STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
Honorable D. Craig Brown, Circuit Court Judge
Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2019-002068

THE STATE,

Respondent,

vs.

ELIZABETH LEANNE HOWZE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

Post Office Box 607
Lancaster, SC 29721
(803) 416-9367

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by denying defense counsel's requests for a continuance and the issuance of a bench warrant in order to locate Appellant for trial and, instead, proceeding with Appellant's trial in absentia when the record did not show Appellant had notice of what day the trial would go forward?

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his broad discretion by denying defense counsel's continuance request and proceeding forward with Appellant's trial even though Appellant failed to appear when—just as the trial judge recognized—Appellant was fully aware of her right to be present for trial, the term of court during which her trial was scheduled to be held, and the fact her trial would proceed forward without her if she failed to appear and, therefore, validly waived her right to be present by knowingly and voluntarily failing to appear as required?

STATEMENT OF THE CASE

In June of 2019, Appellant Elizabeth Leanne Howze was arrested after she sold methamphetamine to a confidential informant working directly with law enforcement several months earlier. In October of 2019, the Chester County Grand jury indicted Appellant for one count of distribution of methamphetamine along with one count of distribution or possession with intent to distribute of a controlled substance near a school. On November 5, 2019, Appellant's case was called to trial before a jury in the Chester County Court of General Sessions with the Honorable D. Craig Brown, circuit court judge, presiding. However, Appellant was not present at that time, and the trial proceeded forward in her absence. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant and sealed the sentence. Subsequently, Appellant was apprehended, and, on December 2, 2019, a sentencing hearing was conducted in the Chester County Court of General Sessions with the Honorable Brian M. Gibbons, circuit court judge, presiding. During the hearing, the sentencing judge unsealed Appellant's sentence and imposed a seventeen-year term of imprisonment for the distribution of methamphetamine conviction along with a concurrent ten-year term of imprisonment for the proximity-related conviction.[1] Following imposition of the sentence, Appellant quickly sought for it to be reconsidered, and the sentencing judge granted Appellant's request by reducing her sentence for distribution of methamphetamine to a twelve-year term of imprisonment. Appellant then timely filed a notice of appeal.

[1] As was readily conceded by defense counsel, Appellant's distribution of methamphetamine conviction qualified as a third or subsequent drug offense based on Appellant's multiple prior convictions for other drug offenses, including distribution of cocaine base, possession of marijuana with intent to distribute, and possession of cocaine. (R. pp. 103-105).

STATEMENT OF FACTS

On the afternoon of January 10, 2019, Lieutenant Ricky Sanders of the Chester Police Department met with Christy Burrell, searched both her and her vehicle, and provided her with money to use to complete a controlled purchase of narcotics. (R. pp. 40-43; p. 47; pp. 51-52; p. 56; State's Ex. # 4 (Recording of Transaction)). At that time, Burrell had pending criminal charges and was working as a confidential informant in hopes of obtaining some non-guaranteed form of assistance with her charges. (R. p. 49; pp. 55-56; pp. 58-59; p. 61).

Upon receiving the money from the officer, Burrell drove her vehicle to the parking lot of a nearby Dollar General store located in Chester, South Carolina. (R. p. 44; p. 56; State's Ex. # 4). When she arrived, Appellant quickly got into the vehicle, and Burrell drove off with Appellant inside. (R. pp. 43-44; p. 56; State's Ex. # 4). After that, Burrell handed over some money to Appellant, and, in exchange, Appellant gave Burrell a plastic baggie, which—according to Appellant—contained "good shit." (R. pp. 56-57; State's Ex. # 4).

Following that transaction, Burrell dropped Appellant off near a gas station and then met back up with Lieutenant Sanders.[2] (R. p. 44; State's Ex. # 4). When she did so, Lieutenant Sanders again searched both Burrell and her vehicle while also taking possession of the substance Appellant had sold to Burrell. (R. pp. 44-45; p. 57). The officer then conducted a field test on that substance, and it tested positive for the presence of methamphetamine. (R. p. 46).

