The Supreme Court of South Carolina

In the Matter of J. William Ray, Deceased.

Appellate Case No. 2017-001649

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition advising the Court that J. William Ray, Esquire, passed away on March 18, 2017, and requesting the appointment of the Receiver, Peyre T. Lumpkin, to protect the interests of Mr. Ray's clients pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition is granted.

IT IS ORDERED that Mr. Lumpkin is hereby appointed to assume responsibility for Mr. Ray's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) maintained by Mr. Ray. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Ray's clients. Mr. Lumpkin may make disbursements from Mr. Ray's trust account(s), escrow account(s), operating account(s), and any other law office account(s) maintained by Mr. Ray that are necessary to effectuate this appointment.

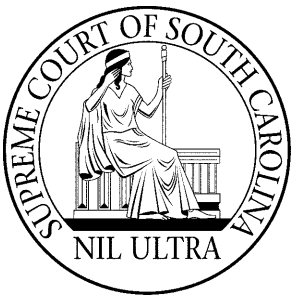
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Ray, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Ray's mail and the authority to direct that Mr. Ray's mail be delivered to Mr. Lumpkin’s office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Donald W. Beatty C.J.

Columbia, South Carolina
August 9, 2017



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
August 16, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Renwick D. Mose, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-000609

ON WRIT OF CERTIORARI

Appeal From Williamsburg County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 27732
Submitted February 9, 2017 – Filed August 16, 2017

REVERSED AND REMANDED

Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Julie Amanda Coleman, of Columbia, for Respondent.

CHIEF JUSTICE BEATTY: We granted certiorari to review the dismissal

of Renwick Mose's application for Post-Conviction Relief (PCR). Mose contends that, although the Clerk of Court formally stamped his application as "filed" three days after the statute of limitations period ended, he complied with the one-year statute of limitations because he delivered his application to prison authorities for mailing within one year of the date of his conviction.[1] Mose now seeks reversal of the PCR judge's ruling so that he may receive a PCR hearing on the merits of his application. We reverse and remand.

I. Factual / Procedural History

On March 7, 2013, Mose pled guilty to the lesser-included offense of burglary in the second degree and as indicted for assault and battery in the first degree, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). The plea judge sentenced Mose to twelve years' imprisonment for burglary and ten years' imprisonment for assault and battery, to be served concurrently. Mose did not appeal his guilty plea or sentences.

In a PCR application, dated February 18, 2014, Mose alleged that he was denied due process, effective assistance of counsel, and his right to a speedy trial. The Verification and Application to Proceed Without Payment of Costs both indicate they were sworn to and subscribed before a notary public on February 18, 2014. However, Mose's PCR application was stamped "filed" by the Williamsburg County Clerk of Court on March 10, 2014.

The State filed a Return and moved to dismiss Mose's PCR application, arguing that the application was barred by the one-year statute of limitations as provided by section 17-27-45(A) of the South Carolina Code (2014). By order dated

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[1] Section 17-27-45(A) of the South Carolina Code provides that:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A) (2014).

October 1, 2014, the PCR judge issued a Conditional Order of Dismissal, which allowed Mose twenty days to submit factual or legal reasons why his application should not be dismissed.

Mose filed a response in which he maintained he placed the PCR application in the prison mailbox on February 18, 2014, the day the PCR application was notarized. Mose asserted the application was deemed "filed" at the time it was mailed pursuant to the "prison mailbox rule" as enunciated in *Houston v. Lack*, 487 U.S. 266 (1988). Mose also attached an affidavit in which he stated an associate warden at the prison investigated the date Mose submitted his PCR application and discovered the application was mailed on February 18, 2014, and the envelope used to mail the application contained the same date.[2]

By order dated February 5, 2015, the PCR judge summarily dismissed Mose's PCR application, finding Mose filed it outside of the one-year statute of limitations.

II. Standard of Review

In PCR actions, the burden of proof is on the applicant. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). "This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed *de novo*, and we will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

"Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005); S.C. Code Ann. § 17-27-70(b), (c) (2014). When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. *Leamon*, 363 S.C. at 434, 611 S.E.2d at 495. When reviewing the propriety of a dismissal, an appellate court must view the facts in the same fashion. *Id.*

[2] The record does not include the envelope or an affidavit from the associate warden.

III. Discussion

A. Arguments

In challenging the PCR judge's order, Mose contends the judge erred in finding Mose's PCR application was filed outside of the one-year statute of limitations. Mose maintains he complied with the statute of limitations when he signed, notarized, and placed his PCR application in the prison mail room on February 18, 2014, seventeen days prior to the filing deadline. Mose argues that regardless of the calculations, he "clearly made a good faith effort to meet the deadline." Furthermore, Mose asserts three days is a minimal time lapse when viewed in light of the overall intent of the PCR statutory scheme. In sum, Mose contends the dismissal of his PCR action based on filing three days late was unfair, unreasonable, and in violation of the spirit of the PCR statutory boundaries regarding filing deadlines.

