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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Appellate Case No.2012-207548

State of South Carolina -- Respondent,

-Vs-

Ontaney V. Jackson -- Appellant,

Appellant's pro-se Anders Brief

Attorney for Respondent
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Issues on Appeal

Issue I.

Did the trial court err in denying Appellant's motion for a continuance and trying Appellant **in abstenia** based on the fact Appellant was not aware the case was being called for trial and therefore was not present?

Issue II.

Did the trial court err in denying Appellant's motion to suppress the drugs based on an inadequate chain of custody?

Statement of the Case

On June 30, 2010, Appellant was indicted by the Florence County Grand Jury for possession with the intent to distribute cocaine, possession with the intent to distribute crack cocaine, and possession of marijuana.

On August 10, 2010, a trial by jury was convened in Appellant's absence before the Honorable Michael G. Nettles. Appellant was represented by Carrington Wingard, Esquire and the State was represented by Fitzlee McEachin. the jury ultimately found Appellant guilty as indicted and Judge Nettles sealed the sentence.

On January 31, 2012, Appellant appeared before Judge Nettles for sentencing. Appellant was present and represented by Vick Meetze, and the State was represented by Matthew Ozment. Judge Nettles opened the sealed sentence and sentenced Appellant to (15) fifteen years for the PWID crack cocaine third offense, a concurrent (15) fifteen years for the PWID of cocaine, and a (1) one year sentence for the possession of marijuana.

A timely notice of appeal was filed and Appellant is represented by Lanelle Cantey Durant, esquire of the South Carolina Office of Indigent defense. Durant filed a no merit Anders Brief and a Petition to be relieved as counsel.

Appellant's pro-se Anders Brief is as follows:

Argument

Issue I.

Did the trial court err in denying Appellant's motion for a continuance and trying Appellant in absentia based on the fact Appellant was not aware the case was being called for trial and therefore was not present?

FACTS

Appellant in the instant matter was tried absentia. Prior to trial counsel moved the Court for continuance, R.27, 11.13-19.

In support of the motion counsel advised the Court: "Judge it is a fairly new case. The docket appearance was back on April 30th, and, given the case management system, I believe the Solicitor's Office still does control the docket. Certainly the spirit of the case management is that all older cases should be disposed of quicker than the newer cases. This is a fairly new case. It is on the trial docket for this term of Court, Judge, but by my count I believe there was a hundred and seventy-five cases on the docket or approximately that many on the docket. The majority of those cases were not 2010 indictments. There were even some 2007, 2008 cases -- over a hundred, I would say, for 2009. So this is not an old case. It is less than a year old. Mr. Jackson is facing some very, very serious felony charges. I believe if the State's position that this would be his third offense, so he is looking as fifteen to thirty-years if the Court agrees with their interpretation of his record. So obviously this is not some simple possession of marijuana case that they are bringing, but a case with grave consequences for Mr. Jackson. I know he has come before during this term of Court, and I would

ask the Court [to continue] the matter and give us an opportunity to locate him. Certainly, we would not oppose a bench warrant, but we would ask Your Honor not to have him tried in his absence, (emphasis original), R.28, ll.7-25 -- p.29, ll.1-8.

The Solicitor argued: "First with regard to the motion for continuance, the Defendant was put on the trial list not only for this term but for the term before. As an Officer of the Court, I know that I spoke to Ms. Bailey with the Public Defender's Officer yesterday, and she told me she had spoken with him and told him to be here this morning. As. Ms. Wingard stated, she did also speak with the Defendant yesterday and told him to be here this morning. Obviously, this is a case we called where the defendant didn't show up for Court to be tried, R.29, ll.10-21.

Thereafter Appellant's counsel advised the Court:

> Ms. Windard: Judge, I do want to say that I was told it would possibly be called. I certainly was not told it was a kind of certain case. I was told it was a possibility .
>
> The Court: Ms. Wingard, one thing we can't do is let the Defendants determine when we try a case. You clearly communicated with him this potentially was going to trial this week several weeks ago. Is that right?
>
> Ms. Wingard: Judge, yes, He was -- he came to Court, and actually, I believe Mr. McEachin excused him that first week prior to my being able to actually talk to him, but it is my understanding that Mr. McEachin talked to him the first week of the term.
>
> Mr. McEachin: That's correct, Your Honor. There was a member of the Public Defender's Office present when -- it might not have been known to Ms. Wingard, but there was a member of the Public Defender's Office present when I told the Defendant that he was free to go; that he wouldn't have to be back in Court during that week.

