

COUNTY OF CHARLESTON
STATE VS.

JOHN CLEVELAND, JR

INDICTMENT/CASE#: 2015GS1000019
A/W: 2014A1010900046
Date of Offense: 12/31/2013
S.C. Code §: 23-03-0470(B)(3)
CDR Code #: 2435

AKA:
Race: Black/African American Sex: M
DOB: [REDACTED] SS#: [REDACTED]
Address: [REDACTED]
City, State, Zip: [REDACTED]
DL# [REDACTED] SID# [REDACTED]

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was

CONVICTED OF or PLEADS

TO: Failure To Register As A Sex Offender 3rd Offense

In violation of § 23-03-0470(A) of the S.C. Code of Laws, bearing CDR Code # 2435

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45
(CSC w/minor 1st or Lewd Act)

The charge is: As indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (def.'s initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

Edward R. Corvey, III, Assistant Solicitor SC Bar # 101454 Defendant
Attorney for Defendant SC Bar # 61

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,
for a determinate term of 5 days/months/years or under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which
are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: _____

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____
Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED

Set by SCDPPS _____ Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____ May serve W/E beginning _____

*Fine: _____ \$ _____ Substance Abuse Counseling

§14-1-206 (Assessments 107.5%) \$ _____ Random Drug/Alcohol Testing

§14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ _____ Fine may be pd. in equal consecutive weekly/monthly

§14-1-211 (A)(2)(DUI Surcharge) \$100 \$ _____ pmts. of \$ _____ Beginning _____

§56-5-2995 (DUI Assessment) \$12 \$ _____ \$ _____ Paid to Public Defender Fund

§56-1-286 (DUI Breath Test) \$25 \$ _____ Other: _____

Proviso 47.9 (Public Def/Prob) \$500 \$ _____

§14-1-212 (Law Enforce. Funding) \$25 \$ _____

§14-1-213 (Drug Court Surcharge) \$150 \$ _____

§50-21-114 (BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

Proviso 90.5 (SCCJA Surcharge) \$5 \$ _____

3% to County (if paid in installments) \$ \$ _____

TOTAL \$ _____

Clerk of Court/Deputy Clerk: _____ Presiding Judge: [Signature]
Court Reporter: _____ Judge Code: 2156
ATTEST: A TRUE COPY Date: 15 Dec 15
JULIE J. ARMSTRONG, CLERK OF COURT & REC.

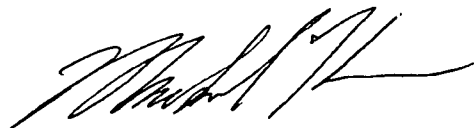
By [Signature] DEPUTY CLERK

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
	:	
COUNTY OF CHARLESTON)	INDICTMENT No.: 2015-GS-10-00019
	:	
The State of South Carolina)	
Plaintiff,	:	
~V~)	VERDICT
	:	
John Cleveland, Jr.)	
Defendant	:	

We the jury, by unanimous agreement, find the Defendant, John Cleveland, Jr., on the charge of Failure to Register as a Sex Offender;

Not Guilty _____

Guilty _____



Mister Foreman

Dated in Charleston, South Carolina this 15th day of October, 2015

ATTEST: A TRUE COPY
JULIE H. ARMSTRONG (SEAL)

CLERK OF COURT & S.C.
By 
DEPUTY CLERK

2014001673
ARREST WARRANT

2014A1010900046

STATE OF SOUTH CAROLINA

County/ Municipality of

Charleston

THE STATE
against

John Cleveland, Jr

Address: [REDACTED]

Phone: [REDACTED] SSN: [REDACTED]

Sex: M Race: B Height: 5 7 Weight: 185

DL State: SC DL #: [REDACTED]

DOB: [REDACTED] Agency ORI #: SC0100000

Prosecuting Agency: Charleston County Sheriff

Prosecuting Officer: J Bowen - 0784

Offense: Sex / Sex Offender Registry Violation, fail to register - 3rd & sub. offense

Offense Code: 2435

Code/Ordinance Sec: 23-03-0470(B)(3)

This warrant is CERTIFIED FOR SERVICE in the
 County/ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant John Cleveland Jr on 9/3/2014

S/SG [Signature]
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
Charleston County Judicial Center
100 Broad Street, Suite 106
Charleston, SC 29401

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

County/ Municipality of

Charleston

Personally appeared before me the affiant J Bowen who

being duly sworn deposes and says that defendant John Cleveland, Jr did within this county and state on or about 12/31/2013 violate the criminal laws of the

State of South Carolina (or ordinance of County/ Municipality of Charleston) in the following particulars:

DESCRIPTION OF OFFENSE: Sex / Sex Offender Registry Violation, fail to register - 3rd & sub. offense

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA

County/ Municipality of

Charleston

Affiant's Address 3505 Pinehaven Drive
Charleston, SC 29405-7789
Affiant's Telephone (843)202-1700

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 12/31/2013 defendant John Cleveland, Jr

did violate the criminal laws of the State of South Carolina (or ordinance of County/ Municipality of Charleston) as set forth below:

DESCRIPTION OF OFFENSE: Sex / Sex Offender Registry Violation, fail to register - 3rd & sub. offense

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 1/27/2014
[Signature] (L.S.)
Signature of Issuing Judge
Ellen S Steinberg
Judge Code: 7280

Judge's Address 1720 Sam Rittenburg Blvd, Unit 11
Charleston, SC 29417-1861
Judge's Telephone (843)766-6531

Issuing Court: Magistrate Municipal Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ATTEST: A TRUE COPY
JULIE L ARMSTRONG (SEAL)
CLERK, C.P., C.S. & F.C.
By [Signature]
DEPUTY CLERK

BAIL set by

WITNESSES

Judge Lombard
on 9-4-14
Type and Amount: 10,000-
Name of Surety: [Signature]

Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____

Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

Decision: _____

DISPOSITION before

Judge _____
on _____
by _____
(Indicate jury trial, bench trial, plea, nol. pros., etc.)

Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

Disposition: _____
Sentence: _____

JURORS

Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

CODEFENDANTS



FILED

2014 SEP -9 AM 11:22

JULIE J. ARMSTRONG
CLERK OF COURT

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT
By [Signature]
DEPUTY CLERK



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

OCA# 2014-001673

AFFIDAVIT

Personally appeared before me, a magistrate of this County, one Det. J. Bowen, who, first being duly sworn, deposes and says that

John Cleveland Jr.

did within this County and State on the 31st day of December, 2014, violate the criminal laws of the State of South Carolina in the following particulars:

**FAILURE TO REGISTER AS A CONVICTED SEX OFFENDER, 3rd OFFENSE
23-3-470(B)(3)**

The affiant states that there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on November 27, 2013, while at 3505 Pinehaven Drive, North Charleston, in the County and State aforesaid, the above named defendant, **John Cleveland Jr.**, did commit offense of violation section 23-3-470(B)(3) of the South Carolina Code of Laws, 1976 as amended, **FAILURE TO REGISTER AS A SEX OFFENDER, 3rd Offense**, in that he did fail to report for his regular quarterly registration in the month of December, 2013.

On January 13, 1987, John Cleveland Jr. was convicted of Criminal Sexual Conduct With A Minor, 2nd degree, and subsequently registered as a convicted sex offender. On September 18, 2013, during his most recent quarterly registration, Cleveland signed his registration form acknowledging that he must register quarterly for life and that his next registration was to be during the month of December, 2013. As of January 27, 2014, Cleveland has neither reported for registration nor contacted the Sheriff's Office to arrange for registration. On December 27, 2013, a voice message was left at Cleveland's last known phone number reminding him to report for his December registration.

Cleveland has been convicted of Failure To Register, 1st Offense, on two prior occasions; June 7, 2006, and on May 20, 2009.

The above information was revealed through the investigation of Detective J. Bowen, and he is witness to prove the same against the peace and dignity of the State.

Sworn to and Subscribed before me
This 27 day of January, 2014

Ellen S. Steinhilber
Signature of Judge

J. Bowen
Det. J. Bowen
Charleston County Sheriff's Office
3505 Pinehaven Drive
North Charleston, SC 29405
843-202-1710

ATTEST: A TRUE COPY
JULIE D'ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By [Signature]
DEPUTY CLERK

WITNESSES

Charleston County Sheriff Office

The State of South Carolina

County of Charleston

AGENCY CASE NUMBER

2014001673B

COURT OF GENERAL SESSIONS

January Term 2015

ARREST WARRANT NUMBER

2014A1010900046

DATE OF ARREST

September 4, 2014

THE STATE

vs.

JOHN CLEVELAND, JR.

DOB: [REDACTED]

B/M

ACTION OF GRAND JURY

Indictment for

Failure to Register Sex Offender
- 3rd Offense

Nancy McKee
Foreperson of Grand Jury

Date: JAN 13 2015

VERDICT

Foreperson of Petit Jury

Date:

INDICT

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT
[Signature]
DEPUTY CLERK



SECRET

SECRET

RECEIVED

SEP 21 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA

) IN THE SOUTH CAROLINA
) COURT OF APPEALS

COUNTY OF CHARLESTON

) Case No(s): 2015GS1000019
)
) Warrant No(s): 2014A1010900046

STATE OF SOUTH CAROLINA

) Charge(s): Failure to Register As A Sex Offender 3rd
) Offense

-versus-

REQUEST FOR REPRESENTATION
ON APPEAL

John Cleveland Jr.,

Defendant.

On behalf of the request of the above-named Defendant, to be represented by the South Carolina Commission of Appellate Defense, the undersigned attorney would show unto this Honorable Court that:

1. She represented the defendant-appellant at the sentencing hearing in the above captioned case. The defendant-appellant was placed in custody immediately following conviction and sentence and was not available to personally sign this Request.
2. The defendant-appellant was represented by the Charleston County Public Defender's Office as an indigent, pursuant to the Defense of Indigent Act.
3. The defendant-appellant has been informed that he may request assistance from the South Carolina Commission of Appellate Defense in perfecting his appeal.
4. A timely Notice of Appeal has been filed on the defendant's-appellant behalf.
5. The defendant-appellant has been informed that nothing requires that office to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the defendant-appellant requests the aid of the South Carolina Commission of Appellate Defense in perfecting his appeal to the South Carolina Court of Appeals.

Shirene C. Hansotia

Shirene C. Hansotia
Assistant Public Defender
Charleston County Public Defender

Charleston, South Carolina

Dated: 9/16/16, 2016.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA

Plaintiff,

vs.

John Cleveland, Jr.,

Defendant.

) - IN THE COURT OF GENERAL SESSIONS
) FOR THE NINTH JUDICIAL CIRCUIT
)
) Warrant No(s): 2014A1010900046
) Charge(s): Failure to Register As A Sex Offender,
) 3rd Offense

MOTION FOR
RECONSIDERATION OF SENTENCE

RECEIVED

SEP 21 2016

SC Court of Appeals

PLEASE TAKE NOTICE that the above captioned defendant, by and through the undersigned attorney, moves this Honorable Court for a reconsideration of the sentence imposed upon the defendant on October 15, 2015 by the Honorable W. Jeffrey Young, pursuant to the above mentioned charge. The sentence was published on July 18, 2016 during a sentencing hearing held before the Honorable Deadra L. Jefferson.

Attorney for Defendant, Shirene C. Hansotia, requests a hearing to present mitigating factors. This motion being made upon the grounds that the Defendant was tried in his absence and the sentence imposed is unnecessarily severe under the circumstances, and upon such other and further grounds as may be hereinafter presented. Please see attached case law in support of the argument that the judge that unseals and publishes the sentence has jurisdiction to amend or reconsider the sentence. 290 S.C. 435; 355 S.C. 255, 276 S.C. 494.

