STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No: 2012-212712

THE STATE, ...RESPONDENT

v.

JOHN W. BARNETTE,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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2. Whether the circuit court properly affirmed Appellant's trial in absentia and the summary court's denial of Appellant's motion for a new trial where Appellant received constructive notice of the trial date and voluntarily waived his right to be present, and where Appellant suffered no prejudice from the alleged failure to provide notice?

STATEMENT OF THE CASE

On December 24, 2008, Appellant was arrested for criminal domestic violence (CDV) by Officer J. Crews of the Horry County Police Department. (Uniform Traffic Ticket No. 21792 ES). At a bail proceeding on the date of his arrest, a magistrate set Appellant's bail at one thousand dollars ($1,000) and ordered that he appear in the Criminal Domestic Abuse Court at the session beginning on January 21, 2009, and that "If no final disposition is made during that session, the [Appellant] shall appear at such other times and places ordered by the court." Appellant signed an acknowledgement stating in part: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence." He listed his mailing address as: "xxx5 L Rd, Myrtle Beach, SC 29588."[1] (Bail Proceeding Form II issued December 24, 2008) (emphasis added). The magistrate completed a checklist noting Appellant had been informed of his right to be present at trial and that trial would proceed in his absence if he failed to attend. (Checklist for Trial Court).

On December 26, 2008, Appellant was released from custody when Coastal Bail Bonds posted a surety bond on his behalf. (Bail Proceeding Form II issued December 24, 2008, including Appearance Recognizance with Surety executed December 26, 2008). On January 13, 2009, Appellant filed a written request for a jury trial and listed his permanent address as: "xxx5 L Rd, Myrtle Beach, SC 29558." Appellant's request

[1] Appellant's home address and the subsequent addresses he provided to the lower court are relevant to the Court's consideration of the notice issues raised in this appeal. In compliance with the Supreme Court's August 13, 2007, Administrative Order regarding personal data identifiers and other sensitive information in appellate court filings, the State has used partially redacted addresses in this Initial Brief. They include only the unique last digit of each street number, and the unique first letter of each street name. The State requests that Appellant adopt this convention when redacting relevant portions of the records in preparing the record on appeal.

included the statement that: "I understand that if my address changes, it is MY responsibility to notify the COURT in writing immediately. The Court address is: Horry County/City, Criminal Domestic Abuse Court, 1201 Third Avenue, Conway, SC 29526." (Jury Trial Request dated January 13, 2009) (emphasis added).

The originally scheduled trial was continued several times, in part because Appellant was given a chance to have the charge handled through pre-trial intervention (PTI), but he did not complete the PTI program requirements. (R.p.57, line 24-p.58, line 2). On November 15, 2011, Appellant's case was called for trial before the Honorable Margie B. Livingston, Horry County Central Civil & Criminal Jury Court Judge. Appellant was not present, so the court called for him three times in and outside of the Olin I. Blanton Building at 21st Avenue, Myrtle Beach, SC. Appellant did not answer at 8:30 AM or within the courtroom at the calling of the case, and was tried in absentia. (Answer to Criminal Appeal p.3). The trial transcript begins with the court recognizing that the jury panel had successfully appointed a forelady. However, the magistrate states: "you've heard the introduction of the matter (R. p.34, lines 13-14), and "I explained to you on Monday that you may not see someone sitting at this table." (R.p.34, lines 21-22).[2]

At trial, Respondent (the State) presented testimony from the arresting officer, Jeremy Crews, and the victim, Carol Turner, and introduced four photographs of the victim's injuries as a single exhibit. A six person jury returned a unanimous guilty verdict. (R.p.34, line 1-p.52, line 19). Appellant was sentenced to pay a fine of two

[2] The jury selection and any other pre-trial matters that may have been addressed at the call of the case are not included in the transcript.

thousand one hundred and five dollars ($2,105) or to serve thirty (30) days in jail, and to complete a program for criminal domestic violence. (R.p.53, lines 6-16).

