

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
CIRCUIT COURT

Daniel D. Hall, Circuit Court Judge

Case No. 2017-CP-46-01964
Appellant Case No. 2020-000027

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Sep 08 2020

SC Court of Appeals

Winston Shell.....Respondent,

vs.

Nathaniel Shell.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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 I. Despite respondent’s arguments, Appellant has substantially complied with the conditions of rule 40(i)(2) and the trial court abused its discretion in moving forward with the trial without Appellant being present for the trial 1

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ARGUMENT IN REPLY

I. DESPITE RESPONDENT'S ARGUMENTS, APPELLANT HAS SUBSTANTIALLY COMPLIED WITH THE CONDITIONS OF RULE 40(i)(2) AND THE TRIAL COURT ABUSED ITS DISCRETION IN MOVING FORWARD WITH THE TRIAL WITHOUT APPELLANT BEING PRESENT FOR THE TRIAL.

Despite Respondent's assertions to the contrary, Appellants substantially complied with SCRCF Rule 40(i)(2) which states in relevant part, "No motion for continuance shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is in not intended for delay."

While Respondent contends no motion for continuance was for the court to consider, it can be seen from the trial transcript that Appellant's counsel was seeking additional time from the court to notify his client that the case had been called for trial that morning, that the judge considered the request and decided to move forward with the trial without Appellant's presence. There had also been a meeting in the judge's chambers all of which is not repeated on the record. The record does indicate, however, that the court was well aware that counsel for Appellant found out about the case being called about an hour before the trial began, that he could not put his case on without the presence of Appellant, and that he needed more time to contact his client since he had always been able to contact him throughout the case. While counsel for Appellant did not use the words, "I move for a continuance", it is not hard to glean from the transcript that counsel for Appellant needed and was seeking from the court additional time to communicate the fact that the

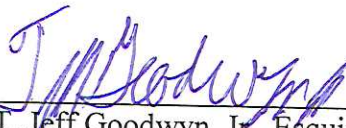
court had called the case for trial for that same day. Respondent points to no authority requiring a party to use any specific language to seek a continuance. The only cases Respondent cites are two Georgia case that have no binding effect on this court.

As a result, it can fairly be said that counsel for Appellant sufficiently conveyed the fact that Appellant could not properly move forward with the trial without the presence of Appellant and was requesting additional time to notify Appellant that trial was being held that day. The trial court then abused its discretion to move forward with the trial and this court should reverse this decision and grant Appellant a new trial.

CONCLUSION

For the reasons set forth in its Initial Brief, and incorporated herein, the Appellant respectfully requests that the Court reverse the rulings of the trial court to move forward with the trial without a necessary witness and remand the case for a new trial and for such other and further relief as this Court may deem just and proper.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.



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