FILED
2016 JUL 20 AM 11:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY *[Signature]*

Respectfully Submitted,

Shirene Hansotia

Shirene Hansotia
Assistant Public Defender
Attorney for Defendant

Charleston, South Carolina

Dated: 7/20/16

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT
BY *[Signature]*
DEPUTY CLERK

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Source: **Combined Source Set 23** - SC State Cases, CombinedTerms: **290 S.C. 435** (Suggest Terms for My Search) Select for FOCUS™ or Delivery

290 S.C. 435, *; 351 S.E.2d 167, **;
1986 S.C. LEXIS 450, ***

The STATE, Respondent v. Arthur L. JACKSON, Appellant

No. 22637

Supreme Court of South Carolina

290 S.C. 435; 351 S.E.2d 167; 1986 S.C. LEXIS 450

October 20, 1986, Heard
December 8, 1986, Decided

PRIOR HISTORY: [***1] Appeal From Charleston County, Thomas Hughston ▾, Judge,
Jonathan Z. McKnown, Judge.

DISPOSITION: Reversed and remanded.

CORE TERMS: new trial, notice, sentence, sentencing, reduction

COUNSEL: *Asst. Appellate Defender Tara D. Shurling* • of S.C. Office of Appellate Defense,
Columbia, for appellant.

Atty. Gen. T. Travis Medlock ▾, *Asst. Attys. Gen. Harold M. Coombs, Jr.* ▾, and
Carlisle Roberts, Jr. ▾, Columbia, and *Sol. Charles M. Condon* ▾, Charleston, for respondent.

JUDGES: Gregory, J., not participating.

OPINION BY: PER CURIAM

OPINION

[*436] [**167] Appellant was tried in his absence and convicted of housebreaking. We reverse and remand for a new trial.

Neither appellant nor his counsel was present at trial. The State produced no evidence at trial that appellant had been given notice of his trial date. At the sentencing hearing six months


later, appellant moved for a new trial but was not permitted to state his grounds. Appellant argues on appeal that he is entitled to a new trial because the record does not support a finding that he knowingly and intelligently waived his right to be present. We agree.

Notice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an **[***2]** effective waiver of his right to be present. *Ellis v. State*, 267 S.C. 257, 227 S.E. (2d) 304 (1976). If the record, however, does not include evidence to support a finding that the defendant was afforded notice of his trial, the resulting conviction *in absentia* cannot stand. *State v. Simmons*, 279 S.C. 165, 303 S.E. (2d) 857 (1983); *Brewer v. [437] South Carolina State Highway Dept.*, 261 S.C. 52, 198 S.E. (2d) 256 (1973). Appellant therefore is entitled to a new trial.

Appellant also excepts to the sentencing judge's refusal to entertain his motion for a reduction of sentence. While we need not address this issue in light of our disposition in this case, we reiterate for the benefit of the trial bench our holding in *State v. Smith*, 276 S.C. 494, 280 S.E. (2d) 200 (1981), that when a sealed sentence is opened and read, the judge has the authority to consider a motion for reduction of sentence.

Accordingly, the judgment of the lower court is reversed and the case is remanded for a new trial.

Reversed and remanded.







Source: **Combined Source Set 23**  - **SC State Cases, Combined**

Terms: **290 S.C. 435** (Suggest Terms for My Search)

View: Full

Date/Time: Tuesday, July 19, 2016 - 8:32 AM EDT

* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

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Cases - (35)

Source: **Combined Source Set 23** - SC State Cases, CombinedTerms: **355 S.C. 255** (Suggest Terms for My Search) Select for FOCUS™ or Delivery*355 S.C. 255, *; 584 S.E.2d 131, **;
2003 S.C. App. LEXIS 103, ****

The State, Respondent, v. Paul Thompson, Appellant.

Opinion No. 3659

COURT OF APPEALS OF SOUTH CAROLINA

355 S.C. 255; 584 S.E.2d 131; 2003 S.C. App. LEXIS 103

April 18, 2003, Submitted


July 7, 2003, Filed


PRIOR HISTORY: [***1] Appeal From Marlboro County. Edward B. Cottingham, Circuit Court Judge.**DISPOSITION:** REVERSED AND REMANDED.**CASE SUMMARY****PROCEDURAL POSTURE:** Defendant was tried in absentia and without counsel. He was convicted in the Marlboro County Circuit Court (South Carolina) of discharging a firearm into a dwelling and malicious injury to personal property over \$ 1,000 but less than \$ 5,000. The trial judge sentenced him to five years on each count, to run concurrently. He appealed.**OVERVIEW:** A witness testified that defendant and two other men shot firearms at her car and into her house. On the day of trial, neither defendant nor counsel for him were present, though the two codefendants were. Defendant was tried in absentia and was convicted. The codefendants were acquitted. The trial court determined that a lawyer would have been appointed for defendant if he had presented himself at trial. The appellate court noted that defendant never verbally requested to waive counsel, or was given a Faretta advisement as to the dangers and disadvantages of self-representation. In fact, he had sought appointment of a member of the public defender's office, and the record did not reveal any inference that he understood the dangers and disadvantages of self-representation (he had no prior record which would have familiarized him with the criminal court system). His failure to appear for trial was not a waiver of his right to counsel. Whether South Carolina should embrace the doctrine of forfeiture of the right to counsel did not have to be decided, because defendant's conduct was not sufficient to constitute forfeiture.**OUTCOME:** The judgment was reversed and the case was remanded.