A few months later, Appellant was arrested in connection to her distribution of methamphetamine to Burrell. (R. pp. 47-48). Thereafter, bond was set for Appellant, and

[2] Prior to being dropped off, Appellant showed Burrell a pipe she was carrying on her person and further candidly advised Burrell she had recently been making a large amount of money selling fentanyl. (State's Ex. # 4).

Appellant was able to obtain release on bond before her case was called to trial. (R. p. 47; pp. 130-131). Notably, before being released on bond, Appellant personally signed bond paperwork confirming: (1) she was required to appear in the Chester County Court of General Sessions for the term of court scheduled to begin on August 29, 2019; (2) if her case was not resolved during that particular term of court, she was required to "appear and remain throughout each succeeding term of court until final disposition is made of his case, unless otherwise ordered by the court;" (3) she understood she had a right and obligation to be present at trial; and (4) her trial would proceed in her absence if she failed to attend. (R. pp. 50-51; pp. 130-131).

Shortly after Appellant obtained release on bond, she was indicted for multiple drug charges in connection to her transaction with Burrell. (R. p. 6; pp. 122-125; pp. 130-131). Thereafter, on October 19, 2019, Appellant appeared before a circuit court judge and was advised she needed to be present for the term of court beginning on November 4, 2019, because her case was first up for trial at that time. (R. p. 2). In response, Appellant confirmed to the circuit court judge she understood and would be present as directed "with [her] bells on and ready to go." (R. pp. 2-3).

Subsequently, at the scheduled term of court, Appellant's case was called to trial, but Appellant was not present for it. (R. p. 6; p. 15). In response, defense counsel alerted the trial judge Appellant had been advised on the record her case would be called for trial during that term of court and had also been alerted by the probation office she needed to be present that week.[3] (R. pp. 15-16). However, defense counsel indicated he had been unsuccessful in getting in touch with Appellant and asked the trial judge to "consider delaying the case" so he could

[3] Specifically, as to Appellant's notice regarding her trial date, defense counsel affirmed: "[Appellant] was advised on the record in front of the judge in open court that she would be first up for trial for this term." (R. p. 15).

discuss the matter further with her. (R. p. 16). Following defense counsel's remarks, the solicitor asserted the trial should proceed forward in Appellant's absence because Appellant had received notice of the trial date from multiple sources and had been advised of the consequences of her failure to appear through the bond paperwork. (R. p. 16).

Upon reviewing the bond paperwork and considering the remarks of defense counsel and the solicitor, the trial judge found Appellant had been advised her case was scheduled for trial during the current term of court and had affirmed she understood the consequences of failing to appear for trial. (R. pp. 19-20). Based on that, the trial judge denied defense counsel's request for a delay. (R. p. 20). However, he issued a bench warrant for Appellant's arrest, requested all possible efforts be made to locate her, and recessed the matter for the remainder of the day so efforts could be made to potentially locate her before her trial progressed. (R. p. 17; p. 20).

On the following day, Appellant again failed to appear for trial, and, due to her absence, defense counsel requested a continuance. (R. pp. 24-25). In response, the trial judge noted defense counsel's request but elected to proceed forward with the trial based on the findings that had been made "concerning [Appellant] voluntarily choosing not to be [t]here." (R. pp. 25-26).

Subsequently, during the course of trial, Lieutenant Sanders and Burrell discussed the details of Burrell's transaction with Appellant, and a covertly-made recording of the transaction was admitted into evidence and played for the jury. (R. pp. 40-61). Furthermore, expert testimony was presented establishing the substance Appellant provided to Burrell during the recorded transaction constituted just under a half gram of methamphetamine. (R. pp. 67-72). Ultimately, following the presentation of that testimony and evidence, the jury convicted

Appellant as indicted, and the trial judge imposed a sentence that was promptly sealed.[4] (R. p. 101; pp. 108-109).

