

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Anderson County

Honorable J. Cordell Maddox, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

NANCY ELAINE CARSWELL,

APPELLANT

APPELLATE CASE NO 2019-001818

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INITIAL BRIEF OF APPELLANT

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**SC Court of Appeals**

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW .....3

ARGUMENT

The trial court erred in denying Appellant’s motion for a continuance because two material defense witnesses who would have testified that the police began searching the house prior to obtaining a search warrant ignored subpoenas and refused to appear in court for Appellant’s motion to suppress the drugs found in the house where Appellant was arrested.....6

CONCLUSION.....11

**TABLE OF AUTHORITIES**

**Cases**

State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981) ..... 3

State v. Colden, 372 S.C. 428, 641 S.E.2d 912 (Ct. App. 2007) ..... 8

State v. Dodgens, 120 S.C. 239, 113 S.E. 77 (1922) ..... 8

State v. Nelson, 847 S.E.2d 480 (Ct. App. 2020) ..... 8, 9, 10

State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012) ..... 3

**Constitutional Provisions**

S.C. Const. art. I, § 14..... 8

U.S. Const. amend. VI ..... 8

**Rules**

Rule 7(b), SCRCrimP ..... 7

**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in denying Appellant's motion for a continuance where two material defense witnesses who would have testified that the police began searching the house prior to obtaining a search warrant ignored subpoenas and refused to appear in court for Appellant's motion to suppress the drugs found in the house where Appellant was arrested?

## STATEMENT OF THE CASE

Appellant was indicted by the Anderson County grand jury for trafficking methamphetamine. R. \*. Appellant's trial was held before the Honorable J. Cordell Maddox and a jury from October 14 – 17, 2019. Tr. 1. Appellant was represented by Hadden Lucas and Joey Opperman. Tr. 1. The state was represented by Chelsey Hucker and Mary Holahan. Tr. 1.

The jury found Appellant not guilty of trafficking but guilty on the lesser offense of possession with intent to distribute methamphetamine. Tr. 566, ll. 1 – 25. The judge sentenced Appellant to twelve-years imprisonment. Tr. 573, ll. 1 – 5.

This appeal follows.

### **STANDARD OF REVIEW**

A motion for continuance is addressed to the sound discretion of the trial court and its ruling on such motion will not be reversed without a clear showing of abuse of discretion. State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012).

## STATEMENT OF FACTS

Tara Thomason claimed that on March 12, 2018 she went to a house and sold seventy-nine grams of methamphetamine to Appellant in exchange for one thousand, four hundred dollars. Tr. 313, l. 24 – 318, l. 20. After Thomason left the house, she was pulled over by the police who asked if she had anything illegal in the car. Tr. 320, l. 14 – 321, l. 7. Thomason told the police that there was “paraphernalia” in the car, and they searched the car. Tr. 321, ll. 7 – 8. The police found approximately thirty-eight thousand dollars in cash and some drug residue. Tr. 321, ll. 9 – 17. Thomason told the police that she got the money from selling drugs. Tr. 321, l. 18 – 322, l. 10.

The house where Thomason claimed to have sold methamphetamine to Appellant was under surveillance on March 12, 2018 by the Anderson County Sheriff’s Office for alleged drug activity. Tr. 330, l. 22 – 331, l. 23. Sean Proner testified that while conducting surveillance on the house, he observed numerous vehicles coming and going from the house. Tr. 332, ll. 1 – 2. Proner observed Thomason arrive at the house and get a bag out of her trunk and take it inside the residence. Tr. 333, l. 10 – 334, l. 1.

Stephen Earwood with the Anderson County Sheriff’s Office was also assisting with the surveillance of the residence and he initiated a traffic stop on Thomason after she left the house. Tr. 340, l. 24 – 344, l. 2. After searching Thomason’s car and finding the money, Earwood returned to the house to “secure the residence.” Tr. 346, ll. 14 – 23. Appellant was inside the residence along with several other individuals who were all handcuffed and detained. Tr. 346, l. 23 – 347, l. 13. The officers entered the residence and detained the individuals inside prior to their obtaining a search warrant. Tr. 369, l. 1 – 371, l. 17.