CORE TERMS: right to counsel, forfeiture, self-representation, waive, disadvantages, appointed, absentia, waived, forfeit, sentence, public defender, assistance of counsel, sealed, verbal, times, jury selection, fundamental right, per se, reasonable time, pro se, preliminary hearing, misconduct, sentenced, retaining, forfeited, indigent, appoint, advice, sit, door


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
Criminal Law & Procedure > Verdicts > General Overview 


Criminal Law & Procedure > Sentencing > Concurrent Sentences 


Criminal Law & Procedure > Sentencing > Imposition > General Overview 


HN1  A sealed sentence is not opened until the defendant is arrested and before the court. Pursuant to caselaw, the circuit judge opening the sealed sentence is under the law the sentencing judge. More Like This Headnote | *Shepardize*: Restrict By Headnote


Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel 


Criminal Law & Procedure > Counsel > Right to Counsel > General Overview 

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Potential Imprisonment 


HN2  It is well established that a defendant may be tried in his absence. S.C. R. Crim. P. 16. However, to try a defendant without counsel is a completely different matter. The Sixth and Fourteenth Amendments of the U.S. Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment. Moreover, an indigent criminal defendant may request the court to appoint an attorney to represent him. Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have. The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is per se reversible error. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. More Like This Headnote | *Shepardize*: Restrict By Headnote


Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel 


Criminal Law & Procedure > Counsel > Right to Counsel > Trials 

HN3  A defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture. More Like This Headnote | *Shepardize*: Restrict By Headnote


Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel 


Criminal Law & Procedure > Counsel > Right to Counsel > General Overview 


Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Constitutional Right 

HN4  A defendant may waive his Sixth Amendment right to counsel. A waiver is an intentional and voluntary relinquishment of a known right. The courts indulge every


reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights. More Like This Headnote | *Shepardize*: Restrict By Headnote


Civil Procedure > Judicial Officers > Judges > General Overview 


Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel 

Governments > Courts > Judges 

HN5 Waiver is most commonly understood as an affirmative, verbal request. To effectuate a valid waiver of the right to counsel, the two-pronged Faretta test must be met in which the accused is (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. If the trial judge fails to address the disadvantages of appearing pro se, as required by the second prong of Faretta, the appellate court will look to the record to determine whether the defendant had sufficient background or was apprised of his rights by some other source. While a specific inquiry by the trial judge expressly addressing the disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied. More Like This Headnote | *Shepardize*: Restrict By Headnote


Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel 

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview 


Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Constitutional Right 


HN6 A defendant may waive his right to counsel through his conduct. Most courts have held that the defendant must first be warned that his misconduct will thereafter be treated as a waiver. To the extent that the defendant's actions are examined under the doctrine of waiver, there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings. More Like This Headnote | *Shepardize*: Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel 

Criminal Law & Procedure > Counsel > Right to Counsel > Trials 

HN7 A waiver of the right to counsel can be inferred from a defendant's actions. More Like This Headnote | *Shepardize*: Restrict By Headnote


Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel 



Criminal Law & Procedure > Counsel > Right to Counsel > General Overview 



Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Constitutional Right 

HN8 A defendant does not validly waive his right to counsel where there is no inquiry on the record as to whether the defendant is aware of his rights or whether he knowingly waives them. This type of inquiry is quite obviously impossible when a defendant fails to appear in court. However, failure to appear is not tantamount to a knowing waiver. A defendant's fugitive status is not a per se waiver nor may it be punished by the negation of constitutional rights. His fugitive status is a

separate wrong with its own consequences. More Like This Headnote |
Shepardize: Restrict By Headnote


COUNSEL: Senior Assistant Appellate Defender Wanda H. Haile , of Columbia, for Appellant.

Attorney General Henry Dargan McMaster , Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Jay E. Hodge, Jr. , of Darlington, for Respondent.

JUDGES: ANDERSON , J. GOOLSBY and HUFF , JJ., concur.

OPINION BY: ANDERSON 

OPINION

[*258] [**133] ANDERSON , J.: Paul Thompson was tried in absentia and without counsel. He was convicted of discharging a firearm into a dwelling and malicious injury to personal property over \$ 1000 but less than [*259] \$ 5000. The trial judge sentenced him to five years on each count to run concurrently. We reverse and remand. ¹

FOOTNOTES

¹ This case was decided without oral argument pursuant to Rule 215, SCACR.

FACTS/PROCEDURAL BACKGROUND

Vanessa Pearson [***2] was at home with her adult daughter, Najwa, on October 30, 1999 when a man named Derrick came to her door and asked for "Junior." Pearson told him that no one by the name of "Junior" lived there. Thirty minutes later he came to her door again and asked for "Junior." She reiterated to him that no one by the name of "Junior" lived there. Pearson testified that Derrick, Paul Thompson, and Michael Graham then started shooting at her car and into her house. The damage to her car was about \$ 4000. Pearson identified Peggy Wright as sitting in the backseat of the vehicle that the men drove during the occurrence.

Graham, Wright, and Thompson were tried together for discharging a firearm into a dwelling and malicious injury to personal property over \$ 1000 but less than \$ 5000. The same counsel represented Graham and Wright. Thompson was not present nor did he have counsel present. The judge told the bailiff to call Thompson's name three times at the courthouse door before the jury selection began. After Thompson did not respond, he was tried in his absence. Graham and Wright presented alibi evidence, which resulted in their acquittals. Thompson was found guilty as charged.

A sealed sentence [***3] was given as required by law. ^{HNI} ~~The~~ The sealed sentence is NOT opened until the defendant is arrested and before the court. After his arrest, Thompson was brought before the court for the opening of the sealed sentences. Pursuant to State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981), the circuit judge opening the sealed sentence is under the law the sentencing judge. Exercising his discretion, the judge sentenced Thompson to five years on each count, concurrently.

At sentencing, Thompson's attorney professed that Thompson appeared at four or five roll calls after his arrest on November 15, 1999. During that time, Thompson requested [*260] through the Clerk of Court representation from the Public Defender's Office. Thompson

contends he was told he did not meet the cut-off amount of money to qualify for a public defender. He explained to them that he had child support arrearage payments that virtually consumed his salary and offered to produce documentation. According to Thompson's attorney, no one would listen to him regarding his child support payments. The court refuted Thompson's assertion, explicating that if Thompson had said he did not have an attorney, one would [***4] have been appointed for him.

A Bench Warrant was issued for Thompson on September 11, 2000 and another was issued on May 17, 2001. During September 2001, Thompson went to a rehabilitation facility in Maryland for cocaine and alcohol addiction. He left the facility on November 19, 2001. He went to High Point, North Carolina and then to his uncle's house in Bennettsville. Thompson was tried on November 28, 2001. Thompson's brother testified that the family was only given fourteen hours notice of trial.