On November 21, 2011, within ten days after sentence, Appellant filed a "Motion for a New Trial" asking the magistrate for a new trial on grounds that Appellant was not notified of the date of trial and that the trial would proceed in his absence. On December 8, 2011, the motion was heard before Judge Livingston. Appellant was represented by Bobby Frederick, Esquire, and the State was represented by Assistant Solicitor Manuela Ardeljian of the Fifteenth Judicial Circuit Solicitor's Office. (R.p.56). Appellant asked the magistrate to re-open the case, arguing he did not receive notice of the roster or trial date, that he didn't knowingly and voluntarily waive his right to be at trial, and that he did not receive notice that the trial would proceed in his absence if he was not present. (R.p.58, line 7-p.59, line 9). The solicitor responded that Appellant had ample opportunity to notify the clerk of court of his change of address but failed to do so after providing the solicitor with an initial change to an address in North Carolina. In regard to the written notice that was attempted, the Solicitor stated: "they both came back (inaudible). There was no new forwarding address." (R.p.59, line 11-p.60, line 22). She said Appellant "was notified that, if he did not show up, he would be tried in his absence." (R.p.60, lines 3-4). Appellant's counsel said: "his current address is xxx7 M Parkway, Matthews, North Carolina" and asked to see the notice mentioned by the solicitor. (R.p.60, lines 16-22). The solicitor repeated that the last address Appellant had provided was in Matthews, North Carolina, and appears to contend written notice was in

fact sent to that address.[3] Appellant claimed any such notice "never made it to him." (R.p.61, lines 2-7). After hearing from both parties, Judge Livingston denied the motion. (R.p.62, lines 18-23).

Appellant timely appealed his conviction to the Horry County Court of Common Pleas. On December 20, 2011, pursuant to Section 18-3-40 of the South Carolina Code, Judge Livingston filed an "Answer to Criminal Appeal" wherein she made the following findings of fact and conclusions of law:

> (1) The defendant ***was*** notified of the date, time and place of his trial,
> (2) The defendant ***was*** notified that the trial would proceed in his absence, and
> (3) The defendant, by not appearing, waived his right to be present at the trial.

On July 24, 2012, an appellate hearing was convened at the Horry County Courthouse before the Honorable Benjamin H. Culbertson. Appellant was again represented by Bobby Frederick, Esquire, and the State was represented by Scott Hucks of the Fifteenth Judicial Circuit Solicitor's Office. At the hearing Appellant argued he should be given a new trial because, contrary to the factual findings of the Magistrate, he did not receive notice of the November 15, 2011, trial date. (R.p.68, line 24-p.69, line 12). In response the State produced copies of two documents proving the Solicitor's Office did in fact mail written notice of the November 15, 2012, trial to Appellant to two different addresses, the original Myrtle Beach address he provided on the bond form, and to: "xx9 C Rd, Matthews NC 28105."[4] The notices said that Appellant's failure to appear would

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[3] The specific comments made by the solicitor and the documents she may have referenced in relation to those comments are unknown because significant portions of the audio recording are noted as "inaudible" by the registered professional reporter.

[4] This appears to be the Matthews, North Carolina, addressed referenced by the Solicitor at the December 8, 2011, hearing, which is not the same as the address of xxx7 M Parkway, Matthews, North Carolina, which was provided by Appellant for the first time at the December 8, 2011, hearing.

result in a bench warrant being issued, estreatment of the bond, and a trial in his absence. (R.p.71, line 25-p.72, line 14). Appellant objected to the introduction of the documents; however, over Appellant's objection, Judge Culbertson admitted them into evidence as State's Exhibits 1 and 2, and denied the appeal. (R.p.72, line 15-p.75, line 1). Appellant timely filed a notice of intent to appeal the circuit court order affirming his conviction and sentence, and subsequently submitted an Initial Brief. This Initial Brief of Respondent follows.