> The Court: So he knew potentially, and you knew at some point in time this potentially would be called for--
>
> Ms. Wingard: Yes, sir. I knew there was a possibility it would be called.
>
> The Court: And you spoke with him yesterday and someone else from your office spoke with him as well on yesterday?
>
> Ms. Wingard: Judge, I have to say had it been on for yesterday I would have contacted him last Friday and started this thing in motion. He wasn't on the list to come to Court yesterday.
>
> The Court: Okay. So taking everything into consideration, and you are protected on the record -- your motion is denied, R.30, 11.15-25--p.31, 11.1-25.

Appellant asserts from the recorded colloguy before this Court it cannot be said with sufficient certainty that Appellant was in fact put on notice the trial would commence August 10, 2010. Counsel for Appellant advised the Court numerous times that it was a "possibility" that the case would be called. Counsel went to further advise the Court: "Judge, I have to say had it been on for yesterday I would have contacted him last Friday and started this thing in motion. He wasn't on the list to come to Court yesterday."

The Prosecution successfully was able to rely on what someone from the Public Defender's Officer had "allegedly told" him, regarding advising Appellant when the case would be called for trial. This was error as well as no-one from the Public Defender's Office testified in support of the Prosecution's argument and inuendos.

Appellant asserts the Trial Court erred in failing to grant the continuance as the record is simply too vague to determine whether or not Appellant in fact had actual notice, and therefore should not have been tried in absentia.

Discussion

If the defendant feels that his rights are prejudiced by reason of calling of his case at any particular time, he may apply to the judge for continuance beyond term or for postponement to a date later in the term, State v. Mikell, 257 S.C. 315, 185 S.E.2d 814).

The Appellant here asserts he should have been granted a continuance. A motion for continuance is addressed to the sound discretion of the trial court and it's ruling on such motion will not be reversed without clear showing of abuse of discretion, State v. Brown, 277 S.C. 206, 284 S.E.2d 775 (1981).

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, State v. Bell, 293 S.C. 391, 401, 360 S.E.2d 706, 711 (1987); Ellis v. State, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976). However, a waiver of such an important right is permitted only in limited circumstance, City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (2006).

Therefore, before a defendant may be tried abstensia, the trial court must determine a defendant voluntarily waived his right to be present at trial, making findings on the record, (1) received notice of his right to be present, and (2) was warned the trial would proceed in his absence, Id.

In the instant case there is no evidence in the record that Appellant ever received notice of his right to be present or that he was warned the trial would proceed in his absence. Appellant

was undoubtedly out on bond, but the record does not indicate the circumstances surrounding Appellant's bond. While a bond form, normally provides that a defendant can be tried absentia may serve as requisite notice, State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (S.C.App.2007). Here the record is void of any evidence including a bond form advising Appellant of such notice and therefore it cannot sufficiently be found that Appellant was in fact put on notice or that he would be tries absentia.

In State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966), the Court held that the trial court did not abuse his discretion in refusing to grant a continuance. The Squires Court in pertinent part stated: There is no showing that any other evidence on behalf of the appellant could have been produced, of that any other points in their behalf could have been raised, had more time been granted for the purpose of preparing the case for trial, Squires, 248 S.C. at 244, 149 S.E.2d at 603. See also State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977).

The instant case is distinguishable from Squires. Here it appears from the record Appellant's counsel advised the Court: "Judge I do want to say that I was told it would possibly be called. I certainly was not told it was a kind of certain case. I was told it was a possibility", R. 30, 11.15-18.

Therefore, no real harm would have befallen the State from a continuance and indeed, Appellant's testimony would have been critical to his defense regarding the voluntariness of the statement Appellant was to have allegedly made to Officer Chamberlain during the arrest of Appellant. Without Appellant's testimony the State was allowed to admit Appellant's alleged oral

statement regarding the consent to search his person and the statement to have been made regarding the bags found on the ground during the incident.(emphasis supplied).

If the record does not include evidence to support a finding that the defendant was afforded notice of his trial, the resulting conviction in "absentia" cannot stand, State v. Simmons, 279 S.C. 165, 303 S.E.2d 857 (1983), Brewer v. S.C. Highway Dept., 261 S.C. 52, 198 S.E.2d 256 (1973). Here there is no evidence supporting the trial court's findings Appellant was put on notice his trial would be called August 10, 2010.

Although it is arguable the defendant did not properly preserve an objection to trial in his absence. The Appellate Court can still address the matter on the merits since defense counsel moved for a continuance and the trial court made findings on the record that the defendant had notice, State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554 (S.C. App.2010).

Appellant here asserts the record is void of any findings sufficient that he had any notice much less sufficient notice that his case was called for trial and the trial court erred in not granting a continuance.