Alternatively, Mose maintains he is entitled to equitable tolling of the statute of limitations because he placed his application in the mail seventeen days prior to the deadline but "due to no fault of his own, his PCR application did not leave the [South Carolina Department of Corrections] mailroom in time to reach the [Clerk of Court]" before the one-year deadline passed. Consequently, Mose asserts that because of "the totality of the circumstances surrounding [Mose's] pursuit of his PCR action, a sense of fundamental fairness would require that [Mose] be afforded the benefit of his PCR action filed in his case."

In response, the State argues that, similar to *Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008),[3] the PCR judge properly dismissed Mose's PCR

[3] In *Pelzer*, the applicant notarized and mailed his application before the statute of limitations expired, but mailed it to the Office of Appellate Defense instead of to the county Clerk of Court. 378 S.C. at 518, 662 S.E.2d at 619. The Office of Appellate Defense forwarded it to the county Clerk of Court, but it was not received by the Clerk until after the statute of limitations had expired. *Id.* at 518-19, 662 S.E.2d at 619. The circuit court dismissed the application as untimely. *Id.* at 519, 662 S.E.2d at 619. The Court of Appeals affirmed, finding that mailing did not constitute filing and "the narrow window by which Pelzer's application missed the statute of limitations [could not] be considered as so exceptional a circumstance as to warrant equitable tolling." *Id.* at 522, 662 S.E.2d at 621.

application as untimely. The State maintains that Mose "has offered no proof that the application was placed in the mailroom on [February 18, 2014] or when it was postmarked or stamped."[4] According to the State, the only date that is certain is the date the application was filed with the Clerk of Court, March 10, 2014. Furthermore, the State contends Mose has not alleged any wrongdoing by the State, or the Clerk of Court, and has failed to show any circumstances extraordinary enough to warrant equitable tolling of the one-year statute of limitations. Finally, the State asserts Mose has failed to show any basis on which a deviation from the statute should be allowed.

B. Untimely Filing Determination

This Court has held that mailing does not constitute filing of a PCR application for statute of limitations purposes. *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001). Rather, the application is deemed "filed" when it is delivered to and received by the Clerk of Court. *Id*.

In *Gary*, the petitioner pled guilty to murder and was sentenced to thirty years' imprisonment on October 25, 1995. *Id.* at 628, 557 S.E.2d at 663. No direct appeal was taken. *Id*. On November 5, 1996, the petitioner filed a PCR application asserting that he was indigent and alleging trial counsel was ineffective in advising him to plead guilty. *Id.* In response, the State filed a motion to dismiss on the ground the action was barred by the one-year statute of limitations provided in section 17-27-45(A). *Id.* At the hearing, the petitioner, who appeared *pro se*, explained to the PCR judge that he mailed his application within the one-year statute of limitations, but claimed he mistakenly addressed it to "the wrong place" and "by the time it came back, it was too late." *Id*. at 629, 557 S.E.2d at 663. No other evidence was introduced. *Id*. The PCR judge summarily dismissed the application as untimely. *Id*.

On appeal, this Court determined that mailing of the application was not sufficient under section 17-27-45(A), and declined to address the petitioner's unpreserved argument that "equitable tolling" of the statute of limitations should have been allowed. *Id.* The Court, however, "express[ed] no opinion on the validity of [the equitable tolling] defense to the statute of limitations." *Gary*, 347 S.C. at 629

[4] Mose alleged in his affidavit that an associate warden investigated the matter and determined that Mose's PCR application was mailed on February 18, 2014.

n.2, 557 S.E.2d at 663 n.2. Ultimately, the Court found the petitioner's hearing inadequate and remanded the case for appointment of counsel and an evidentiary hearing regarding the petitioner's claim of equitable tolling of the one-year statute of limitations. *Id*. at 629-30, 557 S.E.2d at 663-64.

Although *Gary* created the bright-line rule that mailing does not equate to filing, our decision did not foreclose the application of the doctrine of equitable tolling in the context of PCR. Since *Gary*, our appellate courts have permitted equitable tolling in some cases. Notably, this Court has determined the statute of limitations shall be equitably tolled where "'circumstances preventing a petitioner from making a timely filing [are] both beyond the petitioner's control and unavoidable despite due diligence.'" *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (quoting *Commonwealth v. Carneal*, 274 S.W.3d 420, 429 (Ky. 2008)) (holding that PCR applicant's failure to timely file due to mental incompetency warranted equitable tolling of the statute of limitations); *cf. Pelzer*, 378 S.C. at 522, 662 S.E.2d at 621 (determining equitable tolling was not warranted where inmate missed filing deadline due to mailing application to wrong venue).