The judge determined that a lawyer would have been appointed for him if he had presented himself at trial:

THE COURT: Well, I can say here for the record if he would have been here like the other two defendants were, didn't have a lawyer, we would have appointed one for him.

[THOMPSON'S COUNSEL: Yes, sir, Your Honor.

THE COURT: But you can't appoint one for him if he runs and doesn't even come to court. [**134]

LAW/ANALYSIS

Thompson argues the judge erred in denying his motion for a new trial because he was denied the right to counsel at trial.

I. RIGHT TO COUNSEL

^{HN2}It is well established that a defendant may be tried in his absence. Rule 16, SCRCrimP ("Except in cases wherein capital [***5] 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 [*261] 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.")²

However, to try a defendant without counsel is a completely different matter. *Pennsylvania v. Ford*, 715 A.2d 1141, 1143 (1998) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)).

FOOTNOTES

² Thompson's waiver of his right to be present at trial is not at issue on appeal.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562, 566 (1975); [***6] accord *Gideon v. Wainwright*, 372 U.S. 335, 339-40, 83 S. Ct. 792, 794, 9 L. Ed. 2d 799, 802-03 (1963). Moreover, an indigent criminal defendant may request the court to appoint an attorney to represent him. *Gideon*, 372 U.S. at 344, 83 S. Ct. at 796-97, 9 L. Ed. 2d at 802; see *Scott v. Illinois*, 440 U.S. 367, 367, 99 S. Ct. 1158, 1159, 59 L. Ed. 2d 383, 389 (1979) ("The Sixth and

Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense . . .").

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronin*, 466 U.S. 648, 654, 104 S. Ct. 2039, 2044, 80 L. Ed. 2d 657, 664 (1984). The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is per se reversible error. *State v. Boykin*, 324 S.C. 552, 555, 478 S.E.2d 689, 690 (Ct. App. 1996) (citing *Chapman v. California*, 386 U.S. 18, 23 n.8, 87 S. Ct. 824, 828 n.8, 17 L. Ed. 2d 705 (1967)). **[***7]** "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *McKnight v. State*, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 696 (1984)).

[*262]

II. RELINQUISHMENT OF RIGHT TO COUNSEL

^{HN3} A defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture. *State v. Boykin*, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996).

A. Waiver

^{HN4} A defendant may waive his Sixth Amendment right to counsel. A waiver is an intentional and voluntary relinquishment of a known right. *United States v. Goldberg*, 67 F.3d 1092, 1099 (3d Cir. 1995); *Maxwell v. Genez*, 350 S.C. 563, 571, 567 S.E.2d 496, 500 (Ct. App. 2002). The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938); **[***8]** *Pitts v. North Carolina*, 395 F.2d 182, 188 (4th Cir. 1968).

1. Waiver by Affirmative, Verbal Request

^{HN5} Waiver is most commonly understood as an affirmative, verbal request. *United States v. Goldberg*, 67 F.3d 1092, 1099 (3d Cir. 1995); *State v. Boykin*, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996). To effectuate a valid waiver of the right to counsel, the two-pronged *Faretta* test must be met in which the accused is (1) advised of his right to counsel and (2) adequately warned of **[**135]** the dangers of self-representation. *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977) (citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). If the trial judge fails to address the disadvantages of appearing pro se, as required by the second prong of *Faretta*, "this Court will look to **[***9]** the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." *Prince*, 301 S.C. at 424, 392 S.E.2d at 463; accord *Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). While a specific inquiry by the trial judge expressly addressing the **[*263]** disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. *Gardner v. State*, 351 S.C. 407, 411-12, 570 S.E.2d 184, 186 (2002); *Wroten*, 301 S.C. at 294, 391 S.E.2d at 576. If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied. *Id.*

Pellucidly by his absence, Thompson did not make an affirmative, verbal request to waive counsel.

2. Waiver by Conduct

^{HN6}A defendant may waive his right to counsel through his conduct. *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995); *State v. Jacobs*, 271 S.C. 126, 128, 245 S.E.2d 606, 608 (1978); **[***10]** *State v. Boykin*, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996). Most courts have held that the defendant must first be warned that his misconduct will thereafter be treated as a waiver. *Boykin*, 324 S.C. at 556, 478 S.E.2d at 691. "To the extent that the defendant's actions are examined under the doctrine of 'waiver,' there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings." *Goldberg*, 67 F.3d at 1100. Any subsequent misconduct will be treated as a "waiver by conduct." *Boykin*, 324 S.C. at 556, 478 S.E.2d at 690.

In *State v. Cain*, 277 S.C. 210, 284 S.E.2d 779 (1981), the appellant was tried in absentia and without counsel. Cain was represented by counsel at a preliminary hearing and both he and his attorney were aware the case was coming up for trial. *Cain*, 277 S.C. at 210, 284 S.E.2d at 779. The court found Cain was cognizant of his duty to keep in contact with his attorney and the court. *Id.* The court held a waiver of the right to counsel was inferable from his omissions. *Cain*, 277 S.C. at 211, 284 S.E.2d at 779. **[***11]**

Although in the present case Thompson was tried in absentia and without counsel, the facts in *Cain* are quite different. Unlike Thompson, Cain was represented by counsel at a preliminary hearing. Cain edifies:

[*264] The appellant was released on a general appearance bond and was represented by counsel at a preliminary hearing. Both the appellant and his attorney knew the case was coming up for trial. The appellant knew he had a duty to stay in touch with his attorney and with the court.

We held in *State v. Jacobs*, 271 S.C. 126, 245 S.E.2d 606 (1978) that ^{HN7}a waiver of the right to counsel can be inferred from a defendant's actions. In this case, the appellant failed to fulfill the conditions of his appearance bond and neglected to keep contact with his attorney, although he knew his trial was imminent. We think a waiver of the right to counsel is inferrable [sic] from these omissions.

