STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

vs.

PHILLIP WESLEY WALKER,

Appellant.

Appellate Case No. 2017-002204

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Defense counsel failed to object on the grounds raised and conceded his client was supposed to be present for trial. The defendant admitted during sentencing he fled to Texas. Appellant was not prejudiced by being tried in absence. The trial court did not err in denying the motion for a continuance.

STATEMENT OF THE CASE

On December 5, 2016, defense counsel and the prosecution selected a jury for Appellant Walker's trial for the armed robbery of a Family Dollar store and held a hearing on the victim's identification of Walker. The Honorable R. Lawton McIntosh presided. Walker was not present and defense counsel did not know why he was not present. The case proceeded to trial on December 7, 2016, and Walker was still nowhere to be found. He was convicted in his absence for both charges – armed robbery and possession of a weapon during the commission of a crime. Judge McIntosh sentenced Walker to twenty years' imprisonment for armed robbery and five years' imprisonment for the weapons charge. The sentence was sealed and after Walker was finally found, the sentence was unsealed on October 12, 2017. Walker admitted fleeing to Texas and counsel admitted Walker knew he was supposed to be at trial. October 12 transcript (Sent. Tr.) pp. 4-6. Walker's motion to reconsider the sentence, made the same day the sentence was unsealed, was denied by written order issued later the same day as the hearing.

STATEMENT OF FACTS

Appellant Walker loitered about the store, Family Dollar, then purchased Pringles and Airheads with an EBT card. The cashier, Natasha Oliver (Victim) rang up the items. Walker then asked for Newports, and she rang those up also. She turned around to see Walker point a gun at her face. The gun was small and rusty. Walker demanded money and she emptied the bills out of her drawer. He left the store and went down the side walk. Tr. pp. 38-41. She pushed the panic button. Tr. p. 44. Thirty minutes later, law enforcement took her to see if the person they detained was the robber. She recognized Walker and was certain of the identification. Tr. p. 51.

Victim testified that when Walker pointed the gun at her, he said if she screamed Walker would pull the trigger. Tr. p. 52, lines 13-17. She believed Walker, which is why she gave him the money. Tr. p. 52, lines 18-21. **She assumed the gun worked when he pointed it at her.** Tr. p. 55, lines 2-4.

Sergeant Trevor Simmons and his partner responded to Family Dollar. On the way they observed a man looking straight ahead, intently ignoring the passing vehicles with sirens blaring. They suspected he was the robber, but he did not have on a brown jacket per Victim's description they received. After speaking with Victim and receiving a more detailed description, they decided that was the robber and went back to find him. Tr. pp. 64-65. They located him in about three or four minutes. He had a wad of cash in his pockets, cigarettes, a Family Dollar bag with a receipt for Pringles and Airheads, and an EBT card. Tr. pp. 67-68. Walker was cooperative, admitted to the robbery, and admitted he had what he described as a "pop gun," but also what he referred to as a .22. Tr. p. 82, lines 6-22; State's Exhibit No. 2, (published to the jury, Tr. pp. 80-81).

Sara Smith proved to be a good citizen. She worked across the street from Family Dollar.

She saw a man throwing clothes in a dumpster and found it suspicious enough to take pictures of him. She notified officers gathered at Family Dollar. Tr. pp. 88-89. Detective Ty Blackwell, based on what she told law enforcement, went to the dumpster and found a brown jacket and brown hat consistent with the clothing Victim described that the robber wore. Underneath the jacket was a small caliber handgun, a .22 type pistol that was empty. It was rusty. Tr. p. 100, p. 103; p. 106; p. 108.

Defense counsel was not left with much of a defense. He argued the surveillance did not depict a robbery because Walker made a purchase. Tr. p. 155. The jury reached a verdict in twenty-five minutes. Tr. pp. 162-63.

ARGUMENT

Defense counsel failed to object on the grounds raised and conceded his client was supposed to be present for trial. The defendant admitted during sentencing he fled to Texas. Appellant was not prejudiced by being tried in absence. The trial court did not err in denying the motion for a continuance.

Walker alleges the trial court erred in denying the motion for continuance. However, Walker admitted fleeing before trial to Texas, and his counsel admitted Walker knew he was supposed to be present for trial. The defense failed to object to the sufficiency of the showing that he received notice of the trial and that trial would proceed without him. Therefore, the issue is waived and not preserved for review. Further, Walker acknowledged in his bond form that the trial would proceed in his absence, and the record establishes he had notice of the trial. Finally, Walker was not prejudiced by his absence in light of the overwhelming evidence: there was no substantial defense at trial, the evidence was overwhelming, and Walker admitted his guilt again when the sentence was unsealed.