Now, we must determine whether the statute of limitations should be tolled where the filing of a PCR application is delayed due to the processing of documents by prison authorities. As will be discussed, we are persuaded by the rationale behind the "Prison Mailbox Rule" and, therefore, hold that equitable tolling may be applied in this context if the defense is properly raised and the circumstances warrant.

C. "Prison Mailbox Rule"

In *Houston*, petitioner (acting *pro se*) drafted a notice of appeal from the dismissal of his habeas corpus petition. *Houston v. Lack*, 487 U.S. 266, 268 (1988). Twenty-seven days after the judgment was entered, petitioner submitted the notice to prison authorities for mailing to the district court. *Id.* The date of submission was noted in the prison log for outgoing mail. *Id.* Although there was no evidence of when the clerk of the district court received the notice, the notice was stamped "filed" by the district court clerk thirty-one days after the adverse judgment was entered—one day after the thirty-day filing period set forth in Rule 4(a)(1)(A), Federal Rules of Appellate Procedure (providing that a notice of appeal must be filed within thirty days after a judgment is rendered). *Id.* at 268-69. Without suggesting the notice of appeal was untimely, the District Court issued a certificate of probable cause to

establish federal appellate jurisdiction. *Id.* at 269. Thereafter, the United States Court of Appeals for the Sixth Circuit dismissed the appeal as untimely. *Id.* The United States Supreme Court reversed, holding the notice was filed at the time petitioner delivered it to prison authorities for mailing. *Id.* at 276.

Houston established a bright-line rule premised on equal treatment, and sought to ensure inmates were not adversely affected by delays other litigants might readily overcome. *Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 735 (4th Cir. 1991). In *Houston*, the Supreme Court sympathized with inmates' lack of choice in submitting court documents, as well as inmates' inability to monitor the process of the mail. *Houston*, 487 U.S. at 271. Moreover, the Supreme Court noted the unlikeliness, due to inmates' confinement, of proving whether the delay is attributable to prison authorities, slow mail, or late stamp by the court clerk. *Id.* Addressing concerns over uncertainty, the Supreme Court stressed that prison authorities maintain records of outgoing inmates' mail, and could readily address inmates' assertions that mail was submitted to prison authorities on a different date. *Id.* at 276. Furthermore, the Court stated, "[r]elying on the date of receipt, by contrast, raises such difficult to resolve questions as whether delays by the United States Postal Service constituted excusable neglect and whether a notice stamped 'filed' on one date was actually received earlier." *Id.* at 275. Ultimately, the Supreme Court emphasized that, unlike most litigants, inmates' control over the processing of documents ceases upon delivery to prison authorities, not receipt by the clerk. *Id*.

Having considered the rationale articulated in *Houston v. Lack,* we conclude that the unique conditions of incarceration require a holding that the statute of limitations should be tolled if the circumstances warrant. Our decision in no way eliminates the rule created in *Gary* or absolves inmates from complying with the one-year statute of limitations. In fact, we expressly decline to adopt a rule that automatically deems a PCR application "filed" on the date an applicant claims it was delivered to prison authorities. Instead, if a PCR applicant relies on the defense of equitable tolling in response to a motion to dismiss, the applicant must substantiate that the correct and complete application was delivered to prison authorities prior to the expiration of the statute of limitations and that any delay in the Clerk of Court's receipt of the application was due to processing. If the PCR judge determines that the applicant has presented a valid defense, then the statute of limitations shall be tolled until the application is delivered to and received by the Clerk of Court.

Notably, tolling the statute of limitations in circumstances in which an

applicant demonstrates the failure to timely file for PCR was due to no fault of his own "does not create an exception by which incarcerated litigants may avoid time restrictions." *Lewis*, 947 F.2d at 736. Instead, it provides PCR applicants with functionally equivalent time bars and seeks to ensure equal access to the courts for all. *Id.*; *see Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) ("Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness."(internal quotation marks and citations omitted)).

Furthermore, tolling the statute of limitations in this manner not only recognizes that our own Rule 262(a)(2), SCACR,[5] provides that a document is "filed" the moment it is sent to that court, but also, for the reasons articulated in *Houston*, promotes the interest of fairness in the pursuit of justice and no longer punishes applicants for delays beyond their control.