Cain, 277 S.C. at 210-11, 284 S.E.2d at 779 (footnote omitted).

The case of *State v. Jacobs*, 271 S.C. 126, 245 S.E.2d 606 (1978), analyzes a trial scenario where the appellant participated at trial, but did not have counsel. The appellant was not indigent. **[***12]** The trial judge urged him on several occasions to retain a lawyer. The case was continued at least once to enable the appellant to hire an attorney. *Jacobs*, 271 S.C. at 127, 245 S.E.2d at 607. The judge asked an attorney with the Public Defender's Office to sit with him at trial to offer him advice and assistance. *Id.* Although the appellant never expressly waived his right to counsel, the court held the appellant waived his right to **[**136]** counsel by his conduct because he was given reasonable time to secure counsel, he was financially capable of retaining counsel, and the court had done all it could to advise him to seek counsel. *Id.*

The facts in *Jacobs* are dissimilar to the case sub judice. *Jacobs* was present in the courtroom, he was financially capable of retaining counsel, the judge had repeatedly encouraged him to get an attorney, the judge continued the case at least on one occasion for him to retain an attorney, and he had the assistance of a public defender at trial. *Jacobs* is enlightening:

Appellant never expressly waived his right to counsel but the trial judge found that he was very capable of retaining counsel, that the court had done all it could do **[***13]** to urge him to do so, and that he had still not employed a lawyer. The trial judge asked an attorney from the Public Defender's Office to sit with him during his trial to give him advice and **[*265]**



assistance. The attorney advised the court that he was totally unprepared for trial but the trial judge said that appellant's inaction had caused the situation. Appellant agreed to allow the attorney to sit with him but indicated that he wanted him to do nothing further in the case. The trial then proceeded.

On the facts of this case, we feel that the trial judge allowed appellant, a non-indigent, a reasonable time in which to retain counsel and that appellant did not make a sufficient showing of reasons for his failure to have counsel present. He was on several occasions urged to retain counsel and a phone was made available to him and additional time was given him in order for him to make arrangements. When, on the day of trial, counsel was not present, appellant did not name his attorney, if one had been retained, nor did he indicate when counsel would be available. He gave no reasons for the absence of counsel other than that he had been expecting his brother to bring a lawyer.

*****14** We conclude that, by his conduct, appellant waived his right to counsel.

Jacobs, 271 S.C. at 127-28, 245 S.E.2d at 607-08.

An excellent academic explication of an appellant tried in absentia and without representation is *Pennsylvania v. Ford*, 715 A.2d 1141 (Pa. Super. Ct. 1998). The appellant was originally appointed counsel. *Ford*, 715 A.2d at 1143. He requested a continuance in order to find private counsel. *Id.* The court then approved the withdrawal of the court-appointed counsel. *Id.* Two weeks before jury selection was initiated, the appellant fled the jurisdiction after violating his probation in a prior unrelated case. *Id.* When the appellant did not appear for jury selection, his private counsel filed a motion to withdraw, arguing that the appellant had not paid a large portion of his fee and his absence impeded trial preparation. *Id.* The court granted the motion and proceeded to try the appellant in absentia and without counsel. *Id.* The court found the ^{HNS} appellant did not validly waive his right to counsel because there was no inquiry on the record as to whether the appellant was aware of his rights or whether he knowingly *****15** waived them. *Ford*, 715 A.2d at 1144. The court observed that this type of inquiry is "quite ***266** obviously impossible" when a defendant fails to appear in court. *Id.* However, the court ruled that "failure to appear . . . is not tantamount to a knowing waiver." *Id.* The appellant's fugitive status was not a per se waiver nor could it be punished by the "negation of constitutional rights." *Id.* His fugitive status was a separate wrong with its own consequences. *Id.*

While Thompson did not have counsel withdraw at the brink of trial, he similarly was not queried on the record as to whether he was aware of his rights or whether he knowingly waived them. The *Ford* court acknowledged the impracticability of asking the defendant on the record when he does not appear in court, but still found that a failure to appear does not equate a knowing waiver. Likewise, Thompson's failure to appear does NOT rise to the level of waiver.

The Indiana Court of Appeals thoroughly analyzed a trial in absentia involving a defendant unrepresented by counsel. *Slayton v. Indiana*, 755 N.E.2d 232 (Ind. Ct. App. ****137** 2001). Slayton appeared in court three times before *****16** trial in which the court mentioned counsel but never advised him of the dangers and disadvantages of self-representation. *Slayton*, 755 N.E.2d at 234. The State argued that Slayton never requested the court to appoint counsel and that his failing to appear at trial "prevented the trial court from providing him with counsel or from even determining his intention to have counsel." *Slayton*, 755 N.E.2d at 235. Hence, the State maintained Slayton waived his right because he never clearly exercised it one way or another. *Id.* The court found the State's argument was flawed. First, the court determined that Slayton wanted "standby" counsel. *Slayton*, 755 N.E.2d at 236. Next, the court acknowledged the failure to advise Slayton of the dangers and disadvantages of self-representation relating to the Faretta two-prong test. *Id.* Finally, the court recognized the presumption against a waiver of the right to counsel. *Id.* The court ruled "the State's argument for 'waiver' would turn this presumption on its head, requiring a defendant to clearly exercise

rights that were never explained to him." *Id.* Based upon the record being void of any implication that Slayton understood the [***17] dangers and disadvantages of self-representation, the court held the facts and circumstances of the case did not warrant a finding of a knowing and intelligent waiver of counsel. *Id.*

[*267] The case at bar is most similar to the facts in Slayton. Both defendants were tried in absentia, unrepresented by counsel, and had appeared in court several times before trial. Neither of the defendants was advised of the dangers and disadvantages of self-representation under Faretta. Furthermore, the record in the instant case does not reveal any inference that Thompson understood the dangers and disadvantages of self-representation. Thompson did not have a prior record which would have familiarized him with the criminal court system. Abiding by the presumption against a waiver of the right to counsel, we conclude Thompson did not waive his right to counsel through his conduct when he never was apprised of his right nor the dangers and disadvantages of self-representation.

