

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
General Sessions Court

Honorable R. Lawton McIntosh, Circuit Court Judge

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JUN 02 2017

SC Court of Appeals

Appellate Case No.: 2016-002331

The State,

Respondent

v.

Robert D. House,

Appellant.

APPELLANT'S INITIAL BRIEF

William G. Yarborough, III
Attorney for Appellant
522 N. Church Street
Greenville SC, 29601
Telephone (864) 331-1612
Fax (864) 370 0022

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION SINCE APPELLANT'S SENTENCE WAS UNDULY HARSH CONSIDERING APPELLANT'S RAPIDLY DETERIORATING HEALTH?

- II. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR A CONTINUANCE DUE TO APPELLANT'S FAILING HEALTH WHEN APPELLANT HAD A CRITICAL DOCTOR'S APPOINTMENT ON THE DAY OF THE HEARING?

STATEMENT OF THE CASE

On July 18, 2016, Appellant pled guilty to a violation of the Uniform Securities Act, CDR #0342. On October 24, 2016, the day of sentencing, Appellant had an essential medical consultation with his physician discussing how he could be added to the heart transplant registry. (Exhibit 1 – Certificate of Visit 10/24/2016). Appellant suffers from chronic illness and will most likely require a heart transplant. (Exhibit 2 – Robert D. House’s Medical Records). On the day of sentencing, Appellant’s counsel, William G. Yarborough, made a motion for a continuance, which was denied by the Honorable Judge R. Lawton McIntosh. (Transcript of Record, Sentencing Hearing, pg. 3, line 14 - pg. 4, line 4). Appellant was sentenced in his absence to ten years in prison. This Appeal is taken from the Judge McIntosh’s order dated November 3, 2016, which denied Appellant’s motion to reconsider the sentence.

STANDARD OF REVIEW

“[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion.” *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). “On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law.” *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The appellate court's task is to determine whether the trial court abused its discretion. *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998). Sound judicial discretion must be exercised in every case with a thorough regard for what is just and proper under the circumstances. *State v. Scates*, 212 S.C. 150, 156, 46 S.E.2d 693, 695 (1948).

Typically, motions for a continuance are within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice. *State v. Barrett*, 416 S.C. 124, 134, 785 S.E.2d 387, 392 (Ct. App. 2016) (citing *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct.App.2012)). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION SINCE APPELLANT'S SENTENCE WAS UNDULY HARSH CONSIDERING APPELLANT'S RAPIDLY DETORIORATING HEALTH.

The circuit judge erred in refusing to reconsider Appellant's sentence considering Appellant's advanced age and critical health. The trial court should consider several factors when determining an appropriate sentence for a defendant. One of the factors typically considered is the age and physical condition of defendant. Here, Appellant is a sixty-five-year-old man who is being treated for advanced heart failure and is currently in the process of receiving a heart transplant. (Exhibit 2 – Letter from Department of Veterans Affairs 10/12/2016). Appellant also suffers from numerous other serious health problems including chronic kidney disease stage 3, diabetes, high blood pressure, COPD, and sleep apnea. (See Ex. 2). Currently, Appellant is under the care of several doctors including a cardiologist at the Atlanta Cardiac Transplant Clinic, and he must be seen regularly there to treat his current heart failure condition. (See Ex. 2).

These circumstances demonstrate that Appellant's health is rapidly deteriorating and that he will likely require major surgery in the near future if he is to survive much longer. If incarcerated, it is likely that Appellant's care will not be the same quality as that which he receives now under the immediate care of his private physician, and if he does not receive the proper care, there is a high possibility that he will die.

Here, the purposes of punishment could be accomplished without the need for Appellant's incarceration. Currently, Appellant requires constant monitoring and care for his failing health. Due to these extenuating circumstances, a long-term monitoring

program would be a more appropriate remedy than incarcerating a terminally ill man. This arrangement is even more appropriate when considering the fact that Appellant is required to perform restitution and has no prior criminal record.

Although the trial court stated that it took the Appellant's situation into consideration when imposing its sentence, (Order Denying Defendant's Motion to Rescind Bench Warrant and Order Denying Defendant's Motion for Reconsideration of Sentence Imposed, pg. 2 "Order Denying Defendant's Motion"), the fact that the court imposed a ten-year sentence on Appellant shows that it abused its discretion in this case to the prejudice of Appellant.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A CONTINUANCE DUE TO APPELLANT'S FAILING HEALTH WHEN APPELLANT HAD A CRITICAL DOCTOR'S APPOINTMENT ON THE DAY OF THE HEARING.

The trial court also erred when it denied Appellant's motion for a continuance due to Appellant having to attend a critical doctor's appointment on the day of the sentencing hearing.

On October 24, 2016, the day of the sentencing hearing, Appellant was attending a necessary doctor's appointment in Atlanta, Georgia, regarding his prospective heart transplant. (See Ex. 1). However, Appellant was represented by defense counsel at the hearing and sought a motion for a continuance due to his pressing medical issues. This motion was denied.

Although a defendant may not fail to appear at a sentencing hearing for any reason he chooses, *State v. Holloway*, 262 S.C. 552, 557, 206 S.E.2d 822, 824 (1974), South Carolina courts have excused a defendant's failure to appear when his failure does not result from willful default. *Id.* at 555, 206 S.E.2d at 824. Here, Appellant's absence was due to a life-threatening condition that requires serious medical attention. Appellant requested a continuance so that he could be present at his sentencing hearing, and it was unreasonable for the court to deny his request. As such, the court abused its discretion in denying Appellant's request for a continuance due to his critical medical appointment.

CONCLUSION

The trial court erred in sentencing Appellant to a ten-year term of incarceration in spite of Appellant's life-threatening medical condition. Additionally, the trial court erred in denying Appellant's motion for a continuance since Appellant was absent attending a critical doctor's appointment for his potential heart transplant surgery.

As a result of these sentencing errors, which are errors of law, Appellant's sentence should be reversed, and the case should be remanded for re-sentencing.

RESPECTFULLY SUBMITTED THIS 30th day of May 2017.

William G. Yarborough

William G. Yarborough, III
Attorney for Appellant
522 North Church Street
Greenville, SC 29601
(864)331-1612 Office
(864) 370-0022 Fax
WGYarborough@gmail.com

Greenville, South Carolina

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AFFIDAVIT OF SERVICE

I, Traci Trouton-Burr, certify on this date, May 30, 2017, I served an Initial Brief and Designation of Matter in this action, dated May 30, 2017, on Jennie Kitchings, South Carolina Court of Appeals Clerk of Court, Alan Wilson, South Carolina Attorney General, Brian Petrano, Assistant Attorney General, and Richard Shirley, Tenth Judicial Circuit Clerk of Court by mailing it to him/her at his/her work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Alan Wilson, Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211

Brian T. Petrano
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211

Richard Shirley, Clerk of Court
Tenth Judicial Circuit
PO Box 8002
Anderson, SC 29622

Respectfully submitted,



Traci Trouton-Burr
Paralegal to William G. Yarborough, Esquire

SWORN TO before this 30th
Day of May, 2017



Notary Public for South Carolina

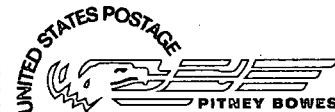
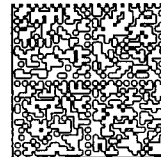
My Commission expires: 10/9/23

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**Law Office of William G. Yarborough III
522 North Church Street
Greenville, SC 29601**



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**Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
PO Box 11629
Columbia, SC 29211**