

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Ronnie L. Blackmon, Appellant.

Appellate Case No. 2009-139906

Appeal From Marlboro County
John M. Milling, Circuit Court Judge

Unpublished Opinion No. 2012-UP-434
Heard June 4, 2012 – Filed July 18, 2012

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Appellate Defender Kathrine H. Hudgins, of Columbia,
for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, and Senior Assistant
Attorney General Harold M. Coombs, Jr., all of
Columbia; and Solicitor William B. Rogers, Jr., of
Bennettsville, for Respondent.

PER CURIAM: Ronnie L. Blackmon appeals his conviction and sentence for failure to stop for a blue light. He argues the trial judge erred in denying his motion for continuance and, therefore, trying him in his absence. He also argues the sentencing judge erred in imposing his sealed sentence without the presence of counsel. We affirm in part, reverse in part, and remand.

1. As to the trial court's denial of Blackmon's motion for continuance, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. McKennedy*, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002) (stating a denial of a motion for a continuance will not be disturbed on appeal unless the trial court clearly abused its discretion); *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (explaining that although the "Sixth Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial," this right may be waived); *State v. Fairey*, 374 S.C. 92, 100, 646 S.E.2d 445, 448 (Ct. App. 2007) (stating that before a defendant may be tried in his absence, the trial court must make "findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned that the trial would proceed in his absence."); *State v. Ravenell*, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) (stating a bond form informing the defendant he could be tried in his absence served as the requisite notice).

2. As to the sentencing judge's imposition of the sealed sentence without the presence of counsel, we reverse and remand.¹ At his sentencing hearing in 2009, Blackmon stated he had been arrested on a DUI charge in Georgia at the time of trial. He claimed he attempted to inform his attorney "to no avail." He further indicated a desire to appeal his conviction and to "get legal counsel here." The sentencing judge stated: "If you wish to obtain an attorney to represent you, there is nothing to prevent you from getting a lawyer, or appealing this decision. I will tell you, you have a right to appeal this decision. . . . [Y]ou must do so within ten days. . . ." The judge then imposed the sealed sentence of thirty months.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Faretta v. California*, 422 U.S. 806, 807 (1975). "The erroneous

¹ Blackmon was represented by counsel at his trial, but he was not represented at the sentencing hearing.

deprivation of a defendant's fundamental right to the assistance of counsel is *per se* reversible error." *State v. Thompson*, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct. App. 2003). "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *McKnight v. State*, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 692, (1984)).

"A defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." *Thompson*, 355 S.C. at 262, 584 S.E.2d at 134. "The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights." *Id.* However, waiver may be inferable by conduct where the defendant fails to appear for trial. *State v. Roberson*, 382 S.C. 185, 188, 675 S.E.2d 732, 733-34 (2009).

We find no facts in the record indicating Blackmon waived his right to counsel at the sentencing hearing. Although the sentencing judge acknowledged Blackmon had the right to appellate counsel, he did not recognize Blackmon's right to counsel at the sentencing proceeding. We find the sentencing judge erred in denying Blackmon assistance of counsel. Accordingly, we reverse and remand for resentencing.²

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and HUFF and SHORT, JJ., concur.

² Although Blackmon has served his sentence, we find the issue is not moot because he could be affected by collateral consequences. *See State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) (finding appellant's direct appeal "not moot because the unconstitutional sentence could continue to affect her through collateral consequences.").