THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2021-000022
Unpublished Opinion No. 2020-UP-290

The State, ...Respondent,

v.

Phillip Wesley Walker, ...Petitioner.

REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF *CERTIORARI*

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IN REPLY

Phillip Walker replies to the State's Response to his petition for a writ of *certiorari* ("State's Response").

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.

The State's Response, at 7-9, argues Phillip Walker's objection to being tried in his absence is not preserved for appellate review by relying on *State v. Rogers,* which provides:

> It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.

361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (internal quotations and citations omitted).

Trial counsel, however, objected to the State trying Mr. Walker in his absence by requesting "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. Trial counsel renewed the objection and request for a "continuance based on the fact that my client's not here." R. 69. By referring to the "bond card," the Solicitor understood the issue before the trial court included whether Mr. Walker had notice of his trial date, as required by Rule 16, SCRCrimP and our state's caselaw. R. 69-71. The trial judge repeatedly denied trial counsel's request to delay Mr. Walker's jury trial until he could be present.[1] Thus, trial

[1] The Court of Appeals opinion stated:

counsel satisfied the requirements of *Rogers*. *See also State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[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."). "Simply because a party does not expressly articulate the relevance of a particular case does not excuse the court [] from failing to apply controlling precedent." *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016). Controlling precedent required the trial judge "to make findings of fact regarding 1) whether the appellant had received notice of her right to be present, and 2) whether the appellant had been warned

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> 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. *See State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) ("[R]eversals of refusal of continuance are about as rare as the proverbial hens' teeth.").

State v. Walker, No. 2017-002204, 2020 WL 6060438, at *1 (S.C. Ct. App. Oct. 14, 2020). Reliance on this statement in *Lytchfield*—a 1957 case—is not only contrary to our state's trial in the absence precedent, but also contrary to our state's continuance precedent. "In 1980, [this Court] recognized that [t]he authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases." *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012) (internal quotations omitted) (citing *Williams v. Bordon's, Inc.,* 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). "This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." *Id.* 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. Tanner*, 299 S.C. 459, 462-63, 385 S.E.2d 832, 834 (1989) ("the trial court erred in failing to consider the potential exculpatory value of the samples" of DNA that had not been tested). When a defendant demonstrates "other evidence" could have been "produced" if "more time [had] been granted for the purpose of preparing the case for trial," then the continuance should be granted. *Id.,* 299 S.C. at 462-63, 385 S.E.2d at 834 (citing *State v. Squires,* 248 S.C. 239, 149 S.E.2d 601 (1966)). *See also State v. McMillian*, 349 S.C. 17, 561 S.E.2d 602 (2002) (defendant was entitled to continuance of retrial, so he could obtain transcript of first trial, for use in impeaching victim's neighbor). Thus, reversals for denial of a continuance motion are not "as rare as the proverbial hens' teeth." More importantly, as discussed in Question II, denying an accused the Sixth Amendment right to be present at trial is structural error.

that the trial would proceed in her absence upon a failure to attend court." *State v. Jackson*, 288 S.C. 94, 96, 341 S.E.2d 375, 375 (1986); Rule 16, SCRCrimP.

This Court should reverse the Court of Appeals, hold the issue was preserved for appeal, and consider the merits of the 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?

In the Court of Appeals and in his petition for a writ of *certiorari*, Phillip Walker argued the trial court did not make the findings of fact, required by Rule 16, SCRCrimP and out state's caselaw, regarding whether the trial court notified him of his trial date and warned him the trial would proceed in his absence if he failed to appear. On appeal, the State does not contend the trial court made the required findings. Instead, the State points to four portions of the record to suggest Mr. Walker must have had notice of his trial date. These arguments are without merit.

First, the State argues:

> The trial court observed, "[W]hen we met in chambers on Monday, I believe you told me that you had spoken with your client several times last week, were supposed to meet with him . . . on the weekend and did show that you were in communication with his father." R. p. 70, lines 2-9. The trial court mentioned counsel "actually had a call from him last night" and counsel confirmed he did and that he attempted to call him back. R. p. 70, lines 8-16.

State's Response, at 5. Full consideration of the record actually reveals that the call from Mr. Walker was in the middle of the night and not answered by trial counsel. Trial counsel also informed the trial court that Mr. Walker's father had "not been able to get in touch

with" his son. R. 70. Thus, nothing about this statement indicates Mr. Walker had actual notice of his trial date.

