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.

FINAL BRIEF OF APPELLANT

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Appellant Phillip Wesley Walker

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Attorney for Appellant Phillip Wesley Walker

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QUESTION PRESENTED

Did the trial judge err by denying trial counsel's motion to continue the trial so Phillip Walker could be present at his jury trial when the trial judge did not make findings of fact regarding whether the Mr. Walker had received notice of his right to be present and whether the Mr. Walker had been warned that the trial would proceed in his absence upon a failure to attend court?

STATEMENT OF THE CASE

On December 16, 2015, the Anderson Police Department charged Phillip Wesley Walker with armed robbery and possession of a weapon during the commission of a violent crime. On March 22, 2016, the Anderson County Grand Jury returned true bill indictments for these charges. R. 252-53. On December 5 and 7, 2016, the State tried Mr. Walker *in absentia* before the Honorable R. Lawton McIntosh and a jury. Catherine Huey and William Stolarski represented the State. William Yarborough represented Mr. Walker. The jurors convicted Mr. Walker as charged. R. 215-16. Judge McIntosh sentenced Mr. Walker to twenty years imprisonment for armed robbery and five years for possession of weapon during the commission during the commission of a violent crime. The sentences are concurrent. R. 239, 254-55. Judge McIntosh sealed the sentences. R. 222. On October 10, 2017, Judge McIntosh unsealed the sentences and denied Mr. Walker's motion to reconsider the sentence. R. 237-51. This appeal follows.

STATEMENT OF FACTS

On December 5, 2016, during an in chambers meeting prior to the Solicitor calling the case to trial, counsel moved for a continuance so Phillip Walker could be present for his trial, noting "[t]he best alternative is for the State to wait and try him when

he is here." The trial judge denied the motion without hearing from the State. The trial judge never determined Mr. Walker had actual notice of his trial date or that he had been informed the trial would proceed in his absence. Following the motion, the trial judge addressed the jurors, subject to counsel's motion for a continuance. R. 4-11. On December 7, 2016, counsel renewed the motion for a continuance, noting neither counsel nor Mr. Walker's bondsman had been in recent contact with Mr. Walker. R. 56. Counsel renewed the motion for a continuance prior to the jurors being sworn. The Solicitor informed the trial judge, "We 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. Yarborough." R. 69-71. Once again, the trial judge did not determine whether Mr. Walker had actual notice of his trial date or that he had been informed the trial would proceed in his absence. During the initial instructions, the trial judge informed the jurors:

> [U]nder the law of this state, a defendant may be tried even if he does not attend the trial. As you see here, the defendant is not here today. But the fact that the defendant is not here may not be considered by you at any time during your deliberations and in any manner because the burden remains on the State of South Carolina to prove his guilt by proof beyond a reasonable doubt.

R. 81-82.

The case proceeded to trial, and the prosecution presented its evidence. On December 16, 2015, Natasha Oliver was running the cash register at the Family Dollar store on River Street in Anderson. She noticed a "brown skinned guy" wearing glasses, a ball cap, "dirty jeans," and a brown Carhartt jacket with a turquoise t-shirt underneath. He was letting other customers check out before him. The man approached the register and purchased a can of Pringles potato chips and Airheads candy with an EBT card. Ms.

Oliver placed the items in a Family Dollar bag with the receipt. The man asked the price of Newport cigarettes. When Ms. Oliver turned around after getting a package of cigarettes, the man was pointing a small, rusty handgun[1] at her and demanded she "give him all the bills, no change" out of the cash register. After the man left the store, Ms. Oliver "pulled the panic button." Law enforcement arrived within minutes, and Ms. Oliver provided a description of the robber. R. 88-104.

Anderson Police Department Patrol Officer Joshua Genthner responded to the Family Dollar. Ms. Oliver gave him a written and recorded statement. Officer Genthner determined $240.00 was missing from the cash register. Another responding officer obtained the surveillance video.[2] Officer Genthner provided the description of the robber to other officers. R. 109-13.