Therefore, if a PCR applicant raises the doctrine of equitable tolling as a defense to the statute of limitations, the judge should make the fact-specific determination of whether equitable tolling is justified. *See Hooper*, 386 S.C. at 117, 687 S.E.2d at 33 ("Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use."). As part of this determination, the judge should consider any reasonably verifiable evidence of the date the document was purportedly in the possession of prison authorities for purposes of mailing. In sum, if the circumstances warrant, the statute of limitations shall be tolled from receipt of the document by the prison until formally filed with the clerk's office, provided that the applicant can verify by competent evidence the date prison authorities received the document for mailing.

Turning to the facts of this case, we find the PCR judge erred in dismissing

[5] Rule 262(a)(2), SCACR, provides that "filing may be accomplished by depositing the document in the [United States] mail, properly addressed to the clerk, with sufficient first class postage attached. The date of filing shall be the date of delivery or the date of mailing."

Mose's application as untimely.[6] Here, Mose relinquished control of his application on February 18, 2014, when he placed it in the hands of prison authorities for mailing. Mose provided proof, which was not contradicted by the State, that his application was notarized that same day.[7] Moreover, Mose alleged in his affidavit that an associate warden confirmed Mose's application was mailed prior to the expiration of the one-year statute of limitations. Thus, viewing the facts presented in the light most favorable to Mose, we believe he was prevented from timely filing for PCR due to circumstances beyond his control. Therefore, the one-year statute of limitations should have been tolled from February 18, 2014, until March 10, 2014. Accordingly, we find the PCR judge erred in summarily dismissing Mose's PCR application as untimely.

IV. Conclusion

Based on the foregoing, we: (1) reverse the decision of the PCR judge dismissing Mose's PCR application as untimely; and (2) remand for a hearing on the merits of Mose's PCR application.

REVERSED AND REMANDED.

KITTREDGE, HEARN and FEW, JJ., concur. Pleicones, A.J., not participating.

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[6] Normally, this Court would remand to the PCR court to make this determination. However, given the clear evidence in the record, we conclude that the interests of judicial economy would best be served if we address the merits of this issue.

[7] Nothing in the record reveals that an inmate's application is "mailed" the same day it is notarized. Additionally, the prison mail log or an affidavit from the associate warden would be definitive evidence that Mose mailed his application on February 18, 2014.

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Lexington County. Effective September 5, 2017, all filings in all common pleas cases commenced or pending in Lexington County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Cherokee	Clarendon
Colleton	Georgetown	Greenville	Hampton
Horry	Jasper	Lee	Oconee
Pickens	Spartanburg	Sumter	Williamsburg

Lexington—Effective September 5, 2017

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
August 14, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Trenton Malik Barnes, Appellant.

Appellate Case No. 2014-002771

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 5509
Heard April 17, 2017 – Filed August 16, 2017

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Susannah Rawl Cole, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

HILL, J: After a joint trial, Trenton Barnes and Lorenzo Young were convicted by a jury of murder, kidnapping, second-degree burglary, and attempted armed robbery. We set forth the relevant facts in *State v. Young*, Op. No. 5501 (S.C. Ct. App. filed July 19, 2017) (Shearhouse Adv. Sh. No. 27 at 96–101). On appeal, Barnes argues

the trial court erred in (1) denying his motions for severance; (2) admitting the testimony of two jailhouse informants as statements against interest under Rule 804(b)(3), SCRE; and (3) allowing the State to improperly impeach the testimony of his mother, Latoya Barnes. We affirm.

I.

Barnes first contends the trial court abused its discretion in denying his motion to sever his trial from Young's. Denial of a severance motion is an abuse of discretion if unsupported by the evidence or controlled by an error of law. *State v. Spears*, 393 S.C. 466, 475, 713 S.E.2d 324, 328 (Ct. App. 2011).

Codefendants in a murder case are not automatically entitled to separate trials. *State v. Kelsey*, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998). They are entitled to a severance "only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." *State v. Dennis*, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999). *See also Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001); *see also Zafiro v. United States*, 506 U.S. 534, 540 (1993) ("[I]t is well-settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials."). We will only reverse the denial of a severance motion when it is reasonably probable the defendant would have received a more favorable outcome had he been tried separately. *Hughes*, 346 S.C. at 559, 552 S.E.2d at 317.

Barnes argues being tried with Young compromised his right to effectively cross-examine Young's girlfriend, Rolanda Coleman. Barnes believes Coleman was a key witness whose credibility was central, as she identified him as the gunman in the gray sweatshirt on the surveillance video, and also testified she had seen him with a gun on another occasion. Barnes claims in a separate trial he would have been able to elicit that Coleman and Young were codefendants in an unrelated pending burglary charge. Barnes believes this would have allowed him to better portray to the jury that Coleman's testimony lacked credibility because she was seeking to protect Young, with whom she shares two children.

