicating Petitioner 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 Petitioner, 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. (R.,

pp. 87). Counsel stated he had not been able to contact Petitioner, but someone claiming to be Petitioner called the Solicitor's Office with the same information. Counsel then moved for a mistrial. (R., pp. 68-69).

The Solicitor's Office reported someone did call claiming to be Petitioner, 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. (R., p. 69).

To further investigate the circumstances of Petitioner'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 Petitioner 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 Petitioner 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 Petitioner from attending court. (R., pp. 72-73).

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

Petitioner 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 Petitioner the previous day told the caller the trial was going forward and he needed to be in court. (R., p. 76).

The jury convicted Petitioner of manufacturing methamphetamine, and the court imposed a sealed sentence. (R., pp. 77, 85-86). Petitioner was arrested on the bench warrant several days later, and the sealed sentence of thirty years incarceration was imposed on December 2, 2013. (R., pp. 93-103).

Petitioner moved for reconsideration of the sentence, which the circuit court denied by Order filed December 20, 2013. (R., pp. 104-116, 117-120). This appeal followed.

By unpublished opinion filed November 25, 2015, the South Carolina Court of Appeals affirmed Petitioner's conviction. State v. McCraw, Unpublished Opinion No. 2015-UP-540 (S.C. Ct. App. filed November 25, 2015). Petitioner moved for rehearing, which the Court of Appeals denied by Order filed January 21, 2016. On February 17, 2016, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, seeking this Court's review of the Court of Appeals opinion.

ARGUMENT

The Court of Appeals properly affirmed the circuit court's determination Petitioner voluntarily waived his right to be present at trial when the evidence established Petitioner 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 Petitioner could not be in court for the trial.

Petitioner 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 Petitioner was medically able to attend the trial, and the court erred in denying his mistrial motion. In support of this contention, Petitioner conveniently ignores the sequence of events leading to Petitioner'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.

Petitioner 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 Petitioner in July, then sent him a letter reiterating it prior to trial, and Petitioner 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 Petitioner regarding the potential conflict and indicated Petitioner waived any conflict.

The solicitor also advised the court the State was ready to proceed with trial, and did not object to Petitioner proceeding *pro se* in the trial if he was prepared to move forward immediately. Petitioner told the court he was not prepared to go forward *pro se*, and asked for a continuance. The court took Petitioner'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 Petitioner**, the trial would resume at 9:30 a.m. the next morning. (TT, pp. 30-36; R., pp. 30-36).

When Petitioner did not appear in court the next morning as scheduled, counsel informed the court he unsuccessfully attempted to reach Petitioner "at all numbers." The court found Petitioner 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).

Petitioner'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 Petitioner had sufficient notice of his right to be present.²

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

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

in July about the discussion with Petitioner regarding the potential conflict and indicated Petitioner waived any conflict.

The solicitor also advised the court the State was ready to proceed with trial, and did not object to Petitioner proceeding *pro se* in the trial if he was prepared to move forward immediately. Petitioner told the court he was not prepared to go forward *pro se*, and asked for a continuance. The court took Petitioner'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 Petitioner**, the trial would resume at 9:30 a.m. the next morning. (TT, pp. 30-36; R., pp. 30-36).

When Petitioner did not appear in court the next morning as scheduled, counsel informed the court he unsuccessfully attempted to reach Petitioner "at all numbers." The court found Petitioner 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).

Petitioner'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 Petitioner had sufficient notice of his right to be present.²

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

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

B. Trial In Absentia

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 Petitioner's bond form sufficiently notified him he would be tried in his absence if he failed to come to court.

The bond form Petitioner 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.**" (R., p. 88) (emphasis added). The form clearly afforded Petitioner 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

Petitioner 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, Petitioner 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, Petitioner contends his injury and medication precluded him traveling to the courtroom and participating in his defense. As a threshold matter, Petitioner 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 Petitioner apparently sustained before the trial began. Nothing in the note, or anything else presented to the circuit court, indicated Petitioner was unable to travel, or even unable to assist in his defense.³ To the contrary, Petitioner 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. Further, if anything regarding Petitioner's condition precluded his appearance in court, he could have requested, and in all reasonable likelihood the hospital would have willingly provided, a document stating that fact.⁴

Petitioner 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.