Andres Acevedo, also with the Anderson County Sheriff's Office, obtained a search warrant for the residence after Thomason's car was searched during the traffic stop. The search warrant was executed at 10:27 p.m. Tr. 394, ll. 15 – 25. Acevedo admitted that officers had already entered the residence at 8:55 p.m. to secure the scene while he worked on getting a search warrant. Tr. 414, ll. 11 – 14. Approximately one hundred forty grams of methamphetamine was found in the house during the search. Tr. 307, ll. 7 – 13.

## ARGUMENT

The trial court erred in denying Appellant's motion for a continuance because two material defense witnesses who would have testified that the police began searching the house prior to obtaining a search warrant ignored subpoenas and refused to appear in court for Appellant's motion to suppress the drugs found in the house where Appellant was arrested.

### **Relevant Facts**

Defense counsel moved for a continuance prior to Appellant's trial because two key defense witnesses, Stephen Harris and Dylan Patterson, were ignoring their subpoenas and refusing to come to court. Tr. 36, ll. 4 – 13. Counsel informed the judge that Harris was served with a subpoena on September 17 and Patterson was served on October 10. Counsel had been unable to reach either witness since they were served subpoenas. Tr. 42, ll. 10 – 22.

The assistant solicitor did not object to bench warrants being issued for the defense witnesses and the judge issued bench warrants for both. Tr. 42, ll. 23 – 25. Defense counsel introduced his private investigator's notes from her conversations with Harris and Patterson as Court's Exhibits. Tr. 96, l. 15 – 97, l. 11; R. \* (Court's Ex. 1 and 2 Investigator's notes). Counsel argued that Appellant could not receive a full and fair suppression hearing without the testimony of Harris and Patterson because Harris and Paterson had informed the defense's private investigator that the police had entered the house and searched prior to getting a search warrant. Tr. 97, ll. 1 – 17. This was critical to Appellant's motion to suppress because the law enforcement officers who testified all claimed that they did not search the house until after the search warrant arrived. Tr. 102, ll. 19 – 21; tr. 121, ll. 11 – 19; tr. 131, ll. 3 – 11; tr. 151, ll. 2 – 22; tr. 180, ll. 11 – 25; tr. 188, l. 8 – 192, l. 12; tr. 196, l. 10 – 197, l. 2; tr. 200, l. 7 – 201, l. 8; tr. 211, l. 11 – 212, l. 17.

Defense counsel argued that the drugs found in the home should have been suppressed because they were the fruit of an illegal, warrantless search. Tr. 229, ll. 15 – 24. Counsel pointed out that it was undisputed that the officers entered the home an hour prior to getting a search warrant. Tr. 231, l. 17 – 232, l. 1. Counsel argued that law enforcement did not have exigent circumstances to enter without a warrant. Tr. 232, l. 2 – 239, l. 14.

The judge responded that every officer who testified claimed that no search was done prior to the arrival of the search warrant. Tr. 239, l. 15 – 240, l. 10. The judge then said:

I understand the defense is really hamstrung by the fact that they have two witnesses who said something in the statement *that if they said here would make me pause*, but they decided not to appear and they're apparently actively evading you . . . bench warrants and your subpoena.

Tr. 245, ll. 18 – 24 (emphasis added). The judge denied counsel's motion to suppress and told counsel: "You guys are just hamstrung because everybody that could help you is in the wind."

Tr. 249, ll. 19 – 23.

### **Discussion**

Rule 7 of the South Carolina Rules of Criminal Procedure governs the continuance of a trial based on the unavailability of a witness:

No motion for continuance of trial 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: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Rule 7(b), SCRCrimP. "All components of Rule 7(b), SCRCrimP, including that of the attestation under oath, are strictly required, and a party asking for a continuance must show due

diligence in trying to procure the testimony of the witness, as well as what the party believes the absent witness would testify to and the basis for that belief.” State v. Colden, 372 S.C. 428, 438, 641 S.E.2d 912, 918 (Ct. App. 2007).

If an unavailable witness’ testimony is likely to be cumulative to other evidence already presented, then the absence of that witness “does not supply a strong basis for a continuance.” State v. Nelson, 847 S.E.2d 480, 490 (Ct. App. 2020). Furthermore, “[t]he denial of an opportunity for an accused to present a material witness on his behalf raises serious constitutional concerns.” Id. Both the Sixth Amendment to the U.S. Constitution and Article I, Section Fourteen of the South Carolina Constitution provide that criminal defendants have a right to “compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI; S.C. Const. art. I, § 14. Defendants also have the right to fully present a defense. S.C. Const. art. I, § 14.