The trial court erred in not granting a continuance, and Appellant is entitled to a new trial.

Argument

Issue II.

Did the trial court err in denying Appellant's motion to suppress the drugs based on an inadequate chain of custody?

Facts

During trial the State called Deputy Chamberlin. Chamberlin testified the powder substance and the bag of the all-black rock substance was logged into the SLED evidence Best Pack, which he logged into the Best Pack and then logged into the evidence locker at the Sheriff's Office, R.104, ll.1-5.

Larry Quick testified he is the evidence technician at the Florence County Sheriff's Office, R.119, l.25 -p.120, l.2. Quick further testified that after the Officers put evidence in the evidence box, it is secured with a lock, and he (Quick) is the only one with a key to the box, R.120, ll.12-19.

Quick testified that for each evidence log sheet, he checks what's in the box with what's on the log sheet. He signs for it and then takes it to the evidence room, R.122, ll.1-3. Quick testified that on November 26, 2009 he collected State's Exhibit 1 and 3 from Deputy Chamberlin's box connected with the incident in question, R.122, ll.4-6.

Qucik testified from there he took it to the evidence room and once in the evidence room he took the evidence and started logging it into the computer. He testified he uses the evidence log sheet to go by, and checks each item off and makes sure it's put in the right place, and then it was taken to SLED, R.123,

11.22-25 -p.124, l.1-3. Quick testified the date he took the evidence to SLED was November 30, 2009, and it was returned January 15, 2010, R.124, 11.19-22.

Quick testified that after he carried the evidence to SLED it was logged in by Ms. Dottie Yarborough, and that he (Quick) picked the evidence back up from SLED January 15, 2010, R.124, l.25 -p.125, l.1-8.

Dottie Yarborough was called by the State and testified that she is a technician in the evidence control log-in department at the Forensics Building for SLED, and what she does is take the evidence from throughout State agencies that wants to submit something to be forensically analyzed, and logs it into their system and it's tracked by a particular number, R.126, 11.9-25 -p.1-2. Yarborough testified that she was working on the day of December 9, 2009 when the evidence and paper work were delivered, R.128, 11.1-19. Yarborough further testified she accepted the evidence from Larry Quick at 12:26 pm., and once she received the evidence from Quick it was taken to the evidence room and placed into the drug box, R.128, 11.23-25 -p.129, 11.1-2.

Yarborough further testified that the next forensic technician who touched the evidence was Amy Stevens, who transferred it to Douglas Robinson, who is the forensic analyst, R.129, 11.5-9. Yarborough testified she logged in the evidence and placed it into a secure evidence room, and when the forensic analyst wanted it for testing he sent an Email, and whoever is available at the time would go to the evidence room and pull the items and they transfer it to the analyst.

Yarborough testified that she was not the one who transferred

the evidence, but rather it was Amy Stevens, R.130, ll.1-9. Appellant's counsel questioned Yarborough, that according the records, the drugs were handled by Amy Stevens, Yarborough answered in the affirmative, But Yarborough could not say for sure she (Yarborough) was present when Amy Stevens handled the drugs, R.130, ll.20-25 -p.131, ll.1-4. Appellant's counsel clarified that since Amy Stevens name is on the chain of custody documents, then Amy Stevens was the one who would have transferred the evidence, R.131, ll.23-25 -p.132, l.1.

Counsel questioned Yarborough about Patricia Crooks. Yarborough replied that Patricia Crooks is the evidence room person, who is part-time. Counsel asked Yarborough [if] Crooks' name is on the SLED chain of custody then the drugs would have been in Crooks' possession. Yarborough replied, correct "she could" have had them transferred to the analyst or received it from the analyst to be returned to the agency," R.132, ll.2-15.

It should be noted that Amy Stevens and Patricia Crooks did not testify during trial, (emphasis supplied).

The State then called Douglas Robinson. Robinson testified he works for SLED as a forensic scientist who is assigned to the drug analysis department, R.133, ll.23-25 -p.134, ll.1-4. Robinson was qualified as an expert as a narcotics analyst, R.136, ll.11-13. Robinson testified he received the Best Kit from Amy Stevens December 11, 2009, R.139, ll.4-8.

Thereafter, Appellant's counsel advised the Court: "Judge, I believe it is encumbent on me to have an objection continuing as far as the suppression of the drugs. I don't believe they were

properly seized or constitutionally seized, and so I would have that continuing objection....