The record reveals the trial court only prohibited Barnes from telling the jury Young was charged in the pending burglary case, presumably because to do so would have introduced improper evidence of Young's character and prior bad acts, transgressing Rule 404, SCRE. Nothing stopped Barnes from confronting Coleman about her bias

in favor of Young based on their relationship or her willingness to testify in hopes of reducing her exposure to substantial prison time on the burglary charge. In fact, these areas were explored during her testimony. Being tried with Young did not hamper Barnes' right to cross-examine Coleman effectively; consequently, no prejudice accrued to him. Moreover, we do not believe exclusion of this singular point of impeachment prevented the jury from making a reliable judgment about Barnes' guilt. *See Dennis*, 337 S.C. at 282, 523 S.E.2d at 176. Coleman's testimony was cumulative to other evidence, including Barnes' letter to his mother and his mother's identification of him in the video.

Barnes also claims the joint trial prevented him from cross-examining Young about the statements he made to Alfred D. Wright and Michael Schaefer identifying "Trigg" and "Trap" as his accomplices. Because Young did not take the stand, Barnes maintains he could not confront Young and consequently *Bruton v. United States*, 391 U.S. 123 (1968), required Barnes be granted a separate trial.

This is a closer issue. As we noted in *Young*, the State's decision to try Barnes and Young together was fraught with risk. It also placed the trial court in difficult positions throughout the almost three week trial. Yet, as we concluded in Young's appeal, the trial was fundamentally fair and we can confidently say the jury was not prevented from making a reliable judgment about Barnes' guilt. As more fully explained in Section II, *infra*, the evidence of Barnes' guilt was overwhelming. The probability Barnes would have fared better in a separate trial is remote. Accordingly, even if the denial of severance compromised Barnes' right to confront Young, the error was harmless. *See State v. McDonald*, 412 S.C. 133, 142, 771 S.E.2d 840, 844 (2015) ("In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." (quoting *Schneble v. Florida*, 405 U.S. 427, 430 (1972))).

II.

Barnes next argues the trial court erred in admitting the testimony of Wright and Schaefer under the hearsay exception for statements against penal interest, Rule 804(b)(3), SCRE. We agree.

In criminal cases, an appellate court reviews only errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the discretion of the trial court, and we may only check that discretion if it is abused. *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the decision of the trial court is controlled by an error of law or lacks evidentiary support. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

Over Barnes' objections, Wright testified in part:

> Q: . . . . What did [Young] tell you about his case?
>
> [WRIGHT]: That he was with two other individuals that he called Trigg and Trap, and I later got their names from somebody else, but not from him. He just gave me their nicknames. He said they went to rob a club, but the club was closed, so they went next door to a bakery where Trap stayed outside as a look out and he and Trigg went in. A woman resisted when they demanded for money and swung a knife at them, and he shot her two times.
>
> Q: And backing up just a little bit, you said he mentioned that he did this with two other individuals?
>
> A: Right.
>
> Q: Did you learn who Trigg was?
>
> A: I was told by someone else, not him, that Trigg was Troy Stevenson and Trap was Trenton Barnes and they were both brothers.

Schaeffer later took the stand and provided the following:

> Q: Just go ahead and tell the jury what Mr. Young told you.
>
> [SCHAEFER]: Okay, he said him and two other people by the name of Trap and Trigg went out to rob a nightclub

> in the area, but it was closed. They saw the bakery was opened. They took that as an opportunity to go in. The woman was in there. He said she went for a knife and she was struggling so [he] shot her twice. He fled the scene. He said he was wearing a red hoodie and jeans.
>
> . . .
>
> Q: And you just mentioned Trap and Trigg. Did you know who those individuals were?
>
> [SCHAEFER]: No, it wasn't until later on. I just knew them by their nicknames
>
> Q: And did you determine later who Trap and Trigg were?
>
> A: Yeah.
>
> Q: Who was Trap?
>
> A: A 16-year-old kid named Troy. Yeah, Troy.
>
> Q: A 16-year-old?
>
> A: Yes.
>
> Q: Did you understand who Trigg was?
>
> A: That's Trenton, Trenton Stevens (sic).

Williamson v. United States, 512 U.S. 594, 600–01 (1994), is the starting point for considering admissibility of statements against penal interest:

> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3)

> that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Our supreme court adopted the *Williamson* approach in *State v. Fuller*, 337 S.C. 236, 244–45, 523 S.E.2d 168, 172 (1999). We interpret the rule allowing statements against penal interest stringently. *Fuller* emphasized the "strict requirements" of the rule. *Id.* at 245, 523 S.E.2d at 172. *State v. Holmes* reaffirmed *Fuller* and stressed the rule is to be applied "very narrowly to only those portions of a hearsay statement which are plainly self-inculpatory." 342 S.C. 113, 117, 536 S.E.2d 671, 673 (2000). *See generally Weinstein's Federal Evidence* 804-64 (2d ed. 2017) ("[A] statement which shifts a greater share of the blame to another person (self-serving) or which simply adds the name of a partner in crime (neutral) should be excluded even when closely connected to a statement that assigns criminality to the declarant."); *McCormick on Evidence* 533 (7th ed. 2013) ("The result is that only the specific parts of the narrative that inculpate qualify.").