Thereafter, roughly a month later, Appellant was apprehended and brought before a sentencing judge, and her sentence was unsealed. (R. p. 112). Once that had occurred, defense counsel quickly moved for the sentence to be reconsidered, and Appellant candidly admitted to the sentencing judge she knew she had "messed up" by not coming to court. (R. p. 112; p. 118). Appellant further claimed she had simply gotten mixed up with "the wrong crowd." (R. p. 118). The sentencing judge then reconsidered Appellant's sentence and imposed an aggregate twelve-year term of imprisonment for her crimes.[5] (R. p. 119).

[4] Throughout the trial, the trial judge advised the jury on multiple occasions Appellant's absence could not be considered against her in any manner. (R. p. 27; p. 86).

[5] At that time, Appellant was on probation for five other drug offenses, and the sentencing judge revoked Appellant's probation in full for violating the terms of her probation while further ordering she serve a concurrent—and suspended—six-year term of imprisonment for the violation. (R. pp. 114-115).

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. State v. Ravenell, 387 S.C. 449, 454, 692 SE.2d 554, 557 (Ct. App. 2010). When carrying out such review, the appellate court is bound by the trial judge's factual findings unless those findings are clearly erroneous. Id. As a result, the appellate court will not re-evaluate the facts based on its own view of the evidence and, instead, will simply determine whether the trial judge's ruling is supported by any evidence. State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006).

ARGUMENT

The trial judge did not abuse his broad discretion by denying defense counsel's continuance request and proceeding forward with Appellant's trial even though Appellant failed to appear because—just as the trial judge recognized—Appellant was fully aware of her right to be present for trial, the term of court during which her trial was scheduled to be held, and the fact her trial would proceed forward without her if she failed to appear and, therefore, validly waived her right to be present by knowingly and voluntarily failing to appear as required.

Appellant contends the trial judge reversibly erred by denying defense counsel's "reasonable" continuance request and conducting Appellant's trial in her absence. In support of that contention, Appellant maintains the record purportedly did not support a finding Appellant knew the "day" on which her trial would go forward and, instead, only demonstrated she had been advised it would go forward during the next term of court. Although not completely clear, Appellant further appears to maintain she did not have sufficient notice of the consequences of failing to appear for trial. Based on that, Appellant contends the record cannot support a conclusion she knowingly and voluntarily waived her right to be present for trial.[6] To the contrary, the trial judge correctly found Appellant had all the required notice regarding her right to be present for trial, the term of court during which her trial was scheduled to be held, and the consequences of her failure to appear before proceeding with the trial in Appellant's absence, and the trial judge's factual findings in that regard were fully supported by the assertions of defense counsel and the solicitor, the information contained in Appellant's bond paperwork, and Appellant's own direct acknowledgements during a pre-trial hearing held just a few weeks

---

[6] In her statement of the issue being raised on appeal, Appellant additionally appears to fault the trial judge for purportedly refusing defense counsel's request for a bench warrant to be issued. (App. Br. p. 1; p. 4). To the extent Appellant is raising such a contention, it is a puzzling one since the trial judge did, in fact, issue a bench warrant for Appellant's arrest almost immediately after defense counsel requested he do so and recessed the case for the remainder of the day to ensure there was an opportunity for Appellant to potentially be located. (R. pp. 15-17; pp. 19-20).

before her trial began. As a result, the trial judge did not abuse his discretion or commit any other conceivable error by denying defense counsel's continuance request and proceeding forward with the trial in Appellant's absence since Appellant validly waived her right to be present for trial by knowingly and voluntarily failing to appear as required. Appellant's convictions should be affirmed.

In South Carolina, trial judges are vested with broad discretion when faced with a decision as to whether to grant or deny a motion for a continuance, and such decisions are ordinarily entitled to and afforded the highest degree of deference. State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005); see State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966) ("It is well settled in this jurisdiction, as well as in most others, that the trial court's refusal of a motion for continuance in a criminal case will not be disturbed in the absence of a clear and conclusive abuse of discretion."). As a result, reversals of continuance decisions "are about *as rare as the proverbial hens' teeth*" in our state. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) (emphasis added).

