THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
COURT OF COMMON PLEAS

G. THOMAS COOPER, CIRCUIT COURT JUDGE

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CASE NO. 2014-CP-28-00416
APPELLATE CASE NO. 2016-000189

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STATE OF SOUTH CAROLINA, RESPONDENT,

v.

JEFFREY BOYD COOPER, APPELLANT.

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# INITIAL BRIEF OF APPELLANT

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II. DID THE TRIAL COURT ERR BY CONVICTING COOPER OF THE CRIME OF BREACH OF PEACE EVEN THOUGH THE STATE FAILED TO PROVE THE ELEMENTS OF THE CRIME?

## STATEMENT OF THE CASE

Jeffrey Boyd Cooper alleges that he was tried without proper notice. Appellant asserts that while he was hospitalized, his attorneys were not properly noticed of the trial, as the Summary Court was not using the proper address for Defendant's counsel. Cooper asserts that the failure to notice his attorneys, regardless of whether he was noticed at his address, is a violation of his due process rights under the South Carolina and the United States Constitution.

## FACTS

Jeffrey Boyd Cooper was arrested on October 6, 2011 for Breach of Peace. On October 19, 2011 Jeffrey Boyd Cooper requested a jury trial. ROA 2. An appearance was filed with the Kershaw County Summary Court by Deborah J. Butcher on January 13, 2014. The Summary Court issued Summonses on January 31, 2014 to the various parties involved in this matter setting trial for March 5, 2014. ROA 4 – 6; 26. It is uncontroverted and it has been unchallenged that Jeffrey Boyd Cooper was hospitalized during this time. ROA 35. Counsel for Jeffrey Boyd Cooper never received notice of the hearing. ROA 8 – 11. Counsel for Cooper at first believed that the notices were delivered to the wrong address. ROA 18 – 19. It now appears that the Summary Court sent notices related to eight different hearings to the wrong address and not to the Counsel of record. ROA 29 – 31. Although the address on the notice was correct, the clerk at the Summary Court was sending the envelopes to an old address that the law firm had left several years ago and not the address listed on the Attorney Information System. ROA 30, 36, 38, 41 - 42.

Jeffrey Boyd Cooper was tried in his absence on March 5, 2014. ROA 26 – 27, 56 – 76. Cooper filed a timely motion to vacate judgment and for a retrial on March 17, 2014. ROA 8 – 11. The motion was denied on May 7, 2014. ROA 12 – 22. A notice of appeal was filed on May 15, 2014. ROA 23 – 25. The magistrate filed a return on May 22, 2014. ROA 26 – 27. Cooper filed a supplement to his notice of appeal on November 12, 2014. ROA 28 – 32. The supplement detailed the issues Cooper's counsel was having with receiving correspondence from the Summary Court. ROA 29 – 31.

The appeal was heard by the Honorable G. Thomas Cooper, Jr. on November 20, 2015 in the Court of Common Pleas. ROA 33 – 43. The appeal was denied. ROA 45 – 47. A motion to reconsider was filed on January 6, 2016 and was denied by Judge Cooper on January 13, 2016.

## ARGUMENTS

Cooper's main concern in this appeal is whether his attorney is entitled to notice of trial and when there is substantial evidence that the Summary Court was not providing proper notice to Cooper's counsel, is it in the interests of justice to vacate judgment and retry the case?

### I. STANDARD OF REVIEW AND JURISDICTION

In criminal cases, the appellate court sits to review errors of law only. *City of Aiken v. Koontz*, 368 S.C. 542, 546, 629 S.E.2d 686 (Ct.App. 2006); *State v. Gault*, 375 S.C. 570, 572, 654 S.E.2d 98 (Ct.App. 2007); S.C. Code Ann. § 18-3-70 (requiring that the appeal must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without examination of witnesses in that court).

## II. THE TRIAL COURT FAILED TO PROVIDE NOTICE OF THE TRIAL TO COOPER'S COUNSEL IN VIOLATION OF COOPER'S UNITED STATES CONSTITUTIONAL RIGHTS AND OF HIS SOUTH CAROLINA CONSTITUTIONAL RIGHTS.

A criminal defendant has a right to be present during the trial of the charges against him. The Constitution of the State of South Carolina guarantees this right by affording a defendant, like Cooper, this right by affording him the right "to be confronted by the witnesses against him..., and to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. of 1895, art. I, § 14; see also *State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987); *State v. Patterson*, 367 S.C. 219, 625 S.E.2d 239 (Ct.App. 2006) (a criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial).

The United States Constitution also guarantees the defendant's right "to be confronted with the witnesses against him..., and to have the assistance of counsel for his defense." U.S. Const. amend VI; see also *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990) (right to be present rooted largely in the confrontation clause of the Sixth Amendment), citing *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Ellis v. State*, 267 S.C. 257, 227 S.E.2d 304 (1976). This right is not absolute and may be waived by a defendant in misdemeanor and felony cases. *Bell*, at 401.

Rule 16 of the South Carolina Rules of Criminal Procedure provides:

> 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.

While Rule 16, SCRCrimP, permits a knowing and intelligent waiver of the right to be

present, the waiver is permitted online in limited circumstances. *State v. Wright*, 304 S.C. 529, 405 S.E.2d 825 (1991). A trial judge must determine a defendant voluntarily waived his right to be present at trial in order to try the case in absentia. *Patterson*, at 229. Additionally, a trial judge must make findings of fact that the defendant (A) received notice of the right to be present and (b) was warned the trial would proceed in his absence. *Patterson*, at 229. The trial judge must make the findings on the record prior to the beginning of the trial. *State v. Ritch*, 292 S.C. 75, 354 S.E.2d 909 (1987); *State v. Jackson*, 288 S.C. 94, 341 S.E.2d 375 (1986).