B. Forfeiture

Some courts recognize forfeiture as a means to waive the Sixth Amendment right to counsel. A defendant can forfeit his right to counsel irrespective of his knowledge of either the consequences [***18] of his actions or the dangers of self-representation. *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995). "Because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a 'waiver by conduct' could be based on conduct less severe than that sufficient to warrant a forfeiture." *Goldberg*, 67 F.3d at 1101. Situations where a defendant's own conduct forfeits his right to counsel are unusual, typically involving a manipulative or disruptive defendant. *State v. Coleman*, 2002 WI App 100, 644 N.W.2d 283, 288, 253 Wis. 2d 693 (Wis. Ct. App. 2002).

The Eleventh Circuit Court of Appeals in *United States v. McLeod* identified methods in which a defendant could forfeit counsel:

The Sixth Amendment right to counsel, for example, may be forfeited by a defendant's failure to retain counsel within a reasonable time, even if this forfeiture causes the defendant to proceed pro se. See *U.S. v. Fowler*, 605 F.2d 181. Additionally, a defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial. See e.g., *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); [***19] *Foster v. Wainwright*, 686 F.2d 1382, 1388-89 (11th Cir. 1982), cert. denied 459 U.S. 1213, 103 [*268] S. Ct. 1209, 75 L. Ed. 2d 449 (1983). A defendant who causes a witness to be unavailable for trial forfeits his right to confrontation. See *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. Unit B 1982), cert. denied, 459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61 (1982). A defendant who escapes from custody during his trial waives his Sixth Amendment rights to be present and to confront witnesses during the trial. See *Golden v. Newsome*, 755 F.2d 1478, 1481 (11th Cir. 1985).

By analogy, we conclude that under certain circumstances, a defendant who is abusive toward his attorney may forfeit his right to counsel.

53 F.3d 322, 325 (11th Cir. 1995) (footnotes omitted). *McLeod* had verbally abused and [**138] threatened to harm counsel in a telephone conversation, at least four times had threatened to sue him, and had attempted to persuade counsel to engage in unethical conduct. 53 F.3d at 325. His behavior was "repeatedly abusive, threatening, and coercive." 53 F.3d at 326. [***20] Consequently, *McLeod* forfeited his right to counsel.

Misconduct by a defendant directed toward counsel is the quiddity of *State v. Boykin*, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996). *Boykin* verbally abused and physically threatened defense counsel. The judge granted the request of counsel to be relieved. *Boykin*, 324 S.C. at 554-55, 478 S.E.2d at 689-90. *Boykin* elucidates:



Although we do not condone Boykin's actions, we do not believe they were so severe as to permanently deprive him of appointed counsel. Both cases which have held a defendant forfeited his right to counsel involved a course of conduct more egregious than the single incident alleged here. Accordingly, we need not decide whether South Carolina should embrace the doctrine of forfeiture because we find that Boykin's conduct in the one event related by Padgett was not sufficient to constitute forfeiture. While the trial judge was certainly justified in granting Padgett's motion to be relieved as counsel, substitute counsel should have been appointed for Boykin. Therefore, the decision of the trial court is reversed and the case remanded for a new trial.

[*269] We decline to place our imprimatur upon [***21] Thompson's conduct or absence. Our declination of approval of Thompson's activities does NOT mandate forfeiture of counsel.

CONCLUSION


Forfeiture of counsel is a drastic consequence, requiring more than absence from trial. We rule Thompson did NOT relinquish his right to counsel through forfeiture.







Based on the record in its entirety, we hold Thompson did NOT waive his right to counsel.

He was erroneously deprived of his fundamental right to assistance of counsel. This denial is per se reversible error. Therefore, the decision of the circuit court is

REVERSED AND REMANDED.

GOOLSBY and HUFF ↗, JJ., concur.

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*276 S.C. 494, *; 280 S.E.2d 200, **;
1981 S.C. LEXIS 445, ****

The STATE, Respondent, v. Alton SMITH, Appellant

No. 21504

Supreme Court of South Carolina

276 S.C. 494; 280 S.E.2d 200; 1981 S.C. LEXIS 445

July 6, 1981

DISPOSITION: [***1] Affirmed and remanded.**CASE SUMMARY**

PROCEDURAL POSTURE: Defendant challenged the judgment of the trial court (South Carolina), which convicted him in his absence for third offense driving under the influence. The trial court denied defendant's motion to modify or vacate his sentence. Defendant claimed that his sentence was unconstitutionally enhanced and also alleged that the trial court erred in ruling that it could not change his sentence because it did not have jurisdiction.

OVERVIEW: Defendant contended that his two prior convictions were uncounseled and could not be used to enhance the sentence for his subsequent conviction for the same offense. On appeal, the court held that because defendant forfeited bond for two previous driving under the influence offenses and voluntarily waived his right to counsel, he could not complain of the denial of counsel when it was caused by his own actions. The court ruled that defendant waived his right to counsel by forfeiting bond, which constituted a prior offense within the terms of S.C. Code § 59-5-2940 (1976) and subjected him to the punishment contained therein. The court also indicated that defendant's motion to vacate the sentence was made within the term of court at which the sentence became the judgment, and therefore the trial court had the jurisdiction to modify. The mere recital of the trial court's discretionary decision, the court determined, was not sufficient to bring into operation the determination that discretion had been exercised. The court concluded that the authority to change a sentence rested solely with the sentencing judge within the exercise of his discretion.

OUTCOME: The court affirmed defendant's conviction for third offense driving under the





influence. The court remanded for reconsideration defendant's motion to alter, amend, or change his sentence.