STATEMENT OF FACTS

On November 15, 2011, Appellant was tried in his absence. Patrol Officer Jeremy Cruz of the Horry County Police Department testified at trial that on December 24, 2008, he responded to a call. He testified he met with a male outside the house to get his side of the story, noting the man had pieces of a female's hair on his shirt. Officer Cruz then went inside the house to speak with a female, who was in bed. He testified the female claimed the male had dragged her out of bed and started striking her in the head and pulling her hair. Officer Cruz testified the woman had chunks of her hair coming out, and that when she pulled back her lip he saw a slight cut inside her upper lip. He testified Appellant [the male] was intoxicated, and that Cruz determined Appellant was the primary aggressor in the situation. (R.p.37, line 19-p.39, line 16).

Carol Turner, the victim, testified she first met Appellant six months before the incident and that they had been living together for about a month. She testified they had gone to a Christmas party, but she left early and got a ride home from her girlfriend because "[Appellant] kept disappearing for long periods of time." Turner testified when she got home, she discovered the back door to the garage open and Appellant's motorcycle lying on its side. She called Appellant to tell him about the motorcycle, and made sure the house was clear before going to bed. (R.p.40, line14-p.42, line 6). Turner testified the next thing she remembers is hearing "running" through the house and Appellant dragging her out of bed and threatening her. She testified Appellant choked her, kicked her, dragged her through the house, and threw her in the bathroom, at which point she called 911. When Turner walked outside to call her girlfriend, Appellant took her cell phone and repeatedly hit her. (R.p.42, lines 7-22). After the police arrived and

arrested Appellant, Turner's girlfriend took photographs of her injuries. Four photos were introduced collectively as State's Exhibit #1. (R.p.42, line 23-p.43, line 24). A six person jury returned a unanimous guilty verdict for CDV. (R.p.52, lines 12-19). Appellant was sentenced to pay a fine of two thousand one hundred and five dollars ($2,105) or to serve thirty (30) days in jail, and to complete a program for criminal domestic violence. (R.p.53, lines 6-16).

ARGUMENT

I.

The circuit court properly considered two "notice" documents physically introduced by the State during a hearing on appeal from Appellant's summary court conviction for criminal domestic violence where: (1) those documents appear to have been considered by the summary court in the proceedings below and were therefore already part of the record for purposes of the appeal, and (2) prohibiting introduction of those documents would violate principles of equity by allowing Appellant to benefit from his own wrongful act.

Appellant argues the circuit court erred in allowing the State to introduce "new evidence" during a hearing on his appeal from his conviction for criminal domestic violence. Specifically, he contends the circuit court should not have admitted copies of two October 19, 2011, post cards from the solicitor's office providing notice of the November 15, 2011, trial, which were addressed to Appellant at two different addresses, and placed in the United States mail. (R.p.74, line 9-p.75, line 15). The State disagrees and submits copies of the notice cards were properly admitted and considered by the circuit court because they appear to have been before the summary court in the proceedings below, and because the act of excluding those documents would improperly allow Appellant to benefit from his own wrongful act.

Insufficient Record for Review

Initially, the State submits this Appeal must be dismissed because Appellant has failed to provide a sufficient record for appellate review. The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 647 (1998). The grounds for Appellant's appeal center on his trial in absentia and his claim that he had no notice of the trial date or that he would be tried in his absence if he failed to appear, and therefore did not knowingly and voluntarily waive his right to be

present at trial. The trial was not attended by a court reporter; however, an audio recording was made by the summary court judge. Appellant procured a copy of the audio recording, submitted it to a registered professional reporter for transcription, and has designated the resulting transcript for inclusion in the record on appeal. Yet, Appellant has provided only a partial transcript of the proceedings before the trial court. As noted above, the submitted transcript begins with the court recognizing that the jury panel appointed a forelady. However, the magistrate states: "you've heard the introduction of the matter" (R.p.34, lines 13-14), and "I explained to you on Monday that you may not see someone sitting at this table." (R.p.34, lines 21-22). In addition, the magistrate's return indicates the summary court addressed Appellant's absence in open court sometime prior to the beginning of the transcript. The jury selection and any pre-trial matters that may have been addressed at the call of the case were not transcribed for inclusion in the record on appeal. Without these preliminary proceedings, the record is not sufficiently complete so that the appellate court is able to review the lower court's actions.

