STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenwood County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

PETITIONER,

V.

STANLEY WRAPP,

RESPONDENT

APPELLATE CASE NO 2018-000108

RETURN TO PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

INDEX

PETITIONER'S QUESTION PRESENTED

Did the Court of Appeals err in ignoring precedent and reversing Respondent's conviction on grounds that: "the circuit court erred in trying Wrapp *in absentia* without making specific findings that Wrapp: (1) received notice of his right to [be] present, and (2) was warned he would be tried *in absentia* if he failed to attend" because: (A) this issue was not preserved for appellate review where Respondent raised no objection to the trial court failing to make findings on the record before proceeding in his absence, and (B) Respondent was in fact given notice of his right to be present for trial and that the trial would proceed without him if he failed to attend. Did the Court of Appeals further err in concluding "we need not undertake a harmless error analysis" where such an analysis was required and where there was overwhelming evidence of Respondent's guilt and a resulting lack of prejudice?

STATEMENT OF THE CASE

Respondent was indicted for driving under suspension and trafficking cocaine base on February 21, 2014 by a Greenwood County grand jury. App. 175 – 178. On July 14, 2014, Wrapp appeared with counsel before the Honorable William P. Keesley in order to request a continuance in order to investigate a witness. App. 7 l. 13 – App. 8 l. 18. Elizabeth P. White appeared on behalf of the State, and Respondent was represented by Shane Goranson. At the conclusion of the hearing, Judge Keesley granted the motion. App. 12 l. 21.

On September 29, 2014, the State called Respondent's case for trial. Elizabeth White and Micah Black prosecuted the matter, and Respondent was represented by Shane Goranson and Patricia Bolen. Counsel for both parties appeared before the Honorable Thomas A. Russo and a jury. Prior to opening statements, counsel for Respondent moved for a continuance due to Wrapp's absence. App. 39 l. 16 – App. 40 l. 14. The State opposed the motion, and Judge Russo denied the motion. App. 42 l. 17 – App. 43 l. 12.

After presenting the testimony of six witnesses, the State rested. App. 120 l. 20. Counsel for Wrapp moved for a directed verdict and renewed all prior objections. App. 121 l. 8 – App. 123 l. 1; App. 124 ll. 10 – 15. The trial judge denied all of them. App. 124 ll. 16 – 20.

The jury found Wrapp guilty of driving under suspension and possession with intent to distribute crack cocaine. App. 163 ll. 5 – 12. Judge Russo sentenced Wrapp to sixty days for the driving under suspension charge and twenty years' incarceration for the intent to distribute second offense. App. 171 ll. 7 – 12. The Honorable Eugene C. Griffith, Jr. read the sentences on March 30, 2015. Id.

Respondent filed a timely Notice of Appeal and both parties presented briefs. App. 182 – 217. An oral argument was held at the Court of Appeals on May 4, 2017, and an opinion was published on August 16, 2017. App. 218 – 222.

The State filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on August 31, 2017. The Petition was denied by way of an order filed on January 18, 2018. App. 244 – 245. On January 24, 2018, the State filed its Petition for Writ of Certiorari.

ARGUMENT

The Court of Appeals did not err in reversing Respondent's convictions where the trial court failed to make the required findings of fact following an objection and motion for continuance by counsel and where the trial court did not review any paperwork related to Respondent's bond or bail prior to ruling that the trial should proceed in Respondent's absence.

Prior to opening statements, the trial judge excused the jury and heard arguments from defense counsel regarding a continuance. App. 39 l. 16 – 45 l. 9. Counsel opened with the following:

> Obviously Mr. Wrapp is not present. I don't have any personal knowledge of why he isn't here. I don't know if his presence is - - or his absence is voluntary or voluntary. What I would like is a continuance to try and locate my client.

Id.

The assistant solicitor indicated that she previously had a conversation with Respondent wherein she allegedly notified him that "his case would be called for trial the next time we could get to it." Id. Responding to the motion for a continuance, she argued that "there's been adequate notice certainly even directly to Mr. Wrapp that his case was coming up for trial." Id. The assistant solicitor claimed that she informed a private attorney, Andrew Hodges, of Respondent's impending trial date. App. 41 ll. 1 – 6. Notably, neither she nor defense counsel nor the trial judge mentioned the bond paperwork at this time.

