

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Lawton McIntosh, Circuit Court Judge

ORIGINAL

THE STATE,

RESPONDENT,

V.

JUSTIN ANDREW SERVA,

APPELLANT

APPELLATE CASE NO 2018-000856

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in trying appellant's case in absentia without making **both** required findings that appellant received notice of his right to be present at trial **and** was warned that he would be tried in his absence if he failed to attend trial.

STATEMENT OF THE CASE

Appellant Justin A. Serva was tried in his absence and convicted per jury trial of possession of methamphetamine during the March 2018 term of the Anderson County General Sessions Court before Judge R. Lawton McIntosh. Appellant's sentence of three years imprisonment was published by Judge McIntosh during the sentencing hearing held at the April 2018 term of the Anderson County General Sessions Court. Appellant was present at his sentencing hearing. Donald Loren Smith, Esquire, represented appellant at both proceedings and Assistant Danny Nelson Fulmer, Jr., represented the state at both proceedings as well.

Appellant appealed his conviction and sentence. This brief follows.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Ravenell, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010). “An appellate court is bound by the trial court’s factual findings unless they are clearly erroneous.” *Id.*

ARGUMENT

The trial judge erred in trying appellant's case in absentia without making both required findings that appellant received notice of his right to be present at trial and was warned that he would be tried in his absence if he failed to attend trial.

At trial, Police Officer James T. Foster testified that he executed a search warrant based on an informant's information regarding a certain residence where appellant was believed to have been present at that time and found a bag of "suspected methamphetamine" in a bedroom. R. 139, l. 14-p. 151, l. 15. Pretrial hearings were held in the case on March 19, 2018, and the actual trial was held on March 20, 2018. Appellant was present in court on March 19, 2018, but was not present in court on March 20, 2018. The colloquy prior to trial on March 20, 2018, follows:

THE COURT: Mr. Smith, have you seen your client this morning?

DEFENSE COUNSEL: I have not, sir.

THE COURT: Why don't you take a quick minute and see if you can't find him real quick.

DEFENSE COUNSEL: Yes, sir.

(WHEREUPON, a recess was taken from 9:33 a.m. to 9:39 a.m.)

THE COURT: Mr. Smith, were you able to find your client?

DEFENSE COUNSEL: I was not.

THE COURT: Did you try to contact him?

DEFENSE COUNSEL: I have.

THE COURT: All right, sir. For the record, before we broke yesterday, as a matter of precaution, I gave [appellant] the admonition that the trial would proceed in his absence if he did not appear today, so that's my intent. Anything from the State?

SOLICITOR: No, Your Honor.

THE COURT: You ready to proceed?

DEFENSE COUNSEL: Yes, sir. R. 126, l. 4- 25.

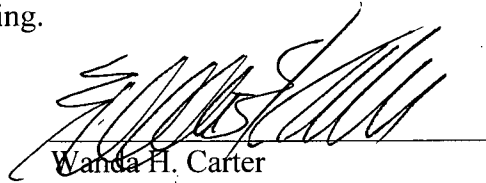
The Sixth Amendment guarantees the right of an accused to be present at every stage of his trial. Ellis v. State, 267 S.C. 257, 277 S.E.2d 304 (1976); Illinois v. Allen 397 U.S. 337 (1970). Rule 16 of the SCR Crim.P. addresses the matter and requirements below:

[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.

In other words, before a defendant may be tried in absentia, the trial court must determine if the defendant voluntarily waived his right to be present at trial via **both** findings that the defendant received notice of his right to be present at trial and warned that the trial would proceed in his absence if he did not appear for trial. State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (2008); State v. Jackson, 288 S.C. 94, 341 S.E.2d 375 (1986); State v. Fleming, 287 S.C. 268, 335 S.E.2d 814 (Ct. App. 1985). In the case at bar, the trial judge only made one finding on the record regarding one factor, which was the notice that he would be tried in his absence for failure to appear, but did not make a finding on the record that appellant received notice of his right to be present at trial. Note the reversal in State v. Wrapp, 421 S.C. 531, 808 S.E.2d 621 (2018), where the Court held that the failure of the trial judge to find whether notice of the trial was given to the defendant meant that the trial in his absence was error, and that such error was not harmless error. Here, appellant did not waive his right to be present at trial and was tried in his absence in error and in violation of the Sixth Amendment and Rule 16, SCR Crim. P. in the case.

CONCLUSION

Based on the forgoing argument, appellant requests that his case be reversed and remanded to the lower court for a new proceeding.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of December, 2018.

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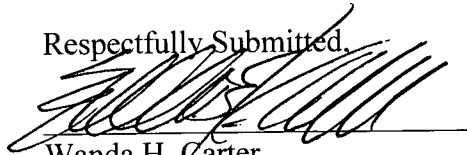
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Justin Andrew Serva states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge R. Lawton McIntosh, which was held on March 19-20, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Justin Andrew Serva.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 17th day of December, 2018.

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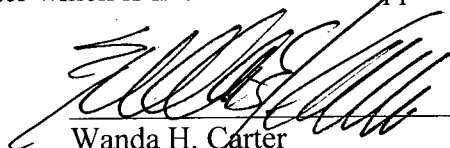
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Trial transcript dated March 19, 2018
- (3) Trial transcript dated March 20, 2018
- (4) Motion Hearing transcript dated April 19, 2018

I certify that this designation contains no matter which is irrelevant to this appeal.

December 17, 2018


Wanda H. Carter
Deputy Chief Appellate Defender

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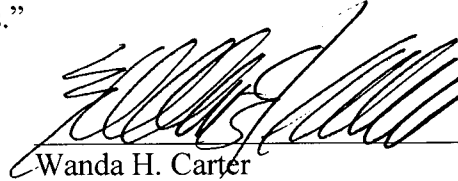
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 17, 2018.



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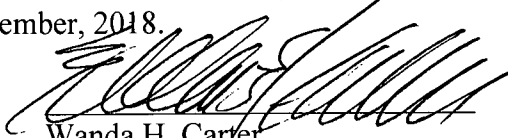
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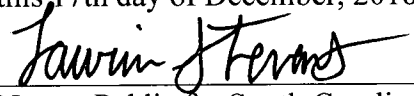
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter 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 a copy of the Anders Brief of Appellant and Designation of Matter have been served on Justin Andrew Serva, 376089, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 17th day of December, 2018.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.