The parties did of course argue the merits of Appellant's motion at the December 8, 2011, hearing before the summary court. However, at that time no transcript of the trial, complete or incomplete, had been requested or prepared. The motion hearing was also not attended by a court reporter; however, an audio recording was made by the summary court judge. Appellant procured a copy of the audio recording, submitted it to a registered professional reporter for transcription, and has designated the resulting transcript for inclusion in the record on appeal. Unfortunately, the hearing transcript is likewise not sufficiently complete so that this Court is able to review the lower court's

actions. In its entirety, the transcript consists of only six (6) pages of text. In those pages the reporter notes twenty-six (26) instances where the proceedings before the magistrate are "(inaudible)," including fifteen (15) instances during the two (2) pages of the transcript where the parties specifically argue whether notice was adequate. (R.p. 59, line 11-p.61, line 9). Although the two notice cards were not physically introduced as exhibits before the summary court, and were therefore not included in the magistrate's answer, there is simply no way to discern whether those cards were in fact discussed by the solicitor in her arguments to the magistrate, or perhaps even shown to the judge, because the transcript is incomplete. The State submits this lack of an adequate record, both from the trial and the motion hearing, supports dismissal of the entire appeal. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999) ("Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court's actions.").

Notice Documents Appear to have been Presented to the Summary Court

The State submits the partial record that has been provided by Appellant nevertheless supports the conclusion that the two notice cards at issue were indeed considered by the summary court in the proceedings below, and therefore were part of the record. The conclusion first finds support from the magistrate's findings of fact that: "The defendant ***was*** notified of the date, time and place of his trial," and "The defendant ***was*** notified that the trial would proceed in his absence." As recognized by Appellant, the only written documentation of such notice in the record before this Court exists in the form of the two notice cards admitted into evidence by the circuit court. Thus, the only logical inference is that the magistrate's finding of fact was based either on her review of the two cards during the non-transcribed proceedings the morning the case was called for

trial, or during the inaudible proceedings on December 8, 2011. At trial, the magistrate even advised the jury that: "this Court has the authority to go forward, and [Appellant] has been so notified of that." (R.p.35, lines 3-5). Alternatively, the solicitor may have simply described the notice cards during the inaudible portions of her argument. Indeed, the parts of the Solicitor's argument that were transcribed support this conclusion.

On January 13, 2009, Appellant filed a written request for a jury trial and listed his permanent address as: "xxx5 L Rd, Myrtle Beach, SC 29558." The summary court subsequently sent copies of a "Summary Court Summons" to that address on December 30, 2008, and again on November 29, 2011. This indicates Appellant never updated his mailing address with the summary court, even **after** his conviction and motion for a new trial. (Summary Court Summons to John Woodrow Barnette dated December 30, 2008, and November 29, 2011). In other words, the summary court officials had no knowledge or information about an address in Matthews, North Carolina, or any address other than the one in Myrtle Beach. At the December 8, 2011, motion hearing, Appellant asked the magistrate to re-open the case, arguing he did not receive notice of the roster or trial date, that he didn't knowingly and voluntarily waive his right to be at trial, and that he did not receive notice that the trial would proceed in his absence if he was not present. (R.p.58, line 7-p.59, line 9). The solicitor responded that Appellant had ample opportunity to notify the Clerk of Court of his change of address but failed to do so since providing an initial change **to an address in North Carolina**. In regard to the notice that was attempted, the solicitor stated: "they both came back (inaudible). There was no new forwarding address." (R.p.59, line 11-p.60, line 22). She said Appellant "**was notified** that, if he did not show up, he would be tried in his absence." (R.p.60, lines 3-4)