CORE TERMS: sentence, modify, amend, sentencing, used to enhance, subsequent conviction, voluntarily waived, right to counsel, discretionary, uncounseled, misdemeanor, marked


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
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HN1  An uncounseled conviction for a misdemeanor may not be used to enhance the sentence for a subsequent conviction for the same offense. [More Like This Headnote](#)


Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview 


Criminal Law & Procedure > Counsel > Right to Counsel > General Overview 


Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial 


HN2  A defendant in a misdemeanor prosecution may not defeat justice by absenting himself from the place of trial. [More Like This Headnote](#)


Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Court's Authority 


Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Due Process 


HN3  A trial court judge is without authority to alter, amend or modify a sentence imposed by him (1) after the expiration of the term of court at which the sentence was imposed or (2) within the same term of court unless the State is afforded due notice. When court is ordered by the chief justice, each week constitutes a separate term. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


Criminal Law & Procedure > Appeals > Reviewability > General Overview 

HN4  A sealed sentence does not become the judgment of the court until it is opened and read to the defendant. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > General Overview 

HN5  The authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Criminal Law & Procedure > Trials > Judicial Discretion 

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview 

HN6 

It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly. The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis the discretion was exercised. More Like This Headnote | *Shepardize: Restrict By Headnote*

COUNSEL: *Asst. Public Defender Martha B. Dicus, and Deputy Appellate Defender Vance J. Bettis* ✓, of S.C. Commission of Appellate Defense, Columbia, for appellant.

Atty. Gen. Daniel R. McLéod, Asst. Attys. Gen., Kay G. Crowe ✓, *Russell D. Ghent* ✓ and *Harold M. Coombs, Jr.* ✓, and *Sol., James C. Anders* ✓, Columbia, for respondent.

JUDGES: Ness, Justice. Lewis, C.J., and Littlejohn, Gregory and Harwell. JJ., concur.

OPINION BY: NESS

OPINION

[*496] [**201] Appellant, Alton Smith, was tried and convicted in his absence for third offense driving under the influence. He appeals from the trial court's refusal to modify or vacate his sentence. We affirm and remand.

Appellant's sentence was published on April 29, 1980 at which time his motions were marked heard and scheduled for a hearing on June 3, 1980.

The trial judge denied the motions holding he did not have jurisdiction to change the sentence.

Appellant first asserts his sentence was illegal because it was unconstitutionally enhanced. We disagree.

He argues his two prior convictions were uncounseled and may not be used to enhance the sentence for a subsequent conviction of the same offense, [***2] relying on *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. (2d) 169 (1980). This case holds ^{HN1} an uncounseled conviction for a misdemeanor may not be used to enhance the sentence for a subsequent conviction for the same offense.

We hold the provisions of S.C. Code § 56-5-2940 (1976) which provides for enhancement of sentences is not offensive to the tenets of *Baldasar* under the facts of this case.

Here, Smith forfeited bond for two previous DUI offenses and voluntarily waived his right to counsel. Therefore, he cannot now complain of the denial of counsel when it was caused by his own actions. See *State v. Jacobs*, 271 S.C. 126, 245 S.E. (2d) 606 (1978). Moreover, ^{HN2} a defendant in a misdemeanor prosecution may not defeat justice by absenting himself from the place of trial. *State v. Langston*, S.C. , 272 S.E. (2d) 436 (1980).

[*497] Appellant conceded at oral argument that bond forfeiture is a conviction and the evidence reveals that appellant knowingly and voluntarily waived his right to be present at this and previous trials. Compare *State v. Green*, 269 S.C. 657, 239 S.E. (2d) 485 (1977).

We conclude Smith waived his right [***3] to counsel by forfeiting bond, this constitutes a prior offense within the terms of S.C. Code § 59-5-2940 (1976) and subjected him to the punishment contained therein.

Smith next asserts the trial judge erred in ruling he could not change the sentence because he

did not have jurisdiction. We agree.

The trial judge held:

"I recognize that the sentence is severe. It has been dealt with severely. The solicitor does not want the sentence changed. The attorney general does not want the sentence changed and under those circumstances, I cannot change the sentence so the motion for a resentence is denied."

The authority of a trial judge to alter, amend or modify a sentence after the same has been imposed is discussed in four decisions of this Court. *State v. Best*, 257 S.C. 361, 186 S.E. (2d) 272 (1972); *State ex rel. McLeod v. County Court of Richland County*, 261 S.C. 478, 200 S.E. (2d) 843 (1973); *State v. Moulds*, 264 S.C. 404, 215 S.E. (2d) 445 (1975); and *State v. Patterson*, 272 S.C. 2, 249 S.E. (2d) 770 (1978). These cases hold ^{HN3} a judge is without authority to alter, amend or modify a sentence *imposed by him* (1) after the expiration of the term of court **[***4]** at which the sentence was imposed or (2) within the same term of court unless the State is afforded due notice. We have held generally when court is ordered by the Chief Justice, each week constitutes a separate term. *State v. Attardo*, 272 S.C. 1, 249 S.E. (2d) 771 (1978).

^{HN4} A sealed sentence does not become the judgment of the court until it is opened and read to the defendant. *Lytle v. Miller*, 157 S.C. 332, 154 S.E. 225 (1930).


[*498] Here the sentence was published **[* to the appellant on April 29, 1980 and although the motions were not heard until much later, they were marked heard by the trial judge on that date. The motion was made within the term of court at which the **[**202]** sentence became the judgment of the court, to the sentencing judge, and he had jurisdiction to alter, amend or modify. *State v. Best, supra*, 257 S.C. at 369, 186 S.E. (2d) 272; 24 C.J.S. Criminal Law 1587b; *State v. Cagle*, 241 N.C. 134, 84 S.E. (2d) 649, 653 (1954).**

We hold ^{HN5} the authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion. *State v. Cagle, supra*.

It is apparent here the sentencing **[***5]** judge did not exercise any discretion but based his ruling on an erroneous view of the law. ^{HN6} It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly. We call to the attention of the bench and bar that the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis the discretion was exercised. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E. (2d) 484 (1972); *State Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. (2d) 22 (1967).

We affirm in part and remand for reconsideration of the motion to alter, amend or change the sentence.

Affirmed and remanded.





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