Rule 804(b)(3), SCRE, requires the trial judge to view the disputed evidence in light of the surrounding circumstances and discern whether each particular remark is plainly self-inculpatory. This entails a searching examination of both content and context. The portions of Wright and Schaefer's testimony that relate Young's mention of "Trigg" and "Trap" as his accomplices were not admissible as statements against Young's interest. To be sure, "a statement is not *per se* inadmissible simply because the declarant names another person." *Fuller*, 337 S.C. at 245, 523 S.E.2d at 172. Nevertheless, we have never found a statement in which a declarant implicates—rather than merely names—another admissible under Rule 804(b)(3). The rule only grants admission of statements against the declarant's penal interest. Statements that are against the penal interest of an accomplice do not qualify for the simple fact that the accomplice is not the declarant.

We find the trial court erred in admitting this testimony. The portions of the testimony that did not plainly inculpate Young were rank hearsay inadmissible against Barnes.[1]

[1] Although not an issue before us, it is unclear how Wright and Schaefer's testimony concerning how they learned the identities of "Trigg" and "Trap" complied with Rule 602, SCRE.

However, the improper admission of hearsay is harmless when it could not have reasonably affected the result. *State v. Brewer*, 411 S.C. 401, 408–09, 768 S.E.2d 656, 660 (2015). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Even if Wright and Schaefer's testimony had been limited to Young's self-inculpatory statements, the State overwhelmingly proved Barnes was one of the people who entered the kitchen and shot at Victim.[2] This evidence includes, most compellingly, Barnes' letter to his mother confessing to the crime; his mother's identification of him as the person wearing the gray sweatshirt in the surveillance video; and the timeline of Barnes' whereabouts on the night of the shooting. Accordingly, the error in admitting hearsay against Barnes through Wright and Schaefer's testimony was harmless beyond a reasonable doubt. *See State v. Prioleau*, 345 S.C. 404, 406–411, 548 S.E.2d 213, 214–16 (2001) (finding admission of hearsay statement by possible accomplice was harmless in light of victims' photographic and in-court identification of their assailant).

III.

Finally, Barnes claims error in the manner the State was allowed to impeach the testimony of his mother, Latoya Barnes, with a prior inconsistent statement she had made to Investigator Matthew McCoy.

The State called Ms. Barnes as a witness on November 13, 2014, and questioned her about a recorded phone conversation with McCoy from August 2013. Ms. Barnes admitted the communication occurred, but flatly denied she had stated Barnes was the one in the surveillance video wearing the gray sweatshirt. For good measure, the State had Ms. Barnes reaffirm her denial at the end of her direct examination.

On November 17, the State called McCoy and, over Barnes' objection, published the portion of the August 2013 conversation when Ms. Barnes states her familiarity with

[2] One of Barnes' best defenses may have been that he was the lookout standing outside the door of the kitchen and "merely present" when the crimes took place. Wright and Schaefer's testimony might have helped advance this defense, as they both placed Barnes outside, implicating Troy Stevenson as the man in the gray-hooded sweatshirt who went inside.

her "kid's build" and identifies Barnes as the one wearing the gray sweatshirt in the video.

Rule 613(b), SCRE, states:

> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

Barnes maintains the State should have been forced to play the recorded conversation between Ms. Barnes and McCoy during Ms. Barnes' testimony. According to Barnes, this approach would have allowed Ms. Barnes the opportunity to explain the inconsistency and given Barnes the opportunity to cross examine her about it. Barnes claims these opportunities vanished once Ms. Barnes was released by consent from her subpoena at the conclusion of her testimony.

We see no error. Once the State confronted Ms. Barnes with the substance of her previous statement, the time and place it was made, and the person to whom it was made, and she denied making it, the foundation required by Rule 613(b) was complete. *See State v. Bixby*, 388 S.C. 528, 551–52, 698 S.E.2d 572, 584–85 (2010) (finding State laid proper foundation under Rule 613(b) for introduction of recorded conversation after witness was excused because witness admitted having conversation at issue but denied making the statements); *State v. McLeod*, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004) (stating that under Rule 613(b), extrinsic evidence of the statement is not admissible unless witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made).

