

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Aug 26 2020

SC Court of Appeals

Appeal from Chester County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ELIZABETH LEANNE HOWZE,

APPELLANT

APPELLATE CASE NO. 2019-002068

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The trial court abused its discretion in denying counsel’s requests for continuance and the issuance of a bench warrant in order to locate appellant for trial and instead proceeded with appellant’s trial *in absentia* where the record did not show appellant had notice of what day her trial would go forward.4

Introduction.....4

Relevant facts.....4

Discussion.....5

CONCLUSION.....8

TABLE OF AUTHORITIES

Cases

Ellis v. State, 267 S.C. 257, 227 S.E.2d 304 (1976) 5, 6

Johnson v. Zerbst, 304 U.S. 458 (1938) 6

State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006) 6

State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010)..... 3

State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2018)..... 7

Taylor v. U.S., 414 U.S. 17 (1973) 6

Constitutional Provisions

U.S. Const. amend. VI 5, 6

U.S. Const. amend. XIV 5

STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion in denying defense counsel's requests for continuance and the issuance of a bench warrant in order to locate appellant for trial and instead proceeded with appellant's trial *in absentia* where the record did not show appellant had notice of what day the trial would go forward?

STATEMENT OF THE CASE

On October 1, 2019, a Chester County grand jury indicted appellant for possession with intent to distribute (PWID) a controlled substance near a park and distribution of methamphetamine third offense. R. *. Appellant was tried *in absentia* on November 5, 2019, before the Honorable D. Craig Brown and a jury. Tr. 1. William Frick represented appellant, and Kaitlyn Easler, assistant solicitor, represented the state. Tr. 1. On November 6, 2019, the jury found appellant guilty as indicted. Nov. 6, Tr. 82, ll. 7-14.

The Honorable Brian M. Gibbons unsealed appellant's sentence on December 2, 2019. Dec. 2, Tr. 1. Judge Brown had sentenced appellant to concurrent terms of seventeen years' imprisonment for distribution of methamphetamine third offense and ten years' imprisonment for PWID controlled substance near a park. Dec. 2, Tr. 2. Counsel for appellant moved to reconsider appellant's sentence as to distribution of methamphetamine. Dec. 2, Tr. 3. Judge Gibbons vacated appellant's sentence as to distribution of methamphetamine and sentenced appellant to twelve years' imprisonment to run concurrent with the ten-year sentence. Dec. 2, Tr. 10, ll. 7-14.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” *State v. Ravenell*, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010). “An appellate court is bound by the trial court's factual findings unless they are clearly erroneous.” *Id.*

ARGUMENT

The trial court abused its discretion in denying counsel's requests for continuance and the issuance of a bench warrant in order to locate appellant for trial and instead proceeded with appellant's trial *in absentia* where the record did not show appellant had notice of what day her trial would go forward.

Introduction

On January 10, 2019 officer Ricky Sanders and confidential informant, Christy Burrell, participated in a controlled buy with appellant as the target. Nov. 6, Tr. 22, ll. 8-25; 23, ll. 23-24. A video recording of the controlled buy, state's exhibit 4, on file with this Court, allegedly showed appellant sell drugs to Burrell. Nov. 6, Tr. 24, ll. 21-24. Appellant was later arrested and charged with PWID a controlled substance near a park and distribution of methamphetamine third offense. Nov. 6, Tr. 28, ll. 20-29, l. 3.

Relevant facts

Prior to trial, counsel for appellant moved for a continuance and requested that the judge issue a bench warrant for appellant because she was not present in court. Counsel said appellant told him at the previous term of court that she was going to retain private counsel. Nov. 5, Tr. 27, l. 17-28, l. 7.

The solicitor argued the trial should proceed in appellant's absence because the last term of court, in October, appellant was told she would be "first up" for trial the following term of court. The solicitor alleged she called "private counsel" and that attorney told her appellant never met with him. Nov. 5, Tr. 28, ll. 9-21. The court asked if appellant was notified that she would be tried in her absence if she failed to appeal. The solicitor admitted she did not

specifically state that on the record but that it was stated in appellant's "bond paperwork." Nov. 5, Tr. 28, l. 22-29, l. 4.