> ....Moreover, Your Honor, the State has not proven -- there are holes in the chain. I mean, I believe the Florence Tech said he took them to SLED -- I believe on November 30, and according to my SLED report and according to the lady's testimony, they were received there December 9th.
>
> So there is a huge defect in the chain in that regard, and there are missing individuals in the chain I would need to ask this witness about, so I would object in that chain was properly connected, R.146, 11.17-25 -p.147, 11.1-7.

The State argued" With regard to the chain, I believe that the case on point is State versus Ballentine, and that case holds that you are not required to produce everybody that's in the chain of custody, that you are simply required to establish their identity. The State has done that to this point. We have established that the drugs were taken from Deputy Chamberlain, from Deputy Chamberlian they went to the evidence locker; from the evidence locker they went to Larry Quick; from Larry Quick they went to Dottie Yarborough; from Ms. Yarborough, in her testimony, they went to Amy Stevens, and from -- and then went from Ms. Stevens to Doug Robinson. Once the drugs were tested by Doug Robinson -- our argument is that once the drugs were tested by Doug Robinson there is no need to establish any further chain because at that point I don't believe the fungibility issue still surrounds that particular substance. However, Patricia Crooks then got the evidence after that, and Larry Quick testified he went back and picked up the drugs from the State Law Enforcement Division, R.147, 11.10-25 -p.148, 11.1-6.

Thereafter the following colloguy was recorded, outside the presence of the jury:

> Ms. Wingard: Judge, please note my continuing objection. I am particularly interested and concerned about this "nine day lapse", and I don't think I misunderstood him saying they were delivered on November 30. I remember writing it down specifically, R.148, 11.8-12.
>
> The Court: Allright, Mr. McEachin, you're recognized.
>
> Solicitor: Thank you, Your Honor. I've spoken to Mr. Quick and he explained to me the discrepancy. Your Honor, I recognize the Defense will probably object, but I'll be happy to call him back to the witness stand with regard to that exclusive issue, R.148, 11.17-23.
>
> The Court: All right. Well, there is certainly nothing wrong with you recalling him, and the objection is noted with regard to the chain of custody.
>
> I think I'm going to hold my ruling in abeyance. I'm going to allow you to clarify that issue, but I am -- even if you were not or were gone, to me it would seem as though the general proposition of law as the cases have cited is that the chain of custody does not have to be absolute, R.149, 11.3-11.

Subsequently, Robinson retook the stand and counsel questioned Robinson regarding the chain of custody:

> Q. Mr. Robinson, you are familiar with your chain of custody document, are you not?
>
> A. Yes, maam.
>
> Q. I show that you received these drugs from Amy Stevens on December 11th. Is that correct?
>
> A. Yes, maam.
>
> Q. And then they were -- there is shown a submission on December 7 when they were individually broke down. What happened to the

drugs during those six days?, R.150, 11.20-25 -p.151, 11.1-3.

State then recalled Larry Quick who testified that the original date he turned the drugs into SLED was December 9, 2009. Quick testified that he had made a mistake because he had to do what is called a pre-log. Everything carried to SLED has to be pre-logged, R.153, 11.17-25; p.154, 11.4-7.

Appellant would assert the trial court erred in failing to suppress the drugs due to a defective chain of custody.

Dottie Yarborough testified the drugs were received December 9, 2009, R.128, 1.19. Yarborough testified that Amy Stevens was the next one to handle the drugs, who was to have transferred the drugs to Doug Robinson, R.129, 11.1-9. But Yarborough was not even sure [if] she was present when Amy Stevens handled the drugs, R.130, 11.20-25, p.131, 11.1-2. Yarborough further testified as to what Patricia Crooks "could" have possibly done, R.132, 11.1-15.

Noting, that not only did yarborough testify as to what "she believed" Stevens and Crooks had done when they handled the drugs, but Stevens and Crooks did not testify during trial. Appellant's counsel adamantly pointed out to the Court that there is a "huge defect" in the chain in that regard, and there are "missing individuals" in the chain that I would need to ask the witnesses about, R.147, 11.1-6.

Yarborough, Robinson and Quick testified the drugs were received at SLED December 9, 2009, yet during cross-examination Appellant's counsel questioned Robinson regarding a submission on

December 7 and what happened to drugs during those six days, to which Robinson testified he received the drugs on December 11th, R.151, 11.1-4.

Here there are simply too many missing links and conjecture to satisfy a proper chain of custody. The substance here has passed through the hand of individuals who did not testify during trial and could not be questioned regarding their actions during the handling of the drugs.

Here there is not a complete chain of custody and the Trial Court erred in not suppressing the drugs. Appellant is entitled to a new trial with the drugs suppressed.

Discussion

The admission of evidence is in the sound discretion of the trial judge whose decision will not be overturned absent error of law resulting in undue prejudice, State v. Johnson, 318 S.C. 194, 456 S.E.2d 442 (Ct.App.1995).

