

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002204

The State,..... Respondent

v.

Phillip Wesley Walker,..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

RECEIVED
APR 08 2019
SC Court of Appeals

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IN REPLY

Phillip Waller replies to the State of South Carolina's Brief of Respondent as follows.

I. Lack of Notice.

The State relies on the bond card the prosecutor claims the State sent directly to Mr. Walker on November 18, 2016.¹ Brief of Respondent at 5. As pointed out in Mr. Walker's opening brief, at 6, it is well settled "that statements of fact appearing only in argument of counsel will not be considered." *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933); *see also Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel."); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986) (judge "properly disregard" counsel's statements about content of depositions when depositions not were provided to the court). The record does contain any information that the card was properly addressed or mailed in order to create an inference that Mr. Walker received the mailing. *See Foster v. Ford Motor Credit Co.*, 302 S.C. 450, 452, 395 S.E.2d 440, 441 (1990) (to get inference that letter was received by addressee requires "[e]vidence that a letter is properly addressed and mailed").

The State relies on standard language contained in the Bail Processing Form, that was filed with the Clerk of Court but not presented to the trial judge. Brief of Respondent at 6. Although this form notified Mr. Walker of his right to be present at his trial and the possibility that he could be tried in his absence, this form did not place Mr.

¹ This attempt at a direct communication by the Solicitor's Office with Mr. Walker likely violated Rule 4.2, RPC of Rule 408, SCACR. S.C. Bar Ethics Opinion 91-02 (found at <https://www.scbare.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-91-02/> (last viewed April 4, 2019).

Walker on actual notice of his trial date. Mr. Walker was arrested on December 16, 2015. His trial was not until December 5 and 7, 2016. This Court can take judicial notice that Court Administration does not publish the Terms of Court a year in advance.

The State relies on statements of counsel during pre-trial matters to argue that Mr. Walker had notice of his trial. *E.g.* Brief of Respondent at 4, 5. A close examination of these statements does not confirm that Mr. Walker had actual notice of his trial date.

Finally, the State relies on statements made at sentencing. Brief of Respondent at 5-6. None of this information was available to the trial judge during the hearings on the motion to continue and, therefore, should not be considered by this Court.

The absence of actual notice of the trial date requires a new trial. *E.g. State v. Simmons*, 279 S.C. 165, 167, 303 S.E.2d 857, 859 (1983) (“[T]he record is in all respects void of evidence to support a finding that appellants were afforded notice of the indictment or trial. Under these facts, the resulting convictions in absentia cannot stand.”); *State v. Wrapp*, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017) (“trial court could not try defendant in absentia without findings regarding whether he received notice of trial and was absent voluntarily”); *City of Aiken v. David Michael Koontz*, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006) (Notice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present. If the record, however, does not include evidence to support a finding that the defendant was afforded notice of his trial, the resulting conviction in absentia cannot stand.”).

II. Error Preservation.

The State argues “[d]efense counsel failed to object on the grounds raised” in this appeal. Brief of Respondent at 4, 7-8. Trial counsel, however, objected to the State trying Mr. Walker in his absence. *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (“[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.”). “Simply because a party does not expressly articulate the relevance of a particular case does not excuse the court [] from failing to apply controlling precedent.” *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016). Controlling precedent required the trial judge “to make findings of fact regarding 1) whether the appellant had received notice of her right to be present, and 2) whether the appellant had been warned that the trial would proceed in her absence upon a failure to attend court.” *State v. Jackson*, 288 S.C. 94, 96, 341 S.E.2d 375, 375 (1986).

The State’s request to try Mr. Walker in his absence and trial counsel’s motion to continue the trial from Mr. Walker to be present required the trial court to make both of these findings and, therefore, preserved this matter for appeal. The absence of actual notice requires a new trial.

III. Harmless Error Analysis is not Appropriate.

The State argues, “[A]ny error by the trial court is harmless and Walker was not prejudiced by his absence.” This Court rejected that this argument in *Wrapp*, holding:

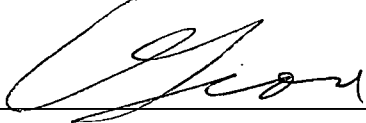
The State urges us to find any error in this process was harmless. However, we need not undertake a harmless error analysis when, as here, the trial court erred in failing to make the requisite findings and the record is devoid of facts allowing us to discern whether Wrapp had notice of the term of court.

421 S.C. at 537, 808 S.E.2d at 824.

CONCLUSION

For the reasons set forth in Mr. Walker's Brief of Appellant and this reply brief this Court should reverse the trial court and order a new trial.

Respectfully Submitted,

By  _____

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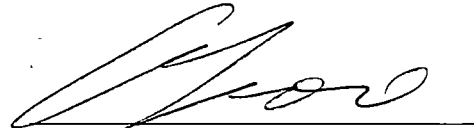
v.

Phillip Wesley Walker,..... Appellant.

Certificate of Service

I certify that I have served the Initial Reply Brief of Appellant on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

David Spencer, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



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The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
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Re: *State of South Carolina v. Phillip Wesley Walker*
Appellate Case Number 2017-002204

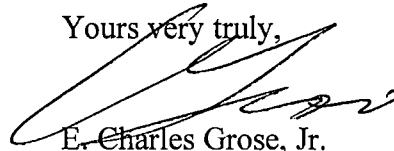
Dear Ms. Kitchings:

Enclosed please find Mr. Walker's Initial Reply Brief of Appellant, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Phillip Walker
David Spencer, Esquire

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