While responding to the Family Dollar, Anderson Police Department Sergeant Trevor Simmons and Lieutenant Joel McKee noticed a man matching the general description of the robber of the robber, except that he was not wearing a brown jacket. After arriving at the Family Dollar and learning more about the description of the robber, they decided the man they passed was "probably" the robber. They located the man, who matched the updated description with the exception of the brown jacket. They identified the man as Phillip Walker. Mr. Walker had a Family Dollar bag which contained the Pringles, Airheads, and the receipt. He also had cigarettes, a wad of cash ($234.00), a gun, and an EBT card. R. 113-26, 150-74.

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[1] The prosecution conceded the gun did not work. R. 63.

[2] Yoshika Chapman, a store manager at the Family Dollar, is responsible for the surveillance video. She provided the video of the robbery to law enforcement, which was played for the jurors at trial. R. 162-68.

Anderson Police Department Patrol Officer Craig Gardner also responded to the Family Dollar. He transported Ms. Oliver from the Family Dollar to the location where other officers had apprehended Mr. Walker. Ms. Oliver identified Mr. Walker as the robber. R. 102-04, 135-39. Ms. Oliver identified the receipt found with Mr. Walker, which included her cashier number, as the receipt from the transaction during the robbery. R. 93-95.

Sara Smith works for the Anderson Housing Authority, which is located across the street from the Family Dollar. On December 16, 2015, she noticed a "guy taking clothes off and throwing them in the dumpster." She thought this strange, so she "snapped a picture of him" with her cell phone. She provided the picture to the police officers that responded to the robbery. R. 140-43. Anderson Police Department Detective Tyrone Blackwell recovered and brown jacket and hat from the dumpster. He found a .22 caliber gun underneath the clothing. The gun was not loaded and was not capable of being fired. R. 145-47, 151-60. Ms. Oliver identified Mr. Walker's gun as being "consistent with the weapon that was pointed at" her during the robbery. R. 95-96.

Sergeant Simmons and Lieutenant McKee interviewed Mr. Walker. Sergeant Simmons recorded the interview on his body camera. Mr. Walker confessed to the robbery. The State played the videotape of the interview for the jurors. Mr. Walker explained he committed the robbery because he did not have money to pay the light bill. Mr. Walker referred to the gun as a "popgun" or "dust buster." R. 126-35, 240.

After the jurors convicted Mr. Walker as charged, trial counsel asked the judge to consider the facts that Mr. Walker cooperated and was apologetic. R. 221. At the sentencing hearing on October 12, 2017, trial counsel noted Mr. Walker sat "in jail for

about nine months" before being released on bond. Mr. Walker was trying "to get himself together before he had to face" these charges. During that period, "[n]obody heard from him." Mr. Walker had gone to Texas and "entered a program called the Dallas Life Program," which is drug rehabilitation program based on Christian values. R. 241-50.

ARGUMENT

Did the trial judge err by denying trial counsel's motion to continue the trial so Phillip Walker could be present at his jury trial when the trial judge did not make findings of fact regarding whether the Mr. Walker had received notice of his right to be present and whether the Mr. Walker had been warned that the trial would proceed in his absence upon a failure to attend court?

"A criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial." *City of Aiken v. David Michael Koontz*, 368 S.C. 542, 546, 629 S.E.2d 686, 688 (Ct. App. 2006) (citing U.S. Const. Am. VI and *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.")); *see also* S.C. Const. Art. I, § 14. Rule 16 of the South Carolina Rules of Criminal Procedure provides:

> Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies 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.

"The proper course of action" before beginning a "trial *in absentia*" is for the trial judge to "make findings of fact regarding 1) whether the [accused] had received notice of [his] right to be present, and 2) whether the [accused] had been warned that the trial would proceed in [his] absence upon a failure to attend court." *State v. Jackson*, 288 S.C.