How the issue arose below

On December 5, 2016, the prosecution and defense counsel selected a jury and Judge McIntosh heard a motion challenging Vicitm's identification of Walker as the robber. Walker was not present. Counsel at the beginning of the hearing moved for a continuance, "based on that my client is not here. The best alternative is for the State to wait and try him when he is here." Pre-trial transcript (PT Tr.) p. 20, lines 11-24. Counsel advised he had been in contact with Walker and did not understand why he was not present in court. PT Tr. p. 20, line 25 – p. 21, line 3.

On December 7, counsel advised he still had not heard from his client and his bondsman also had not seen him. Counsel tried unsuccessfully to call Walker that morning. Tr. p. 4. Counsel renewed his motion for a continuance, which the trial court denied. The trial court observed,

"[W]hen we met in chambers on Monday, I believe you told me that you had spoken with your client several times last week, were supposed to meet with him . . . on the weekend and did show that you were in communication with his father." Tr. p. 18, lines 2-9. The trial court mentioned counsel "actually had a call from him last night" and counsel confirmed he did and that he attempted to call him back. Tr. p. 18, lines 8-16.

The prosecution noted, "[W]e certainly noticed the defendant of this trial. We sent a card – a bond card November 18th. We mailed that out to him, his bondsman, and then of course Mr. Yarborogh." Tr. p. 18, lines 20-24. Following the verdict, reached after twenty-five minutes of deliberations, counsel moved for a judgment of acquittal, but made no other post-trial motions. Tr. pp. 166-67.

During sentencing, counsel reported, "I don't know what happened. I was in regular contact with him and, you know, and we – we talked a lot about – about a plea and he was always going to – he wanted to plead to a strong armed robbery." Tr. p. 168, lines 18-24. Counsel noted Walker was cooperative when he was apprehended and asked Judge McIntosh for some leniency for his cooperation. Judge McIntosh replied, "[Y]ou're right, I mean, he just said, 'Okay. Here I am. I give up. I did it.' Give him some credit for that." Tr. p. 170, lines 20-25.

Walker finally was in Court on October 12, 2017, at which point his sentence was unsealed. Counsel explained, "Because he didn't have the money to pay his light bill, he robbed the store. He confessed to it." Sent. Tr. p. 3.

Counsel admitted Walker "knew he was supposed to be here, . . ." Sent. Tr. p. 4, lines 21-23. However, counsel explained, Walker "decided that he was going to try to get himself together before he had to face this sentence." Sent. Tr. pp. 4-5. Walker came back to South Carolina and went to

DSS to meet his children, **even knowing he had the sentence.** Sent. Tr. p. 5, lines 7-10. At this point Judge McIntosh asked Walker where he was and he admitted he was in Texas, supposedly to enter a rehabilitation program in Dallas. Sent. Tr. pp. 5-6. Walker admitted, "I did something wrong," but his wife lost her job and Duke Power cut off their electricity. Sent. Tr. p. 7.

Walker explained "I'd gone into Family Dollar and I didn't go in thinking I'm going to rob it today. It wasn't like that." Sent. Tr. p. 8, lines 1-3. He described how he bought a can of Pringles and Airheads and then sheepishly robbed her, apologizing for the robbery as he committed it. Sent. Tr. p. 8, lines 6-18. Walker recounted how he admitted to the robbery to the officers. Sent. Tr. p. 8, lines 19-24. The prosecutor noted Walker had four other robbery convictions in addition to a breaking and entering conviction. Sent. Tr. pp. 11-12.

Counsel agreed with Judge McIntosh when he indicated he was treating the request as a motion to reconsider the sentence. Sent. Tr. p. 12. Note Counsel did not move for a new trial because of a lack of notice or because Walker was not made aware that the trial would proceed in his absence.

On file with the Clerk of Court is the Bail Proceeding form, which specifies the conditions that he appear before court at the designated times, that he not leave the State without the permission of the court, and he shall promptly notify the court if he changes his address. On the second page of the form, Walker's signature appears as acknowledgement that, in relevant 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." Bail Proceeding Form, p. 2. This Court may properly take judicial notice of the form on file with the Clerk of Court. Colonial Penn Ins. Co. V. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) (Judicial notice of a fact may be raised for the first time on

appeal). "[A]n appellate court can take judicial notice of something that was not before the trial court if it is indisputable." Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011).

Standard of review

A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

A decision on whether to grant or deny a motion for continuance rests in the sound discretion of the trial court. State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). Appellate courts in South Carolina typically show great deference to the trial court regarding these decisions. State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). The denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion. Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006); State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010).

Error preservation

Walker's attorney never complained that an insufficient showing was made to hold the trial in Walker's absence; and he never claimed, even when the sentence was unsealed, that Walker did not have notice of the trial or realize that the trial would proceed in his absence. "In order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court's finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend, a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal." Ravenell, 387 S.C. at 456, 692 S.E.2d at 558 (citation omitted); see State v.

Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Importantly, those issue preservation requirements are designed "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Walker's counsel never complained that the showing in support of a trial in absence was insufficient. He never complained, even when the sentence was unsealed, that he did not receive notice of the trial and did not realize the trial would proceed in his absence. Accordingly, this issue should not be reviewed because it was incumbent upon him to raise those arguments to Judge McIntosh in order for Judge McIntosh to rule properly. I'On, L.L.C., supra. Because of his failure, or reluctance, to do so, the issue should not be reviewed by this Court.

Further, Walker's counsel conceded Walker knew he was supposed to be at trial. Sent. Tr. p. 4, lines 21-23. An issue conceded in trial court is not preserved for review. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000); State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998) (stating a defendant cannot acquiesce in an issue at trial and then complain about it on appeal). He conceded the issue; therefore, this Court should not review the complaint made for the first time on appeal.

Walker's waiver of the right to be present

Walker waived his right to be present. He knew he was supposed to be present for trial, as conceded by his counsel. His bond form advised him that the trial would proceed in his absence. He fled to Texas. Therefore, the trial court did not err.

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). "A defendant's exclusion, or absence, will be reviewed in light of the whole record." Id. (citations omitted). "Although the right to be present is a substantial one, no presumption of prejudice arises from a defendant's exclusion." Id. (citations omitted); State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987) (absence from trial is subject to harmless error analysis); see State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (2000) (allegation of error in defendant being tried in his absence is without merit where counsel stipulated that defendant received proper notice).

In State v. Wright, 304 S.C. 529, 531, 405 S.E.2d 825, 826 (1991), Wright was not present for his trial on a charge of distributing cocaine. At the outset of trial, Wright's defense counsel moved for a continuance, asserting he had recently been in contact with Wright and believed Wright could be located. Id. at 532, 405 S.E.2d at 827. The trial court denied the continuance motion and proceeded with a trial *in absentia*. Id. Following his conviction, Wright appealed, arguing the trial court erred in denying the continuance motion. Id. The Supreme Court affirmed the trial court's ruling, finding the trial court did not abuse its discretion in denying Wright's continuance motion because the record reflected Wright was aware of the term of court in which he was set to be tried and knew he would be tried in his absence if he failed to appear. Id.

In the present case, based on counsel's representations and the notice the prosecution mailed to Walker, Walker was aware of the term of court he was to be tried, differentiating the case from State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017). In Wrapp, the defendant signed bond paperwork advising his court date was December 6, 2013. The case was scheduled for trial, but continued at defense counsel's request, on July 14, 2014. The prosecution told Wrapp the case would go to trial "the next time we could get to it." The case was called for trial again on September 29, 2014. Counsel moved for a continuance, unaware of why the defendant was not present. Id. at 533-34, 808 S.E.2d at 822. Following the trial court's denial of his motion for continuance, Wrapp's trial counsel explained, "For the record . . . I don't feel like Mr. Wrapp has been adequately noticed and we object to going to trial." Id. at 534-35, 808 S.E.2d at 822-23.

Unlike Wrapp's attorney, Walker's counsel never objected to notice and conceded Walker knew he was supposed to be present. Further, unlike the facts explained in Wrapp, the record is clear Walker knew what term his case was going to be tried, which undoubtedly prompted his flight to Texas. Wright, supra.

For these same reasons, any error by the trial court is harmless and Walker was not prejudiced by the trial in his absence. In Wrapp, this Court refrained from harmless error analysis on the basis that no evidence indicated Wrapp had notice of the term of court during which the case was tried. Id. at 537, 808 S.E.2d 824. However, because Walker's counsel conceded notice and Walker conceded guilt during the motion for reconsideration of his sentence, any error is harmless and Walker was not prejudiced by his absence. Williams, supra; see also State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) ("Any doubt about the correctness of [affirming the appellant's conviction] is eliminated by the admission of appellant in open court, after conviction and during the

pre-sentence inquiry by the trial judge that he had participated in the robbery . . . . Further review of the record, therefore, is rendered unnecessary.").

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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March 15, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Anderson County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No: 2017-002204

THE STATE,

Respondent,

v.

PHILLIP WESLEY WALKER,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, E. Charles Grose, Jr., Esquire, Grose Law Firm, 404 Main St., Greenwood, SC 29646, .

I further certify that all parties required by Rule to be served have been served.
This 15th day of March, 2019.

Anne A. Mueller
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ALAN WILSON
ATTORNEY GENERAL

March 15, 2019

E. Charles Grose, Jr., Esquire
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RE: The State v. Phillip Wesley Walker
Appellate Case No: **2017-002204**

Dear Mr. Grose:

Enclosed please find two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: The Honorable Jenny A. Kitchings (with original and 1 copy)
Victim Advocacy Division