(emphasis added). Appellant's counsel said: "his current address is xxx7 M Parkway, Matthews, North Carolina" and asked to see the notice mentioned by the solicitor. (R.p.60, lines 16-22). The solicitor repeated that **the last address Appellant had provided was in Matthews, North Carolina**, and appears to contend written notice was in fact sent to that address.[5] Appellant claimed any such notice "never made it to him." (R.p.61, lines 2-7). The solicitor's initial reference to an address in North Carolina was not pulled from thin air. In fact it was made before Appellant's counsel stated Appellant's "current address" – an address in Matthews, North Carolina, but **not** the same street address that is listed on the notice card in question. The State submits that but for the October 19, 2011, post cards, the solicitor would not have had the city of Matthews, North Carolina, as a reference. Therefore, the notice cards must have been before the summary court on December 8, 2011. Again, this conclusion is supported by the magistrate's findings of fact and her decision to deny the motion for a new trial. (R.p.62, lines 18-23).

Pursuant to Rule 210(c), SCACR, "[t]he Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267." Most importantly, the Rule instructs: "[t]he Record shall not, however, include matter **which was not presented to the lower court or tribunal**." Rule 210(c), SCACR. (emphasis added). It does not require that matter be introduced as evidence during trial before it can be included in the Record on Appeal. Instead, matter must only be "presented to the lower court or tribunal" in order to appropriately be reviewed on appeal. Here, it appears the October 19, 2011, post cards physically

[5] As noted above, the specific comments made by the Solicitor and the documents she may have referenced in relation to those comments are unknown because significant portions of the audio recording are "inaudible."

introduced by the State during the July 24, 2012, appeal, were "presented" to the summary court or tribunal either before the transcript begins on November 15, 2011, or on December 8, 2011. Thus the circuit court properly considered these notice documents on appeal. Appellant has failed to present a sufficient record to prove otherwise.

Appellant Should Not Benefit from His Own Wrongdoing

To the extent this Court concludes Appellant has provided a sufficient record for review, and that the record demonstrates the October 19, 2011, notice cards were not actually presented to the summary court for purposes of Rule 210, SCACR, the State submits the circuit court nevertheless properly considered those documents in denying Appellant's request for a new trial. Excluding or ignoring the notice cards would have violated principles of equity by improperly allowing Appellant to benefit from his own wrongdoing. See, e.g., Delahoussaye v. State, 369 S.C. 522, 633 S.E.2d 158 (2006) (holding that an escapee should not be given credit against his South Carolina sentence for time served in another jurisdiction on a subsequent crime); State v. Hackett, 363 S.C. 177, 609 S.E.2d 553 (Ct. App. 2005) (holding that where a probationer absconds from supervision, the probationary period is tolled until he is once more placed under probationary supervision).

"New trials are granted for the purpose of attaining real justice." Hudson v. Williamson, 5 S.C.L. (3 Brev.) 342, *4, 6 S.C.L. (1 Tread.) 360, *4 (S.C. Const. App. 1813). Indeed, the fundamental goal of equity has been, and remains, the attainment of justice in a particular case. Id. at *4 (finding that a new trial should have been granted "with a view to the attainment of justice."); Hopkins v. Hopkins, 23 S.C.Eq. (4 Strob. Eq.) 207, *7 (1850) (affirming the decree of the circuit court in part based on the duty to

seek the "attainment of justice."). This Court has recognized that: "Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." Ex parte Dibble, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983).