“Our courts have long recognized a defendant's constitutional right to compulsory process may be violated if the defendant is forced to go forward in a trial without the presence of a material witness.” State v. Nelson, 847 S.E.2d 480, 491 (Ct. App. 2020). In State v. Dodgens, 120 S.C. 239, 239, 113 S.E. 77, 77-78 (1922), the defendants were charged with the “unlawful manufacture of intoxicating liquors” and moved for a continuance based on the absence of their witnesses who had been subpoenaed. The Dodgens Court recognized the importance of the defendant’s right to present favorable witnesses in ordering a new trial because the defendants were not at fault for the absence of the witnesses and their testimony was material to their case. Id.

Here, it was undisputed that both absent witnesses had been duly served with subpoenas by the defense. Furthermore, the trial judge granted defense counsel’s request for bench

warrants to compel their appearance. However, instead of continuing the trial so that the bench warrants could be served on the witnesses by law enforcement, the judge forced Appellant to move forward without them. This was error because the witnesses' testimony was essential to Appellant's motion to suppress.

In State v. Nelson, 847 S.E.2d 480, 491 (Ct. App. 2020), this Court reversed the trial judge's refusal to grant a continuance due to an unavailable defense witness who was hospitalized after the start of the trial. The defendant in Nelson was charged with murder and this Court found that the unavailable witness was critical to the defendant's claim of self-defense. Id. at 493-494. Specifically, in Nelson, the unavailable witness would have refuted the state's theory that the defendant was the initial aggressor and instead would have testified that the decedent shot at the defendant first. Id. at 488. Because of the unavailable witness' critical importance to the defendant's ability to present a defense, this Court ruled that it was error to not grant the defendant a continuance. Id. at 494-495.

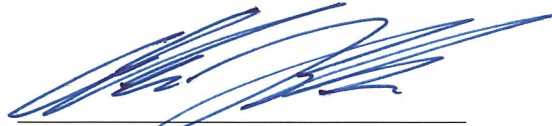
In this case, the time that the search of the house began was a critical and disputed issue. According to the state, law enforcement did not begin to search the house for drugs until after the search warrant was obtained, despite having entered the house and detained everyone inside nearly an hour and a half earlier. The notes that defense counsel gave to the trial judge summarizing Stephen Harris' recollection of the search showed that Harris recalled the officers searching each person individually and then continuing to search the residence immediately. R. \* (Court's Ex. 1). The notes that defense counsel had for Dylan Patterson also indicated that law enforcement began searching right after the occupants were detained. R. \* (Court's Ex. 2).

Defense counsel established that both Harris and Patterson were highly material to the defense because they both contradicted the officers' testimony regarding the timing of the search.

The trial judge even stated that had Harris and Patterson been present to testify, that their testimony “would make [him] pause.” Tr. 245, ll. 18 – 24. The judge also acknowledged that the defense was “hamstrung” by the witnesses’ refusal to appear through no fault of Appellant or counsel. This showed that Appellant was prejudiced by the absence of Harris and Patterson as material witnesses and the judge should have granted a continuance. The judge erred in failing to grant counsel’s request for a continuance and Appellant’s conviction should be reversed. See State v. Nelson, 431 S.C. 287, 847 S.E.2d 480 (Ct. App. 2020).

**CONCLUSION**

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Anderson County Court of General Sessions for a new trial.



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Adam Sinclair Ruffin  
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of October, 2020.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**Oct 21 2020**

**SC Court of Appeals**

Appeal from Anderson County

Honorable J. Cordell Maddox, Circuit Court Judge

THE STATE,

RESPONDENT,

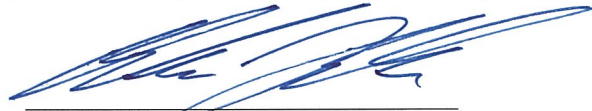
V.

NANCY ELAINE CARSWELL,

APPELLANT

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, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 21st day of October, 2020; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Nancy Elaine Carswell, #373201, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 21st day of October, 2020.



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