The rule does not require extrinsic evidence of the prior statement be admitted immediately. It merely authorizes the use of extrinsic evidence to prove the inconsistency. Because the impeaching evidence is "extrinsic," the avenue of its admissibility may not always run through the witness to be impeached by it, for that

witness may not be competent to authenticate the extrinsic evidence. *See McCormick on Evidence* 215–16 (7th ed. 2013) (equating "intrinsic evidence" with cross-examination, as opposed to "[e]xtrinsic evidence of inconsistent statements, that is, the production of other witnesses' testimony about the statements").

In some instances—say, if the previous statement was to a third party and unrecorded—it may, for many reasons, be impossible to produce the proof while the denier remains on the stand. One reason would be the principle that no two bodies may occupy the same space at the same time. Counsel may also have strategic reasons for delaying such proof. We are not prepared to require a witness who has denied making a prior inconsistent statement to remain glued to the stand until thoroughly impeached, so a party can ask the witness to "explain" her earlier denial. *See e.g. Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1231 (5th Cir. 1984) (no requirement that admission of prior inconsistent statement as substantive evidence per Fed. R. Evid. 801(d)(1) occur while witness on stand).

We also see no prejudice. The State read the statement to the witness twice; we are unclear what difference playing the recording of the statement to her would have made. While Ms. Barnes was no longer under subpoena, we know of no reason why Barnes could not have recalled his mother to the stand, voluntarily or not, after McCoy's testimony. Nor have we been apprised what Barnes would have asked his mother about the inconsistency that he had not already had the opportunity to pursue during her initial cross-examination.

Rule 613(b), SCRE, works in tandem with Rule 611(a), SCRE, which arms the trial court with vast discretion in controlling the mode and order of witness testimony. We find the trial court properly handled this impeachment evidence.

IV.

For the reasons set forth, we affirm Barnes' convictions.

GEATHERS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Stanley Lamar Wrapp, Appellant.

Appellate Case No. 2015-000909

Appeal From Greenwood County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5510
Heard May 4, 2017 – Filed August 16, 2017

REVERSED AND REMANDED

Taylor Davis Gilliam, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General John Benjamin Aplin, of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Respondent.

MCDONALD, J.: Stanley Lamar Wrapp appeals his convictions for possession with intent to distribute (PWID) cocaine base and driving under suspension (DUS), arguing the circuit court failed to make the required findings that he had proper notice of his trial date and that his absence was voluntary before trying him *in absentia*. We reverse and remand for a new trial.

Facts and Procedural History

On October 17, 2013, Greenwood County Drug Enforcement (GCDE) officers initiated a traffic stop and arrested Wrapp for driving with a suspended license. When Wrapp was searched incident to the arrest, the officers found crack cocaine in his pocket. A subsequent search of Wrapp's vehicle uncovered more crack, a set of digital scales, and a razor knife like those commonly used to cut crack cocaine. Wrapp was charged with DUS and trafficking in crack cocaine.

On October 18, 2013, Wrapp signed bond paperwork showing his court date was December 6, 2013, and providing "[i]f no disposition is made during that term, the defendant shall appear and remain throughout each succeeding term of court until final disposition is made of his case." The paperwork also stated, "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence."

On July 14, 2014, Wrapp's case was called for trial before the Honorable William P. Keesley. Wrapp's trial counsel asked for a continuance, in part, so he could have more time to investigate an issue regarding a confidential informant (the CI). Judge Keesley granted the continuance.

On Monday, September 29, 2014, Wrapp's case was re-called for trial before the Honorable Thomas A. Russo. After jury selection, trial counsel moved for a continuance because Wrapp was not present. Trial counsel stated, "I don't have personal knowledge of why he isn't here. I don't know if . . . his absence is voluntary or involuntary." In response, the State asserted that following the July 2014 continuance, the solicitor told Wrapp "that his case would be called for trial the next time we could get to it." The State also contended that during this conversation the solicitor told Wrapp he would not make any deals after the week of July 14. Finally, the State asserted it was contacted three weeks prior to trial by a private attorney whom Wrapp had asked to represent him. Subsequently, this attorney "declined to get involved due to the fact that [the case] was up for trial." Upon inquiry, trial counsel responded that he did not know whether this attorney had informed Wrapp of his upcoming trial date.

The circuit court noted a bench warrant had been issued for Wrapp, and trial counsel confirmed that the public defender's office had an investigator looking for him. In response, the circuit court stated,

> [T]he difficult thing is you led off with this observation that is we don't know whether his absence here today is a voluntary or not voluntary absence. I don't know what his situation is or why he's not here. But it does appear that he was noticed to be here. For whatever reason[,] he's not here. I don't really have a valid reason. I don't see any purpose that would be served in continuing the case. . . . [I]f he makes himself unavailable, that's—I just don't know that you can make yourself unavailable and then use that as a basis for getting a continuance granted. . . . So I'm going to respectfully deny the motion for a continuance. I hope your investigator finds him this afternoon or this evening and then he can show up and be of assistance to you. But we're going to go ahead and proceed whether he's present or not.