Here, the circuit court was presented with undisputed evidence that the Solicitor mailed notice of the date and time of trial to the only two addresses Appellant ever provided following his conditional release on bond. Appellant acknowledged that despite the clear requirement that he notify the summary court if his address changed, he failed to provide that notice. This evidence refutes Appellant's claim that the State did not attempt to provide notice, and his related challenge to the propriety of the summary court's decision to proceed to trial in his absence. To allow Appellant to secure a new trial in the face of such evidence, even where that evidence was not first presented to the summary court, flies in the face of justice. The State submits that under these circumstances, the circuit court appropriately exercised its inherent power to ensure that just results were reached to the fullest extent possible by considering the October 19, 2011, notice cards when denying Appellant's appeal. This prevented Appellant from benefitting from his own wrongdoing – namely, his failure to update his mailing address with either the summary court or the solicitor, and achieved the attainment of justice. For all of these reasons, the State submits copies of the notice cards were properly admitted as exhibits and considered by the circuit court in rejecting Appellant's appeal and affirming the summary court's denial of his motion for a new trial.

II.

The circuit court properly affirmed Appellant's trial in absentia and the summary court's denial of Appellant's motion for a new trial where Appellant received constructive notice of the trial date and voluntarily waived his right to be present, and where Appellant suffered no prejudice from the alleged failure to provide notice.

Appellant argues the magistrate court erred in denying his motion for a new trial because the State offered no evidence that Appellant had notice of the November, 2011, trial date. He contends that since he didn't receive notice that his trial would transpire on November 15, 2011, he did not knowingly and voluntarily waive his right to be at trial. The State submits these contentions are without merit both because Appellant was given constructive notice of the trial date, and because Appellant suffered no prejudice from the alleged failure to provide notice since he failed to provide a valid mailing address where such notice could have been sent.

Standard of Review

In criminal cases the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Parker, 391 S.C. 606, 611, 707 S.E.2d 799, 801 (2011); State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. Parker at 611-12, 707 S.E.2d at 801.

Here, the magistrate made findings of fact that: (1) "The defendant ***was*** notified of the date, time and place of his trial," and (2) "The defendant ***was*** notified that the trial would proceed in his absence." (Answer to Criminal Appeal, p.2). The circuit court was bound, and likewise this Court is bound, by the factual findings in the magistrate's return.

See State v. Brown, 358 S.C. 382, 388, 596 S.E.2d 39, 41 (2004) (noting that in a criminal appeal from magistrate's court, where a fact is clearly stated in the magistrate's return the Court of Appeals was bound by this factual determination). As argued above, the record provided by Appellant is insufficient for this Court to determine whether the summary court's ruling was "supported by any evidence," and cannot be shown to be "clearly erroneous." Therefore, the magistrate's findings of fact must direct this Court's substantive analysis on appeal. Those findings were that Appellant received the requisite notice.

Waiver of Right to be Present for Trial

"A criminal defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." State v. Shuler, 344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001) (citations omitted). However, this right may be waived. Ellis v. State, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976). The South Carolina Rules of Criminal Procedure provide that a defendant: "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." Rule 16, SCRCrimP. "A defendant's exclusion, or absence, will be reviewed in light of the whole record." Shuler at 624, 545 S.E.2d at 815 (citations omitted). Although the right to be present is a substantial one, no presumption of prejudice arises from a defendant's exclusion. Id.; State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987) (absence from trial is subject to harmless error analysis). "The deliberate absence of a defendant who knows that he stands accused in a criminal

case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly process of justice." Ellis at 261, 227 S.E.2d at 306.

In the instant case, Appellant "***was*** notified of the date, time and place of his trial," and "***was*** notified that the trial would proceed in his absence." (Answer to Criminal Appeal, p.2). The October 19, 2011, notice cards physically introduced into evidence by the State during the July 24, 2012, appeal confirm the fact that actual notice was attempted and constructive notice was given of both: (1) the date, time, and location of trial, and (2) that failure to appear would result in trial of the Defendant in his absence.[6] On the morning of November 15, 2011, Appellant's case was called for trial as advised in the two notice cards, but Appellant was not present. The summary court called for him three times in and outside of the courthouse, but Appellant did not answer. As a result, Appellant was tried in absentia. These facts support the summary court's conclusion that Appellant "waived his right to be present at trial." Appellant's failure to update his address was the sole reason he failed to receive actual notice of the date, time and location of trial. This conscious disregard of the summary court's directive is equivalent to a deliberate absence from trial, and indicates an intention to obstruct the orderly process of justice. Notice of Appellant's trial was properly sent to his address in Myrtle Beach and as such, Appellant was placed on notice of his right to be present at his November 15, 2011, trial. State v. Fairey, 374 S.C. 92, 101, 646 S.E.2d 445, 449 (Ct. App. 2008). Likewise, he was warned he would be tried in his absence should he fail to