The trial judge denied the motion:

> Well, and the difficult thing is you led off with this observation that is we don't know whether his absence here today is a voluntary or not voluntary absence. I don't know what his situation is or why he's not here. But it does appear that he was noticed to be here. For whatever reason he's not here. I don't really have a

> valid reason. I don't see any purpose that would be served in continuing the case... So I'm going to respectfully deny this motion for a continuance.

Id.

Before court concluded for the day, defense counsel again objected: "I don't feel like Mr. Wrapp has been adequately noticed and we object to going to trial." Id.

On appeal, the Court of Appeals reversed and remanded Respondent's convictions. In particular, the Court held that the trial court erred "in trying Wrapp *in absentia* without making specific findings that Wrapp (1) received notice of his right to be present, and necessarily, of the term of court for which he needed to be present, and (2) was not warned he would be tried *in absentia* if he failed to attend." App. 221.

The Court of Appeals relied on State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010), which Petitioner seeks to distinguish from the matter *sub judice*. In Ravenell, the defendant was present when his case was called to trial. 387 S.C. at 452, 692 S.E.2d 554, 556. Trial was delayed until the following day as to allow "the defense more time to locate [a] witness." Id. at 453, 692 S.E.2d at 556. The day of trial, Ravenell failed to appear. Id. "The trial judge observed Ravenell was present the day before for jury selection." Id. The trial proceeded in Ravenell's absence, and he was convicted of armed robbery and burglary in the first degree. 387 S.C. at 454, 692 S.E.2d at 557.

In Ravenell, the Court of Appeals cited mandatory language regarding a trial judge's responsibilities: "A trial judge **must determine** a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence." Id. at 455-6, 692 S.E.2d 557-8 (emphasis added); State v. Patterson, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006) (citing State v. Jackson, 288 S.C. 94, 95, 341 S.E.2d 375, 376 (1986)). "The judge **must**

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.

As set forth in Rule 16, South Carolina Rules of Criminal Procedure:

> 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.

SCRCrimP 16.

"A defendant's knowing and voluntary waiver of a . . . constitutional right must be established by a complete record; and may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). "The judge must 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." State v. Castineira, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct. App. 2000).

In Respondent's matter, the trial judge never made the above two factual findings which were required before trial could proceed in Wrapp's absence. Judge Russo was required to find that Appellant received notice of the date of his trial. The only information provided to Judge Russo on the matter was Solicitor White's claim—during her argument and not given in testimony under oath—that she told Appellant's prior attorney the case was on the trial docket and that she "[thought] there's been adequate notice certainly even directly" to Appellant. Her argument is a far cry from a complete record showing Appellant had notice of the trial date. Indeed, the record strongly supports the opposite due to a communication breakdown with his attorney.

Secondly, Judge Russo made no finding as to the requirement that Appellant be warned that he would be tried in his absence. In the pre-trial colloquy, neither Judge Russo nor the attorneys even mentioned such a warning. Accordingly, the record cannot support a finding that Appellant knew he would be tried in his absence as required to conclude he knowingly waived his constitutional right to be present. Finally, no discussion or findings existed as to whether Appellant's absence from the courtroom was voluntary. As the Court of Appeals correctly concluded, Judge Russo therefore committed reversible error in failing to make the findings required to deny Appellant's motion to continue the trial.

Issue Preservation and Harmless Error

"'There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.'" State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004)(quoting Jean Hoefer Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002)).

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(argued one ground in support of circumstantial evidence charge at trial and another ground in support of the charge on appeal).

An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved. Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995).

In order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court's finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend, a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal. State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) citing State v. Williams, 292 S.C. 231, 355 S.E.2d 861, 862 (1987).

As the Court of Appeals in Respondent's case correctly decided, this issue was preserved because counsel moved for a continuance and objected to trial proceeding due to the lack of adequate notice to Wrapp. App. 39 – 45. In Ravenell, supra, the Court of Appeals held that Ravenell's counsel preserved the trial *in absentia* issue following a motion for continuance, meaning the Court of Appeals found it proper to address the matter on the merits. 387 S.C. 456-7, 692 S.E.2d 558.

Here, counsel for Wrapp objected on the record and renewed his objection after the State rested. He timely moved for a continuance. It is inartful to suggest that counsel's motion for continuance, made at the outset of trial, should have articulated the failure to make specific findings where counsel first moved for a continuance by protesting the trial proceeding in Wrapp's absence, prior to any findings of fact. It was mandatory that the trial judge make the required findings before trial proceeded in Respondent's absence.