Second, the State argues:

> The prosecution noted, "[W]e 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. p. 70, lines 20-24.

State's Response, at 5. As argued in the petition for a writ of *certiorari*, at 2-3, 9, the Solicitor was not under oath, the "bond card" was not entered into the record, and this procedure likely violated the rules of professional responsibility.[2] Additionally, the record does contain any information that the "bond card" was properly addressed or mailed to Mr. Walker's last known address in order to create an inference that Mr. Walker received the mailing. *See, e.g., State v. Fairey*, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007) (accused received proper notice of trial date when notice was sent to last known permanent address); *Foster v. Ford Motor Credit Co.*, 302 S.C. 450, 452, 395 S.E.2d 440, 441 (1990) (to get inference that letter was received by addressee requires "[e]vidence that a letter is properly addressed and mailed").

Third, the State contends trial counsel "admitted" at sentencing that Mr. Walker knew he was supposed to be at trial but "decided that he was going to try to get himself together before he had to face this sentence" by admitting himself into a substance abuse rehabilitation program in Texas. State's response, at 6 (citing R. 228-30). Knowing he was supposed to be at his trial does not establish Mr. Walker had actual notice of the trial date. In fact, full consideration of the record reveals that Mr. Walker had disappeared prior to

[2] Rule 4.2, RPC of Rule 408, SCACR. S.C. Bar Ethics Opinion 91-02, https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-91-02/ (last viewed Jan. 31, 2021).

trial and, "Nobody heard from him." R. 228-29. This portion of the record supports a finding that Mr. Walker did not have actual knowledge of his trial date.

Fourth, the State relies on standard language contained in the Bail Processing Form, that was filed with the Clerk of Court but not presented to the trial judge. State's Response, at 4, 9. Although this form notified Mr. Walker of his right to be present at his trial and the possibility that he could be tried in his absence, this form did not place Mr. Walker on actual notice of his trial date. Mr. Walker was arrested on December 16, 2015. His trial was not until December 5 and 7, 2016. This Court can take judicial notice that Court Administration does not publish the terms of court a year in advance. Additioanlly, the bond form issued to Mr. Walker was approved by the Attorney General on September 5, 2006. Suppl. R. 1-2. This form was out of date by the time of Mr. Walker's arrest because it did not represent the change in practice in General Sessions Court after "[t]he sixteen Judicial Circuit Solicitors agree[d] to develop with the Chief Justice and implement criminal case management systems in each county throughout the State of South Carolina." S.C.S.Ct. Order 2007-01-01-01.[3]

Thus, the record before this Court does not support the State's contention that Mr. Walker had actual notice of his trial date.

Finally, the State argues, "[A]ny error by the trial court is harmless and Walker was not prejudiced by his absence." The Court of Appeals rejected a similar argument in *State v. Wrapp*, holding:

> The State urges us to find any error in this process was harmless. However, we need not undertake a harmless error analysis when, as here, the trial court

[3] https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2007-03-01-01 (last viewed Jan. 31, 2021). The more recently approved forms currently in use still do not consider the appearance system currently in use throughout our state.

> erred in failing to make the requisite findings and the record is devoid of facts allowing us to discern whether Wrapp had notice of the term of court.

421 S.C. 531, 537, 808 S.E.2d 821, 824 (Ct. App. 2017). No doubt, the Court of Appeals reached this conclusion in *Wrapp* because the denial of the Sixth Amendment right to be present at trial constitutes structural error not subject to a harmless error analysis. *See, e.g., State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013) (deprivation constitutional right to testify in his or her defense at trial is structural error); *State v. Wright*, No. 2017-002130, 2020 WL 6751312 (S.C. Ct. App. Nov. 18, 2020) (denial of a defendant's substantial right to an individual poll of each juror in open court is structural error).

CONCLUSION

For the reasons set forth in the petition for a writ of *certiorari* and this pleading, this Court should grant the writ, consider the issues, reverse the Court of Appeals, and remand for a new trial. Phillip Walker's case provides this Court the perfect vehicle to address the practice of the Solicitor—not the court—providing notice of trial to and the sufficiency of the standard bond forms for providing notice under our State's modern General Sessions Court practice.

Respectfully Submitted,

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