IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-212712

John Barnette, Appellant,

v.

State of South Carolina, Respondent.

Final Brief

Bobby G. Frederick, Esquire
Matthew S. Swilley, Esquire
P.O. Box 8219
Myrtle Beach, SC 29578
843-444-6122
Attorneys for Petitioner

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STATEMENT OF ISSUE ON APPEAL

1. Whether the Circuit Court erred in allowing the State to introduce new evidence during the appeal hearing.

STATEMENT OF THE CASE

On December 24, 2008, Appellant was charged with Criminal Domestic Violence, First Offense by Horry County Police Officer J. Crews. (R. p. 61, lines 12-15.) Defendant was released from custody on December 26, 2008. (R. p. 61, line 15.) Coastal Bail Bonds signed his bond as surety. (R. p. 61, line 15.) His address of record with the Magistrate's Court was 4295 Lilac Road, Myrtle Beach, SC. (R. p. 68, lines 19-20.)

On January 13, 2009 Appellant, through his retained attorney Greg McCollum, Esq., requested a jury trial. (R. p. 57, lines 16-19.) Subsequent to the jury trial request, Appellant entered the Pre-Trial Intervention Program. (R. p. 58, lines 1-2.) Appellant did not complete the program and his case was sent back to the Horry County Central Jury Court for trial. (R. p. 58, lines 1-2.) On October 10, 2011, Mr. McCollum was relieved as counsel for Appellant. (R. p. 57, lines 20-21.) Appellant's address had changed to 2217 Matthews Township Parkway, Matthews, NC., and Appellant did not receive notice of a trial date. (R. p. 60, lines 17-19.) Appellant was tried *in absentia* on November 15, 2011 and convicted. (R. p. 57, lines 13-16.)

A timely motion was made by Appellant to reopen and on December 8, 2011 a hearing was conducted before the Magistrate. (R. p. 57.) Appellant argued that he had not received notice of his actual trial date and that he did not knowingly and voluntarily waive his right to be present. (R. p. 58, lines 22-25.) Nothing was introduced into the record by the State at this hearing to prove that Appellant was notified of the November 15, 2011 trial date. The Magistrate denied Appellant's motion to reopen. (R. p. 62.)

Appellant appealed to the Circuit Court. A hearing took place in the Court of Common Pleas on July 24, 2012. At that hearing, the State sought to introduce copies of written notices alleged to have been sent to Appellant at his address in Matthews, North Carolina as well as his former address in Myrtle Beach, South Carolina. (R. p. 72, lines 1-5). These letters were not introduced at the trial or at the hearing on the motion to reopen, and were not provided in the magistrate's return or the State's response to the appeal to the Circuit Court. (R. p. 72, lines 19-25.) The Circuit Judge allowed these letters to be admitted into evidence over objection by Appellant's counsel and on July 24, 2012, Judge Benjamin H. Culbertson affirmed the conviction and the denial of Appellant's motion to reopen. (R. p. 75.) A notice of appeal was timely filed with the Court of Appeals on August 8, 2012

STANDARD OF REVIEW

In a criminal case, the appellate court reviews errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The court is bound by the findings of the trial court unless they are unsupported by the evidence, clearly wrong, or controlled by an error of law. State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997). The reviewing "[c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

ARGUMENT

1. **The Circuit Court erred in allowing the State to introduce new evidence during the Circuit Court's appeal hearing.**

Every person convicted before a magistrate of any offense whatever and sentenced may appeal from the sentence to the Court of Common Pleas for the county. S.C. Code Ann. §18-3-10 (1976). Ordinarily, no point will be considered which does not appear in the record on appeal. Rule 210(h), SCACR . Johnson v. South Carolina Dept. of Probation, Parole, and Pardon Services, 641 S.E.2d 895, 897, 372 S.C. 279, 283 (S.C. 2007). An appeal from magistrate's court must be heard "upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses ...." S.C.Code Ann. § 18-3-70 (Supp.2001). State v. Brown, 570 S.E.2d 559, 565, 351 S.C. 522, 534 (S.C.App. 2002) (Connors, J., dissenting).

The appeal is not *de novo.* Id. The appellate court is limited in its review to the "papers" filed with the clerk of court by the magistrate, exclusively "the record, a statement of all the proceedings in the case and the testimony taken at the trial ...." S.C. Code Ann. § 18-3-40 (Supp.2001). Id.

Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Masters v. Rodgers Development Group, 321 S.E.2d 194, 197, 283 S.C. 251, 256 (S.C.App. 1984). We are confined to the record in deciding issues on appeal. Timms v. Timms, 333 S.E.2d 74, 286 S.C. 291 (S.C.App. 1985). Where a point has not been decided by the lower court, we will not consider the point on appeal. Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311 (1980).