Counsel requested a continuance in order to try and locate Respondent. Up until that point, Respondent had participated in his defense; he even appeared at a prior hearing. Counsel believed that Respondent could be located. Counsel twice suggested that "this case could be worked out" if he was allowed time to find his client. App. 39 – 45.

However, as a result of the trial court's decision to allow the trial to proceed in Respondent's absence, he was tried and sentenced to twenty years' incarceration. Had the continuance been granted, counsel could have worked out a deal with the solicitor's office. The error committed at the trial court could not be found to be harmless; the resulting prejudice is illustrated by the lengthy sentence. Had a continuance been granted, Respondent could have appeared and been present for potential plea negotiations or assisted in his defense. It is axiomatic that the attendance of Wrapp at his own trial would have assisted his attorney with his defense. After all, Wrapp was presumably present at the incidents giving rise to his arrest. Conversations between Wrapp and counsel could have yielded multiple legal strategies which would have resulted in a different conclusion.

Under the Sixth Amendment, it is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who has the right to confront witnesses, and who must be accorded "compulsory process for obtaining witnesses in his favor." The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defense," implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial. McKaskle v. Wiggins, 465 U.S. 104 S.Ct. 944 (1984).

Furthermore, because the record does not include evidence to support a finding that Wrapp was afforded notice of his trial, the resulting conviction cannot stand. City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006) citing State v. Jackson, 288

Counsel requested a continuance in order to try and locate Respondent. Up until that point, Respondent had participated in his defense, even appearing at a prior hearing. Counsel believed that Respondent could be located. Counsel twice suggested that "this case could be worked out" if he was allowed time to find his client. App. 39 – 45.

However, as a result of the trial court's decision to allow the trial to proceed in Respondent's absence, he was tried and sentenced to twenty years' incarceration. Had the continuance been granted, counsel could have worked out a deal with the solicitor's office. The error committed at the trial court could not be found to be harmless; the resulting prejudice is illustrated by the lengthy sentence. Had a continuance been granted, Respondent could have appeared and been present for potential plea negotiations or assisted in his defense. It is axiomatic that the attendance of Wrapp at his own trial would have assisted his attorney with his defense. After all, Wrapp was presumably present at the incidents giving rise to his arrest. Conversations between Wrapp and counsel could have yielded multiple legal strategies which would have resulted in a different conclusion.

Under the Sixth Amendment, it is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who has the right to confront witnesses, and who must be accorded "compulsory process for obtaining witnesses in his favor." The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defense," implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial. McKaskle v. Wiggins, 465 U.S. 104 S.Ct. 944 (1984).

Furthermore, because the record does not include evidence to support a finding that Wrapp was afforded notice of his trial, the resulting conviction cannot stand. City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006) citing State v. Jackson, 288

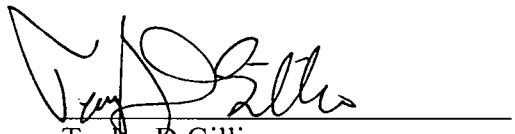
S.C. 94, 341 S.E.2d 375 (1986), State v. Castineira, 341 S.C. 619, 525 S.E.2d 449 (Ct. App. 2000).

The proper course of action in this case would have been for the trial judge, before Respondent's trial *in absentia* began, to make findings of fact regarding 1) whether Wrapp had received notice of his right to be present, and 2) whether Wrapp had been warned that the trial would proceed in his absence upon a failure to attend court. From a review of the record, it is evident that was not done. This was error. State v. Jackson, 288 S.C. 94, 341 S.E.2d 375, 375 (1986); see also State v. Fleming, 287 S.C. 268, 335 S.E.2d 814 (Ct.App.1985).

This matter was raised pre-trial and argued by the parties. Counsel's motion and accompanying objections were raised with sufficiently particularity. The Court of Appeals did not err in concluding that this issue was preserved.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied. However, if this Court grants certiorari, Respondent requests the opportunity to brief fully the issues discussed above.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 15 2018

S.C. SUPREME COURT

Appeal from Greenwood County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STANLEY WRAPP,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Stanley Wrapp, #317309, at Anderson County Jail, 1009 County Home Road, Anderson, SC 29625, this 15th day of March, 2018.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 15th day of March, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.