Meanwhile, a criminal defendant unquestionably has a constitutional right to be present for trial coupled with a corresponding legal obligation to appear at the time set for the trial. See 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."); State v. Holloway, 262 S.C. 552, 556, 206 S.E.2d 822, 824 (1974) ("A person charged with crime is required to appear at the time set for trial, and he can not be permitted to absent himself for any reason which he chooses."); City of Aiken v. Koontz, 368 S.C. 542, 546, 629 S.E.2d 686, 688 (Ct. App. 2006) (recognizing a criminal defendant has a constitutional right to be present for trial); Patterson, 367 S.C. at 230, 625 S.E.2d at 244 ("The right to be present at

trial is not the right to be absent from trial."). However, in South Carolina, a defendant may voluntarily waive her right to be present for trial by failing to appear and may be tried in her absence if she fails to appear for trial after receiving notice regarding: (1) her right to be present; and (2) the consequences of her failure to attend. See Rule 16, SCRCrimP ("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."); State v. Green, 269 S.C. 657, 662, 239 S.E.2d 485, 487 (1977) ("The right to be present at trial, like many other constitutional rights can be waived if done 'voluntarily' and 'knowingly'.").

Notably, in State v. Wright, 304 S.C. 529, 531, 405 S.E.2d 825, 826 (1991), Wright was not present for his trial on a charge of distributing cocaine. At the outset of trial, Wright's defense counsel moved for a continuance, asserting he had recently been in contact with Wright and believed Wright could potentially be located. Id. at 532, 405 S.E.2d at 827. Nevertheless, despite Wright's counsel's assertions, the trial judge denied the continuance motion and elected to proceed forward with the trial in Wright's absence. Id. Subsequently, following his conviction, Wright appealed, contending the trial judge erred by denying the continuance motion. Id. Ultimately though, on appeal, the Supreme Court disagreed with Wright's contention and affirmed the trial judge's decision to proceed forward with the trial in absentia due to the fact the record reflected Wright was aware of the term of court in which he was set to be tried and knew he would be tried in his absence if he failed to appear for trial. Id.

In the case sub judice, Appellant—just like the defendant in Wright—indisputably received notice of her right to attend her trial, the exact term of court during which her trial was scheduled to take place, and the consequences of her failure to appear for trial from multiple sources before her trial got underway. More specifically, as to her right to be present for the trial, Appellant directly acknowledged she understood she had such a right on her bond paperwork before she was released from pre-trial custody, and she certainly was not an ingénue to the criminal justice system such that there could be any legitimate reason to question her understanding of that straightforward right. See State v. Fairey, 374 S.C. 92, 101, 646 S.E.2d 445, 449 (Ct. App. 2007) ("A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice."); cf. Graves v. State, 309 S.C. 307, 310, 422 S.E.2d 125, 127 (1992) (considering Graves's "extensive criminal background" when reviewing a determination of whether Graves validly waived one of his constitutional rights). Likewise, as to when she needed to appear for trial, Appellant's bond paperwork advised her of her obligation to appear at a specified term of court along with all subsequent terms of court until her case was resolved. Fairey, 374 S.C. at 101, 646 S.E.2d at 449; see State v. Goode, 299 S.C. 479, 482, 385 S.E.2d 844, 845-846 (1989) ("General notice given by courts of general session as to which term an individual will be tried in, is sufficient to enable that individual to effectively waive his right to be present."); Holloway, 262 S.C. at 556, 206 S.E.2d at 824 ("The bond signed by the accused and appellant required the accused to appear at the next term of the Court of General Sessions. The accused was under a legal duty to appear in accordance with the condition of the bond, *without further notice to him* or appellant, his surety." (emphasis added)). However, even if the notice from the bond paperwork regarding the time at which Appellant was required to appear for trial had somehow been inadequate, Appellant also appeared in front of a circuit court judge