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. *Ellis*, at 261; *State v. Ravenell*, 387 S.C. 449, 692 S.E.2d 554 (Ct.App. 2010).

A rebuttable presumption of notice arises upon proof that notice was mailed to the defendant and not returned by the postal authorities. *State v. Langston*, 275 S.C. 439, 272 S.E.2d 436 (1980). Cooper asserts that his absence and the absence of counsel was not deliberate and, at a minimum, his attorney was not noticed for the trial. Although it is impossible to show the Court that the magistrate court failed to address the envelopes properly, Cooper would show that the Court failed to provide notice for eight separate hearings in the same time period. This is too much for a coincidence. Cooper cannot be said to have entered a knowing and intelligent waiver of his right to be present, or at least to be represented by counsel at his trial. *State v. Goode*, 299 S.C. 479, 482, 385 S.E.2d 844 (1989).

In order to claim the protection of Rule 16, SCRCrimP, counsel must, and has, raised the issue at the first opportunity. *State v. Williams*, 292 S.C. 231, 355 S.E.2d 654 (1990).

Cooper asserts that once the Kershaw County Summary Court learned that there was a pattern and practice of failing to properly addresses it's summonses to the Camden Law Firm, PA, the Court should have immediately sought to ensure that justice was done. For instance, it should have amended its return to show that it failed to properly notice Cooper's attorney's on eight occasions, including the matter at bar. ROA 29-30. It should have advocated for the retrial of Cooper once it knew that Cooper's counsel was not notified. See *In re English*, 367 S.C. 297, 305 – 306, 625 S.E.2d 919 (2006) (disparate treatment afforded the State and the accused gives an appearance of impropriety and suggests a bias towards the State); *McCullough v. Commission on Judicial Performance*, 776 P.2d 259, 264 – 265 (Cal. 1989) (A justice court judge who violated two criminal defendants' right to representation by ordering their trials to proceed despite the absence of their attorneys was guilty of willful misconduct as to each case); Rule 501, SCACR, Canon 1.

## III. THE TRIAL COURT ERRED BY CONVICTING COOPER OF THE CRIME OF BREACH OF PEACE EVEN THOUGH THE STATE FAILED TO PROVE THE ELEMENTS OF THE CRIME.

Breach of peace is a common law offense which is not susceptible of exact definition. ROA 1; *State v. Edwards*, 239 S.C. 339, 343, 123 S.E.2d 247 (1961), *reversed*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963). Breach of Peace is a generic term, embracing a great variety of conduct destroying or menacing public order and tranquility. *Id.*; *State v. Simms*, 412 S.C. 590, 594-595, 774 S.E.2d 445 (2015).

> A breach of the peace may be generally defined as such a violation of the public order as amounts to a disturbance of the public tranquility, by act or conduct either directly having this effect, or by inciting or tending to incite such a disturbance of the public tranquility. Under this general definition, therefore, in laying the foundation for a prosecution for the offense of breach of the peace it is not necessary that the peace actually be broken; commission of an unlawful and unjustifiable act, tending with sufficient directness to

breach the peace, is sufficient. *Simms*, at 595.

A brief reading of the trial transcript shows that the deputy testified that he entered private property to serve an arrest warrant of a third party. ROA 66 – 68. After the deputy had arrested the third party and placed him in the patrol car, "Mr. Cooper...became very verbally aggressive, used a lot of profanity." ROA 68. Instead of quitting the premises, the deputy, by his own words, began looking for reasons to search Cooper's vehicle. ROA 68. When Cooper protested, he was arrested for breach of peace. ROA 68.

Cooper asserts that the evidence shows that the incident was provoked by law enforcement and that it occurred on private property. Cooper's verbal aggression and use of profanity without fighting words do not amount to breach of peace. *In the Interest of Jeremiah W.*, 361 S.C. 620, 622, 606 S.E.2d 766 (2004) (Citing *State v. Perkins*, 306 S.C. 353, 412 S.E.2d 385 (1991)) (State may not punish a person for voicing an objection to a police officer where no fighting words are used.).

There was no testimony that there was evidence that the Defendant's, "actions/speech caused at least a minimal level of "nervousness, frustration, anxiety," anger, or other evidence that the peacefulness of the neighborhood had been breached. *In the Interest of Jeremiah W.*, 353 S.C. 90, 94, 576 S.E.2d 185 (2003), *reversed on other grounds*, 361 S.C. 620, 606 S.E.2d 766 (2004), (Citing *State v. Peer*, 320 S.C. 546, 552, 466 S.E.2d 375, 378 (Ct.App. 1996)). There is no testimony about the way the only other person present, Bobo Jackson, behaved.

The freedom to verbally criticise law enforcement, while not very smart in Kershaw County, is protected by the First Amendment. *City of Houston v. Hill*, 482 U.S. 451, 461-63, 96 L. Ed. 2d 398, 107 S. Ct. 2502 (1987).

## CONCLUSION AND RELIEF REQUESTED

Our system functions on the belief that the United States Mail gets to where it is supposed to go. This is why the record shows an immediate apology and acceptance of responsibility by counsel for Cooper. When it was shown that the defect was not in processing of mail and calendaring of court dates, and that the defect was in fact due to the magistrate's failure to address envelopes properly, the magistrate failed to seize the opportunity to do justice. Cooper is entitled to procedural due process. The Court violated Cooper's State and Federal constitutional right to counsel by failing to properly notice counsel.

Alternatively, the State failed to present a breach of peace and a directed verdict should have been entered at the close of the State's case.

Cooper asks the Court to grant him a new trial.

Respectfully submitted,

THE CAMDEN LAW FIRM, PA

May 10, 2016

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