Petitioner does not dispute the circuit court's finding Petitioner's counsel diligently tried to reach him, and Petitioner did not initiate communication with his

³Petitioner 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. (Petition, p. 9) (emphasis in original). This grossly overstates the evidence. Petitioner was admitted to the hospital emergency room over an hour **after** court resumed, stayed there approximately one hour, and received a prescription for percocet to take "as needed for pain." While broken ribs are no doubt painful, the treatment Petitioner received, as substantiated by the emergency room supervisor, can hardly be classified as "serious." Further, there is no indication Petitioner filled the prescription, or took any of the pills if he did. Rather, Petitioner wants this Court to ignore the actual facts established by the evidence, and accept his self-serving assertions as fact.

⁴Petitioner'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 Petitioner's record did not indicate any physical or medication reason he could not be in court, and nothing in the record refutes that information.

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.

Petitioner 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 Petitioner 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 Petitioner.

Petitioner claims he informed the circuit court of communication issues with counsel when he moved to relieve him. Contrary to this claim, Petitioner 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 (R., pp. 32-33). Moreover, there is no indication Petitioner even attempted to contact counsel’s office that morning, and he, or someone claiming to be him, failed and/or refused to give good contact information in the limited communication with the clerk’s office and the Solicitor’s Office.

⁵Significantly, counsel later represented Petitioner at the sentencing hearing and filed a motion to reduce the sentence, so Petitioner’s issues with counsel clearly were not substantial. (R., pp. 95-96, 104-116). This supports the circuit court’s stated opinion Petitioner’s motion to relieve counsel was nothing more than an attempt to delay the trial.

Petitioner's absence from the trial must be viewed in light of **all** the evidence before the circuit court. First, Petitioner attempted to delay the trial by moving to relieve his counsel after jury selection based on facts he knew prior to trial, and he knew the court had doubts about his claims. Second, Petitioner knew court was scheduled to resume the next day 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**, and he made absolutely no effort to contact his counsel, the State or the court until that afternoon. Third, the information before the court indicated Petitioner's injuries apparently occurred prior to the first day of trial, but did not preclude Petitioner from appearing on the first day, and he never indicated he was in pain or distress while in court. Fourth, the person who called the Solicitor's Office claiming to be Petitioner **refused** to provide contact or location information, but was apprised the trial was proceeding and Petitioner needed to get to court. Fifth, counsel represented to the court he called every number he had in an attempt to locate Petitioner, but had not been able to reach him. Sixth, after the court issued a bench warrant, law enforcement was unable to locate Petitioner to serve the warrant and bring him to court.⁶ When considered in its entirety, the record amply supports the court's finding Petitioner's absence was a deliberate attempt to thwart any investigation of his claims and delay the trial.

““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

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

S.E.2d at 456 (*quoting* Ellis, 227 S.E. 2d at 306). The evidence in this case indicates Petitioner 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 Petitioner voluntarily waived his right to be present during trial, and denial of Petitioner’s mistrial motion, are amply supported by the evidence, the Court of Appeals properly affirmed the circuit court rulings, and the Petition for Writ of Certiorari to the Court of Appeals should be denied.⁷

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


CONCLUSION

Based on the foregoing and the arguments set forth in the Final Brief of Respondent, Respondent submits the Petition for Writ of Certiorari to the Court of Appeals should be denied in its entirety.

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

By: 
DEBORAH R.J. SHUPE

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 14, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 14 2016

Appeal From Saluda County
The Honorable Donald B. Hooker, Circuit Court Judge
(Unpublished Opinion No. 2015-UP-540, S.C. Ct. App., filed 11/25/2015)
Appellate Case No. 2016-000280

SC SUPREME COURT

THE STATE,

Respondent,

v.

MICHAEL McCRAW,

Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify I served the Respondent's Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing copies in the United States mail, postage prepaid, addressed to:

Benjamin John Tripp
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 14th day of March, 2016.



SALLY ELLISON
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727