This Court has long held that a party offering into evidence fungible items such as drugs must establish a complete chain of custody as far as practicable, State v. sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007), see also Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957)(stating it is generally held that the party offering such speceimen is required to establish, at least as far as practicable a complete chain of custody).

Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis, Benton, 232 S.C. at 33-34, 100 S.E.2d at 537 (citations omitted).

In State v. Chisolm, the State failed to prove a sufficient chain custody, and thus, the crack cocaine should not have been admitted into evidence; although the State presented the testimony of the first and last links in the chain of custody, the State did not provide testimony from either of the intervening links in the chain, and the State did not submit the testimony of [each] individual who handled the evidence nor did the State comply with rule which allows, for the admission of sworn statements in lieu of the appearance of chain of custody witnesses, Id, (S.C.App.2003), 355 S.C. 175, 584 S.E.2d 401, rehearing denied, cert. denied, overruled on other grounds by State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (S.C.App.2004).

Further in Chisolm, 355 S.C. 175, 584 S.E.2d 401 (S.C.App.2003), the Court held under these circumstance, a three judge panel of the Court reversed the conviction", holding the cocaine was inadmissible because no evidence existed to establish either the whereabouts of the evidence between May 10 and June 13 or how the second technician came into possession of the evidence bag. In other words, the identity of the persons handling the evidence was left to conjecture. In so ruling the Court stated: Custodians signature on evidence bag "fails to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce sworn statements pursuant to Rule 6(b), SCRCrim.P., Id at 801, 584 S.E.2d at 404.

Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete, State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In applying this rule, we have found evidence inadmissible only where there is [a] missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable, Id (emphasis original).

But, the party offering into evidence fungible items such as drugs or blood samples bears the burden of proof and must establish "a complete" chain of custody as far as practicable, State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (Ct.App.2011).

In the instant case there is a huge defect in the chain of custody that raises too many questions regarding the handling of the drugs, that fails to establish a "complete chain" of custody.

Dottie Yarborough testified the drugs were received December 9, 2009, R.128, l.19. Yarborough testified that Amy Stevens was the next one to handle the drugs, who was to have transferred the drugs to Doug Robinson, R.129, ll.1-9. But Yarborough was not even sure [if] she was present when Amy Stevens handled the drugs, R.130, ll.20-25, p.131, ll.1-2. Yarborough further testified as to what Patricia Crooks "could" have possibly done, R.132, ll.1-15.

Noting, that not only did Yarborough testify as to what "she believed" Stevens and Crooks had done when they handled the drugs, but Stevens and Crooks did not testify during trial. Appellant's counsel adamantly pointed out to the Court that there is a "huge defect" in the chain in that regard, and there are "missing individuals" in the chain that I would need to ask the witnesses about, R.147, ll.1-6.

Yarborough, Robinson and Quick testified the drugs were received at SLED December 9, 2009, yet during cross-examination Appellant's counsel questioned Robinson regarding a submission on December 7 and what happened to drugs during those six days, to which Robinson testified he received the drugs on December 11th, R.151, ll.1-4.

The illusive question now is "who" handled the drugs on the submission date of December 7 when the drugs were individually broken down, R.151, ll.1-2, [if] the drugs weren't received at SLED until December 9th? (emphasis supplied).

In the instant case there is a huge defect in the chain of custody and there was clearly no "complete chain" and the Trial Court erred in not suppressing the drugs.

Appellant is entitled to a new trial with the drugs suppressed

Conclusion

WHEREFORE, based on the aforegoing, the convictions and sentences should be reversed and Appellant be granted a new trial.

Respectfully Submitted,

/s/ Ontaney V. Jackson

Ontaney V. Jackson

Appellant pro-se

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State of South Carolina -- Respondent,

-vs-

Ontaney V. Jackson -- Appellant,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed pro-se Anders Brief on attorney for Respondent, MS Salley Elliot, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC. 29201,

by placing the copy of the aforesaid in a properly addressed, first-class postage affixed envelope and placed in the U.S. mail this 17th day of July, 2013.

I further state that the Original was also placed in the U.S. addressed to the South Carolina Court of Appeals Clerk, Ms. V. Claire Allen, Post Office Box 11629, Columbia, SC. 29211 the same day stated herein.

Sworn to and Subscribed Before Me

This 18th day of July, 2013

Susan H. Frye

NOTARY PUBLIC My Commission Expires March 5, 2018

My Comm. Expires _____

Respectfully Submitted,

/s/ Ontaney V. Jackson

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