[6] As argued above, the notice cards appear to have been presented to and considered by the summary court in the proceedings below, and therefore were part of the record before the circuit court.

attend. Therefore, Appellant's conviction and sentence for CDV was properly affirmed, and the circuit court's decision should stand.

To the extent this Court looks beyond the summary court's factual findings, and disregards the October 19, 2011, notice cards, the remaining evidence nevertheless demonstrates Appellant's failure to update his address constituted a free and voluntary waiver of his right to be present at trial. Appellant was ordered to appear for trial on January 21, 2009, and was advised that "If no final disposition is made during that session, the [Appellant] shall appear at such other times and places ordered by the court." Appellant signed an acknowledgement stating in part: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence." He listed his mailing address as: "xxx5 L Rd, Myrtle Beach, SC 29588." (Bail Proceeding Form II issued December 24, 2008) (emphasis added). The Magistrate completed a checklist noting Appellant had been informed of his right to be present at trial and that trial would proceed in his absence if he failed to attend. On January 13, 2009, after release on bond, Appellant filed a written request for a jury trial and listed his permanent address as: "xxx5 L Rd, Myrtle Beach, SC 29558." Appellant's request included the statement that: "I understand that if my address changes, it is MY responsibility to notify the COURT in writing immediately. (Jury Trial Request dated January 13, 2009) (emphasis added). Appellant admitted he never updated this address with the summary court. Instead, he relied upon his attorney to forward notice of his rescheduled trial dates. (R.p.57, line 13-p.58, line 16; R.p.68, lines 14-23). Even after that attorney was relieved on October 10, 2011, (R.p.62, lines 3-10), Appellant failed to update his mailing address with the court. Standing alone, these facts support

the summary court's conclusion that Appellant "waived his right to be present at trial." Appellant clearly received notice of his right to be present at trial. See State v. Ravenell, 387 S.C. 449, 457, 692 S.E.2d 554, 558 (Ct. App. 2010) (finding that bond forms and signed acknowledgments can provide notice of rights). Appellant exhibited a conscious disregard of the summary court's directive to update his address. It resulted in a deliberate absence from trial, and indicates an intention to obstruct the orderly process of justice. In addition, the signed acknowledgement served as a warning that he would be tried in his absence, and therefore, that Appellant understood that warning. Ravenell, at 457, 692 S.E.2d at 558; Fairey at 102, 646 S.E.2d at 449-50. Consequently, the circuit court properly affirmed Appellant's conviction, and the conviction should stand.

No Prejudice

Assuming arguendo that the State made no attempt to provide Appellant written notice of the date, time and location of the November 15, 2011, trial, it would have made no difference. Appellant admittedly failed to update his mailing address; therefore, any notice mailed by the State could never have been received. Thus, Appellant suffered no prejudice and any error in the magistrate's decision to proceed to trial in Appellant's absence was harmless. Shuler, supra; Williams, supra.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the circuit court's decision to affirm Appellant's summary court conviction be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
March 7, 2013

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APPEAL FROM HORRY COUNTY
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THE STATE, ...RESPONDENT

v.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
March 7, 2013

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No: 2012-212712

THE STATE, ...RESPONDENT

v.

JOHN W. BARNETTE,.....APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, both dated March 7, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Bobby G. Frederick, Esquire
Matthew S. Swilley, Esquire
Post Office Box 8219
Myrtle Beach, SC 29578

I further certified that all parties required by Rule to be served have been served. This 7th, day of March, 2013.

Angela Bennett
Executive Legal Assistant

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