The Circuit Court allowed the State to enter into evidence copies of letters that the State claims were sent to both addresses of Appellant for the November 15, 2011 trial date for the first time at the Circuit Court hearing on July 24, 2012. (R. p. 75, lines 1-10.)

The "papers" filed with the Clerk of Court pertaining to the appeal pursuant to S.C. Code Ann. § 18-3-70 (Supp.2001) did not contain any such notice. These letters were not entered in evidence or made reference to at Appellant's trial or motion to re-open.

These letters were first offered midway through the July 24 appeal hearing date in the Circuit Court. (R. p. 72, lines 1-5.) The Circuit Court erred in allowing these letters into evidence and considering evidence that was outside of the record on appeal. (R. p. 72, lines 1-10.) No evidence was introduced in the Court below of notice to Appellant of a trial date, and, absent the new evidence that was introduced halfway through Appellant's appeal hearing, there is no evidence to support the Circuit Court's ruling.

2. **The Magistrate's court erred in denying Appellant's motion for a new trial because the State offered no evidence that Appellant had notice of the trial date.**

The Sixth Amendment to the United States Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusations ... [and] to be confronted with the witnesses against him." U.S. Const.Amend. VI. These guarantees are applicable to the States under the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1967). They are also specifically mandated by our State Constitution. S.C. Const. Art. I, § 14. The right to be present can be waived if done knowingly and voluntarily. State v. Goode, 299 S.C. 479, 481, 385 S.E2d 844, 845 (1989).

A person "may voluntarily waive their right to be present and may be tried in their absence upon a finding by the court that such person has received notice of his or her right to be present ..." S.C. Criminal Practice Rule 3. "[A] valid waiver [of an accused's right to be present at his trial] presupposes notice to the accused. Without notice of the charges, the accused cannot be deemed to have made a 'knowing' and 'voluntary' election to be absent." State v. Green, 269 S.C. 657, 662, 239 S.E.2d 485, 487 (1977) (Rule 16 of the S.C. Rules of Criminal Procedure contains the same language as Rule 3 of the S.C. Rules of Criminal Practice).

For a trial to proceed in the defendant's absence, there must be a finding by the court that the defendant 1) received notice of their right to be present, and 2) that a warning was given that the trial would proceed in his or her absence upon failure to attend court. State v. Jackson, 288 S.C. 94, 341 S.E.2d 375 (1986); State v. Ritch, 292 S.C. 75, 354 S.E.2d 909 (1987); City of Aiken v. Koontz, 368 S.C. 542, 629 S.E.2d 686 (2006).

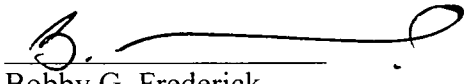
The record from the Magistrate Court contains no evidence presented from the State that Appellant received notice from either the State or the Court that his trial would transpire on November 15, 2011. The Magistrate made no finding on the record that Appellant had received notice that his trial would proceed on November 15 as mandated by S.C.R. Crim. 16. Appellant had retained an attorney and relied on that attorney for court notices, up until the attorney was relieved as counsel a month prior to the date of the trial in absence. (R. p. 57, lines 20-23.) Appellant had been present in court at all times prior to November 15, as conceded by the state. (R. p. 59, lines 18-19.) Only after his attorney was relieved did Appellant fail to receive notice of judicial proceedings. (R.

p. 58, lines 3-7.) Appellant's past conduct in always appearing for court suggests that he did not intend to waive his right to be present for the trial in this case. The evidence in the record indicates that Appellant did not knowingly and voluntarily waive his right to be present at the trial of his case.

CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to vacate his conviction for criminal domestic violence, based on the failure of the State to prove that the Defendant received notice of the trial date.

Respectfully Submitted,



Bobby G. Frederick
Matthew S. Swilley
Frederick Law Office
P.O. Box 8219
Myrtle Beach, SC 29578
Phone: 843-444-6122
Fax: 843-444-6133

March 11, 2013

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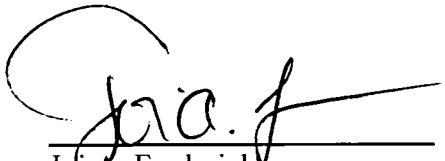
PROOF OF SERVICE

I certify that I have served the Final Brief on the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on March 11, 2013, addressed to:

J. Benjamin Aplin
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

March 11, 2013



Joi A. Frederick
Legal Assistant
Frederick Law Office
P.O. Box 8219
Myrtle Beach, SC 29578
843-444-6122