Trial counsel asked for a delay until Wednesday, October 1, but the circuit court declined, stating it would begin Wrapp's trial at 9:30 a.m. on Tuesday, September 30. Trial counsel objected, stating, "For the record . . . . I don't feel like Mr. Wrapp has been adequately noticed and we object to going to trial." The circuit court responded, "Alright. Well, we'll start back at 9:30 in the morning."

The trial took place on September 30, 2014, and the jury convicted Wrapp of DUS and possession with intent to distribute cocaine base. Wrapp was sentenced to twenty years' imprisonment on the PWID charge and sixty days' imprisonment for DUS. These sentences were sealed and later read to Wrapp in court on March 30, 2015.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Ravenell*, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010). "An appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

Law and Analysis

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." *Id.* at 455, 692 S.E.2d at 557. "It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence." *Id.* "A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence." *Id.* at 455, 692 S.E.2d at 557–58. "The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend." *Id.* at 456, 692 S.E.2d at 558.

Rule 16, SCRCrimP, also outlines the required process:

> 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.

We hold the circuit court erred in trying Wrapp *in absentia* without making specific findings that Wrapp (1) received notice of his right to present, and necessarily, of the term of court for which he needed to be present, and (2) was warned he would be tried *in absentia* if he failed to attend. Initially, we are not persuaded by the State's argument that this issue is unpreserved. Although trial counsel did not specifically object to the circuit court's failure to make these factual findings, he moved for a continuance and objected to the trial proceeding due to the lack of adequate notice to Wrapp. *Cf. Ravenell*, 387 S.C. at 456–57, 692 S.E.2d at 558 (addressing the merits when trial counsel moved for a continuance but did not specifically object to a trial *in absentia* and never asserted that his client failed to receive adequate notice or warnings).

In determining the trial would proceed in Wrapp's absence, the circuit court stated, "I don't know what his situation is or why he's not here. But it does appear that he

was noticed to be here. For whatever reason he's not here. I don't really have a valid reason. I don't see any purpose that would be served in continuing the case. . . ." Even if we were to construe this as a finding that Wrapp received notice of his right to be present, there was no finding that Wrapp was informed he could be tried *in absentia*.[1] Thus, Wrapp cannot be said to have voluntarily waived his right to be present at trial. *See State v. Ritch*, 292 S.C. 75, 76, 354 S.E.2d 909, 909 (1987) (finding error and reversing when a trial court failed to make required findings that an appellant 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).

In addition to the circuit court's failure to make the requisite factual findings, the record is devoid of any fact indicating Wrapp had actual notice of the term of court in which his trial would occur. *See Ravenell*, 387 S.C. at 456, 692 S.E.2d at 558 ("[N]otice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial."); *see also Ellis v. State*, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976) (stating a defendant will not know the day and time of trial until shortly before trial begins). Neither the solicitor's July 2014 statement to Wrapp that he would be tried "the next time [the State] got to it" nor the language in the bond form notified Wrapp of the term of court in which he would be tried. Further, neither party presented any direct evidence—such as a subpoena or a statement from trial counsel—indicating Wrapp had notice of the term of court in which his case would be tried. In fact, the parties were unclear as to that circuit's normal procedure for noticing defendants. *See City of Aiken v. Koontz*, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006) ("If the record . . . does not include evidence to support a finding that the defendant was afforded notice of his trial, the resulting conviction *in absentia* cannot stand."). It seems logical that for one to voluntarily fail to attend trial or otherwise waive his trial appearance, one must actually know when the trial is to occur.

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 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. *See State v. Jackson*,

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[1] We acknowledge Wrapp was provided the "*in absentia*" notice on his bond form. But the circuit court made no such finding and acknowledged that it had no information as to whether Wrapp's absence was voluntary.

290 S.C. 435, 436–37, 351 S.E.2d 167, 167 (1986) (remanding for a new trial because there was no evidence in the record that the defendant was given notice of his trial and neither defendant nor his counsel were present at trial); *State v. Simmons*, 279 S.C. 165, 166–67, 303 S.E.2d 857, 858–59 (1983) (remanding for a new trial because the record was devoid of facts showing defendants had notice of their trial); *see also Ritch*, 292 S.C. 75, 354 S.E.2d 909; *State v. Fleming*, 287 S.C. 268, 335 S.E.2d 814 (1985). Accordingly, we reverse and remand for a new trial.

REVERSED AND REMANDED.

GEATHERS and HILL, JJ., concur.