

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**SC Court of Appeals**

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

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Appellate Case No. 2017-002204  
Unpublished Opinion No. 2020-UP-290

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The State, .....Respondent,

v.

Phillip Wesley Walker, .....Petitioner.

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**PETITION FOR WRIT OF *CERTIORARI***

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## **CERTIFICATION**

Pursuant to Rule 242(d)(1), SCACR, undersigned counsel certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals. A. 4-8.

## **QUESTIONS PRESENTED**

### ***Question I***

The Court of Appeals erred as a matter of law when it agreed with the State and held Phillip Walker failed to raise this issue to the trial court, and it is therefore unpreserved for appellate review.

### ***Question II***

The trial judge erred by denying trial counsel's motion to continue the trial so Phillip Walker could be present at his jury trial when the trial court 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.

Mr. Walker appealed his convictions and sentences to the Court of Appeals of South Carolina. On March 2, 2020, the Court of Appeals notified counsel the case would be submitted without oral argument. A. 9. On June 5, 2020, the Court of appeals notified counsel of its intent to schedule an oral argument. A. 10. On September 10, 2020, the Court of Appeals convened an oral argument via WebEx. On October 14, 2020, the Court of Appeals affirmed Mr. Walker's convictions and sentences. A. 1-3. On October 29, 2020, Mr. walker petitioned for rehearing. A. 4-5. On December 9, 2020, the Court of appeals denied the petition for rehearing. A. 8. This petition for a writ of *certiorari* 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.”<sup>1</sup> 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<sup>2</sup> 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

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<sup>1</sup> 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, <https://www.sbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-91-02/> (last viewed Jan. 8, 2021).

<sup>2</sup> The prosecution conceded the gun did not work. R. 63.

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.<sup>3</sup> 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.

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

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<sup>3</sup> 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.

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 a 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.

## ARGUMENTS

### *Question I*

**The Court of Appeals erred as a matter of law when it agreed with the State and held Phillip Walker failed to raise this issue to the trial court, and it is therefore unpreserved for appellate review.**

Before the Court of Appeals, Phillip “Walker contend[ed] the trial court erred by denying his continuance motion and trying him in his absence because it did not make findings required by Rule 16, SCRCrimP, that he received: (1) notice of his right to be present at trial *and* (2) a warning he would be tried in his absence if he failed to appear.” *Walker*, at \*1. “The State assert[ed] Walker failed to raise this issue to the trial court, and it is therefore unpreserved for appellate review.” *Id.* The Court of Appeals agreed with the State and held Mr. “Walker’s Rule 16, SCRCrimP objection is not preserved because he did not specifically object to a trial *in absentia* or argue to the trial court that he did not receive notice of the trial or was unaware the trial would proceed in his absence. A motion for a continuance is not in itself enough to preserve a Rule 16, SCRCrimP objection.” *Id.* The court below reasoned Mr. “Walker’s counsel proposed no good cause for a continuance, and therefore, the trial court’s ruling denying his request for one was within the wide bounds discretion sets, and we discern no legal or factual error.” *Id.*

Mr. Walker petitioned for rearing, arguing:

In reaching this conclusion, this Court overlooked the significance of trial counsel arguing, “I move for a continuance based on that my client is not here. The best alternative is for the State to wait and try him when he is here.” R. 4. During this appeal, Mr. Walker contended this statement by trial counsel triggered the requirement that trial judge make the findings of fact required by Rule 16, SCRCrimP and our State’s caselaw. *E.g.*, Final Brief of Appellant, at 1-2, 5-7, and Final Reply Brief of Appellant, at 3. During oral argument, Mr. Walker argued this statement preserved this issue for appeal.

A. \*. The Court of Appeals denied this petition. A. \*.

This Court should consider the issue and reverse the Court of Appeals because this issue was preserved for review. “An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.” *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). “[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.” *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011). “[I]t is incumbent upon the court of appeals [and the circuit courts] to apply this Court’s precedent.” *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016). “Simply because a party does not expressly articulate the relevance of a particular case [or court rule] does not excuse the court of appeals from failing to apply controlling precedent.” *Id.*

As discussed in more detail in Question II, Rule 16, SCRCrimP requires the trial judge to determine an accused’s waiver of the right to be present at trial is “voluntarily” before he “may be tried in his absence.” This rule automatically triggers anytime the prosecution seeks to try an accused in his absence. Trial counsel further triggered this requirement by reminding the trial judge the “best alternative is for the State to wait and try him when he is here.” R. 4. The Solicitor understood Rule 16 was an issue by describing the notice the State claims it provided Mr. Walker.

This Court should grant the writ, consider this issue, reverse the Court of Appeals, and consider the merits of Mr. Walker’s appeal.

## *Question II*

**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 on next page)

## CONCLUSION

For the foregoing reasons, this Court should grant the writ, consider the issues, and reverse the Court of Appeals.

Respectfully Submitted,

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