94, 96, 341 S.E.2d 375, 375 (1986); *see also State v. Ritch*, 292 S.C. 75, 76, 354 S.E.2d 909, 909 (1987) ("The trial judge failed to find that appellant had received notice of his right to be present at trial and a warning that he would be tried in his absence should he fail to attend." The trial judge did not make either of these findings of fact before proceeding with Mr. Walker's jury trial *in absentia*.

The only evidence in the record that the Solicitor's Office mailed Mr. Walker a "bond card" is the Solicitor's statement. R. 70. The Solicitor was not under oath, and the State did not provide a copy of the "bond card" to the trial judge. 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).

"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. However, if the record does not reveal that the defendant was afforded notice of his trial, the resulting conviction in absentia cannot stand." *State v. Fairey*, 374 S.C. 92, 100, 646 S.E.2d 445, 449 (Ct. App. 2007) (internal quotations and citations omitted). South Carolina precedent establishes an accused is entitled to actual notice of the trial date. *State v. Simmons*, 279 S.C. 165, 303 S.E.2d 857 (1983) (When "the record is in all respects void of evidence to support a finding that appellants were afforded notice of the indictment or trial. . . . the resulting convictions in absentia cannot stand."); *Brewer v.*

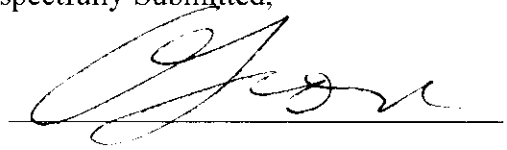
South Carolina State Highway Dept., 261 S.C. 52, 198 S.E.2d 256 (1973) ("The respondent was tried by the magistrate without having given the respondent or his attorney notice of the day of such trial. Such conviction cannot stand."); *State v. Spray*, 74 S.C. 443, 54 S.E. 600 (1906) ("Defendants were bound over to appear for trial before [one magistrate on a particular date, and another magistrate] undertook to try them in their absence on [a different day], without any notice . . . of any change of day of trial, or of the change of venue. Such a conviction was a denial of due process of law, and cannot stand."). *State v. Ravenell,* 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010) illustrates the factual record required to establish a voluntary waiver of the right to be present at trial. "The record show[ed] Ravenell was subpoenaed to appear for that particular week of court." Additionally, "Ravenell was present for the first day of trial when his jury was drawn" and [t]he trial judge noted for the record that he specifically informed Ravenell that if he did not appear the next day, the trial would go forward without him." *Id.* 387 S.C. at 457, 692 S.E.2d at 558. The record here is devoid of any evidence that Mr. Walker had actual notice of his trial date. Nor did the trial judge make a finding of fact that Mr. Walker had been provided actual notice of his trial date.

Finally, the record is devoid of any evidence that the State warned Mr. Walker his trial would proceed in his absence upon his failure to attend court. Even if the State had such evidence, *Jackson* requires the prosecution to present that evidence to the trial court so the judge would be in a position to make the appropriate findings of fact. In addition to not finding Mr. Walker had actual notice of his trial date, the trial judge did not make a finding of fact that Mr. Walker had been warned his trial would proceed in his absence if he did not appear.

CONCLUSION

This Court should reverse Phillip Walker's convictions, vacate the sentences, and remand this case for a new trial because the trial judge did not make findings of fact regarding whether the Mr. Walker had received notice of his right to be present and whether the Mr. Walker had been warned that the trial would proceed in his absence upon a failure to attend court. The trial court, accordingly, committed an error of law this Court must correct. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) ("In criminal cases, the appellate court sits to review errors of law only.").

Respectfully Submitted,

By 

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Phillip Wesley Walker

July 24, 2019.

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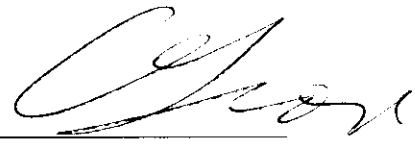
Rule 211(b), SCACR Certification

The Final Brief of Appellant Complies with Rule 211(b), SCACR.



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

July 24, 2019
Greenwood, South Carolina