After reviewing appellant's bond paperwork, the court denied the motion for continuance. The court found appellant voluntarily chose not to appear because both counsel for appellant and the solicitor informed the court appellant was advised she was not excused from this term of court. Nov. 5, Tr. 31, l. 2-32, l. 11.

The following day, November 6, 2019, counsel for appellant again moved for a continuance until the time appellant could be brought in on a bench warrant. The court again denied counsel's motion for continuance. Nov. 6, Tr. 6, l. 17-7, l. 13.

Following trial, the Honorable Brian M. Gibbons unsealed appellant's sentence on December 2, 2019. Dec. 2, Tr. 1. Judge Brown had sentenced appellant to concurrent terms of seventeen years' imprisonment for distribution of methamphetamine third offense and ten years' imprisonment for PWID a controlled substance near a park. Dec. 2, Tr. 2. Counsel for appellant moved to reconsider appellant's sentence as to distribution of methamphetamine. Dec. 2, Tr. 3. Judge Gibbons vacated appellant's sentence as to distribution of methamphetamine and sentenced appellant to twelve years' imprisonment to run concurrent with the ten-year sentence. Dec. 2, Tr. 10, ll. 7-14.

Discussion

The court erred in denying appellant's motion to continue the trial because the record did not support a finding that appellant knowingly and voluntarily waived her right to be present. "[T]he Sixth Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial, and is applicable to the States by reason of the Fourteenth Amendment." *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (per curiam); *see*

also *State v. Patterson*, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006) (“Apodictically, a criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial.”).

The state has an extremely high burden to prove valid waiver of this right.

[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal quotations omitted). Thus, “[t]he right at issue is the right to be present, and the question becomes whether that right was effectively waived by his voluntary absence.” *Ellis* at 260-61, 227 S.E.2d at 305-306 (quoting *Taylor v. U.S.*, 414 U.S. 17 (1973)). See also *Patterson* at 229, 625 S.E.2d at 244 (“While Rule 16 permits a knowing and intelligent waiver of the right to be present, such a waiver is permitted only in limited circumstances. A trial judge must determine a defendant voluntarily waived his right to be present at trial in order to try the case in absentia.” (internal quotations omitted)).

“It is well established that, 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, and a defendant may be tried in his absence.” *Id.* “A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence.” *Id.* at 455, 692 S.E.2d at 557–58. “The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend.” *Id.* at 456, 692 S.E.2d at 558.

The court abused its discretion in denying counsel's reasonable request for continuance until appellant could be found. The record reflects appellant was present the previous term of court, October 2019, and attended sentencing the following month after trial, December 2019. The state and defense knew this was a straightforward case with few witnesses and clear video evidence of the controlled buy. It would not have been difficult or caused any significant delay for the court to have issued a bench warrant and delayed trial until appellant could be present.

Here the record did not support a finding that appellant received notice of what day her trial would go forward. It only showed that she was told it would go forward "the next term of court." The solicitor admitted appellant was not told that she would be tried in her absence should she not appear. The court noted appellant's signed bond paperwork that included a warning of consequences if she should fail to appear. However, in *State v. Wrapp*, the Court of Appeals reversed and remanded Wrapp's convictions where the trial court failed to make the required findings that he had proper notice of his trial date and that his absence was voluntary before trying him *in absentia* even where Wrapp signed bond paperwork that stated, "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend court the trial will proceed in my absence." 421 S.C. 531, 533, 808 S.E.2d 821, 822 (Ct. App. 2018).

Accordingly, the record cannot support a finding that appellant knew she would be tried in her absence as required to conclude she knowingly waived her constitutional right to be present. Additionally, the record reflects no discussion as to whether appellant's absence from the courtroom was voluntary. Thus, the court reversibly erred in denying appellant's motion to continue the trial and by trying her in her absence. *State v. Wrapp*, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2018).

CONCLUSION

Based on the foregoing arguments appellant's convictions should be reversed, and the case remanded to Chester County Court of General Sessions for a new trial.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blich, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 26th day of August, 2020; and a copy of the Initial Brief of Appellant and Designation of Matter has been served on Elizabeth Leanne Howze, #382901, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 26th day of August, 2020.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender
ATTORNEY FOR APPELLANT