and personally confirmed on the record she understood she needed to be present for trial at the *exact* term of court during which her trial was conducted. See State v. Jackson, 290 S.C. 435, 436, 351 S.E.2d 167, 167 (1986) ("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."); Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976) ("In our courts of general sessions, defendants are generally only given notice of the term of court in which they will be tried and do not know the exact date and time of their trial until shortly before the trial begins. We think such notice is sufficient to enable a defendant to make an effective waiver of his right to be present at his trial."). Based on that direct notice coupled with defense counsel's confirmation to the trial judge regarding Appellant's receipt of that notice, there can be no legitimate question Appellant had all the notice to which she was entitled regarding when her trial was set to be held. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal). Finally, as to her notice regarding the consequences of her failure to appear, Appellant's bond paperwork again provided such notice, and Appellant personally signed that paperwork to affirm she understood it. See Ravenell, 387 S.C. at 456, 692 S.E.2d at 558 ("[A] bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear."); Koontz, 368 S.C. at 548, 629 S.E.2d at 689 (holding Koontz had notice of the consequences of failing to appear for trial where he signed an acknowledgment on an order specifying methods and conditions of release indicating he understood his trial would proceed in his absence if he failed to appear for trial).

Recognizing Appellant received all the notice needed for her to be able to knowingly exercise her right to be present for trial, the trial judge specifically found Appellant was aware of

her right to be present, the term of court during which her trial was scheduled to be held, and the fact her trial would proceed forward without her if she failed to appear, and those findings supported a determination Appellant voluntarily waived her right to be present for trial by failing to appear as required. Cf. Koontz, 368 S.C. at 549, 629 S.E.2d at 690 ("The municipal judge fully complied with the mandates of Rule 16, SCRCrimP. The trial court correctly proceeded with a trial in Koontz's absence after making appropriate factual findings on the issue of whether Koontz had notice of the trial and whether he was warned the trial would proceed in his absence."). Moreover, after she was apprehended and brought before the sentencing judge, Appellant did *not* personally suggest she was absent from trial for some involuntary reason or was missing any of the notice needed for a proper trial in absentia to be conducted and, instead, simply acknowledged she knew she had erred by not coming to the trial. Cf. Ravenell, 387 S.C. at 456, 692 S.E.2d at 457 (affirming the trial judge's decision to proceed forward with a trial in absentia when Ravenell did not raise any issue with the trial "following his apprehension and return to court"). Therefore, nothing suggested Appellant's knowing failure to appear for trial was anything but voluntary on her part. See State v. Eskew, 211 S.C. 565, 568, 34 S.E.2d 767, 768 (1945) ("It was [the defendant's] duty to comply with the provisions of the bond and *in the absence of a proper showing* will be charged therewith." (emphasis added)); see also State v. Cassidy, 567 N.W.2d 707, 710 (Minn. 1997) ("Clearly, a defendant bears the burden of showing that his or her absence from trial was involuntary. That burden is a heavy one to meet, and rightly so. Our judicial system could not function if defendants were allowed to pick and choose when to show up for trial.").

Accordingly, because Appellant validly waived her right to be present by knowingly and voluntarily failing to appear for her trial as required without justification or excuse, the trial

judge committed no conceivable error by denying defense counsel's continuance request and conducting the trial in absentia, and the trial judge's decision in that regard is fully supported by everything contained in the record. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) ("The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion."); cf. Wright, 304 S.C. at 532, 405 S.E.2d at 827 (finding no abuse of discretion in the denial of Wright's continuance motion raised before Wright's trial in absentia because the record reflected Wright was aware of the term of court in which his case was set to be tried and was aware the trial would proceed forward in his absence if he failed to appear). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

BY: _____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

February 5, 2021

RECEIVED
Feb 05 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
Honorable D. Craig Brown, Circuit Court Judge
Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2019-002068

THE STATE,

Respondent,

vs.

ELIZABETH LEANNE HOWZE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

BY: _____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

February 5, 2021