

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERVAIS EDMONDS, #2,

APPELLANT

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to grant a continuance and finding that appellant voluntarily waived his right to be present and could be tried in his absence by the State when the record fails to establish that Edmonds received notice of the term of court in which he was to be tried?.

STATEMENT OF THE CASE

On January 22, 2009, the York County Grand Jury indicted Edmonds for failure to stop for a blue light, indictment #2009-GS-46-396. On November 3, 2009, the State called the case for trial before the Honorable John C. Hayes III. Edmonds did not appear for trial. Attorney Jonathan Sullivan represented Edmonds at trial. Attorney Sullivan moved for a continuance and the Judge denied the continuance motion. The jury returned a verdict of guilty and Judge Hayes sealed the sentence.

On December 7, 2009, Edmonds appeared before the Honorable Lee S. Alford for imposition of the sealed sentence for the failure to stop for a blue light conviction and the entry of a guilty plea on a separate charge of possession with intent to distribute crack. Attorney Jonathan Sullivan again represented Edmonds. Judge Alford unsealed and imposed the five year sentence given by Judge Hayes. Judge Alford imposed a seven year concurrent sentence for the drug charge. A timely notice of intent to appeal the failure to stop for a blue light charge was served and filed on December 17, 2009. This appeal follows.

ARGUMENT

The trial judge erred in refusing to grant a continuance and finding that appellant voluntarily waived his right to be present and could be tried in his absence by the State when the record fails to establish that Edmonds received notice of the term of court in which he was to be tried.

The jury found Edmonds guilty of failure to stop for a blue light. Edmonds was not present when the State called the case for trial. Counsel for Edmonds moved for a continuance based on the fact that when Edmonds rejected a plea offer to resolve both the failure to stop for a blue light charge and a separate drug charge he was unaware that his cousin/co-defendant was going to testify against him. (R. p. 4, lines 25 – p. 5, p. 6, p. 7, lines 1-14). The judge denied the motion for a continuance. (R. p. 7, line 15). Edmonds' bond paperwork was introduced in evidence and the judge found that Edmonds received notice that if he did not attend court he would be tried in his absence. (R. p. 7, lines 22 – p. 8, lines 1-11). The bailiff then called Edmonds' name three times in the hallway. (R. p. 8, lines 14- p. 9, lines 1-13). The trial judge then ruled, "I find that Mr. Edmonds has received his notice of his right to be present, he has been properly warned that the trial will proceed in his absence if he failed to attend. And I find that by his contact he voluntarily waived his right to be present and he can be tried in his absence by the State." (R. p. 9, lines 24 – p. 10, lines 1-4). The judge failed to make a specific finding of fact that Edmonds received notice that his trial would proceed during the November 3, 2009, term of court. The judge erred in refusing to grant the continuance motion.

In State v. Ravenell, 387 S.C. 449, 455-456, 692 S.E.2d 554, 557-558 (Ct.App. 2010), the South Carolina Court of Appeals wrote:

It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct.App. 2007); State v. Goode, 299 S.C. 479, 481, 385 S.E.2d 844, 845 (1989). *See also* Rule 16, SCRCrimP (“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.”). 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. 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, 375 (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.

“Notice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present.” City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct.App.2006). However, if the record does not reveal that the defendant was afforded notice of his trial, the resulting conviction in absentia cannot stand. State v. Jackson, 290 S.C. 435, 436, 351 S.E.2d 167, 167 (1986).

The State called Edmonds’ case for trial on November 3, 2009. Trial counsel told the judge that his office sent Edmonds a docket letter for the October 19th term of court. (R. p. 5, lines 23 – p. 6, lines 1-5). Counsel stated that he met with Edmonds on October 19th and had no further contact with him. (R. p. 6, lines 5-7). Counsel told the judge that his office sent a second docket letter for the November 2nd term of court. (R. p. 6, lines

7-10). The docket letters were not introduced as evidence. The judge failed to make any inquiry about the address to which the docket letters were sent.

The judge found that “by his contact he voluntarily waived his right to be present and he can be tried in his absence by the State.” (R. p. 10, lines 2-4). Trial counsel stated that when he and co-counsel met with Edmonds on October 19, “We explained to him that he was placed on the back up trial board but we told him that he would be free to go but he needed to be on stand by. He gave us two phone numbers and we told him to be on immediate standby, we would contacting [sic] him by phone in the event this case was going to be called last week.” (R. p. 5, lines 15-20). Counsel told the judge that he was unable to contact Edmonds during that term of court. (R. p. 5, lines 20-22). The State, however, did not call the case for trial during the October 19th term of court.


While the bond form warned Edmonds that if he failed to attend court he would be tried in his absence, the bond form does not provide notice of the term of court for which trial was set. The bond form states that the defendant shall appear at the term of General Sessions beginning on “TBD.” (R. p. 158). The statement of trial counsel that a docket letter for the November 3rd term of court was sent without the letter being introduced in evidence and without verification that the letter was sent to the proper address is not sufficient notification. Edmonds was not provided sufficient notice that his trial was set for the November 3rd term of court to enable him to make an effective waiver of his right to be present. The judge erred in finding that by his contact with his attorneys during the October 19th term Edmonds voluntarily waived his right to be present at the November 2nd term of court when the State called the case for trial. The in absentia conviction for failure to stop

for a blue light cannot stand because the record does not support that Edmonds was provided with proper notice of his trial during the November 3rd term of court.

CONCLUSION

Based on the above argument, the conviction and sentence for failure to stop for a blue light should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERVAIS EDMONDS, #2,

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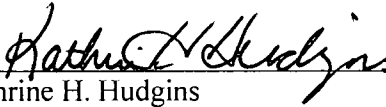
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gervais Edmonds #2 states:

1. She is 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 John C. Hayes, III, which was held on December 7, 2009, 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 Gervais Edmonds #2.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

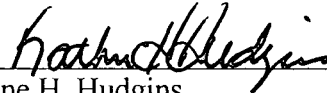
ATTORNEY FOR APPELLANT

This 10th day of September, 2012.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 10th, 2012



Kathrine H. Hudgins
Appellate Defender

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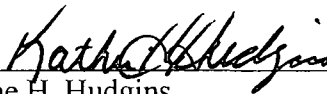
V.

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CERTIFICATE OF SERVICE

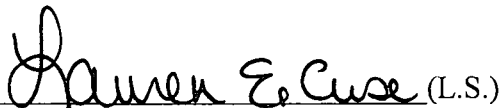
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Record on Appeal have been served on Gervais Edmonds #2, # 294290 at Campbell Pre-Release Center, this 10th day of September, 2012.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of September, 2012.



Notary Public for South Carolina

My Commission Expires: August 23, 2014