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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Thomas A. Russo, Trial Judge
Honorable D. Craig Brown, PCR Judge

JUSTIN JAMAL LEWIS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000998

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

DANIELLE DIXON
Assistant Attorney General
S.C. Bar No. 73999

Post Office Box 11549
Columbia, SC 29211
803-734-2875

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Petitioner's Issue

Did the post-conviction relief court err when it summarily dismissed Petitioner's post-conviction relief application where the court found that because Petitioner proceeded pro se at his trial he was barred from raising ineffective assistance of counsel claims regarding defense counsel's pre-trial conduct?

Respondent's Counterstatement of Issue

The PCR court properly dismissed Petitioner's PCR application without an evidentiary hearing when (1) Petitioner knowingly and voluntarily waived his Sixth Amendment Right to Counsel and elected to proceed pro se at trial, precluding any claims of ineffective assistance at trial and on appeal as a matter of law, and (2) Petitioner's claims of ineffective assistance of pretrial counsel all involve evidentiary issues that could have been raised at trial and on direct appeal, making them inappropriate for PCR.

STATEMENT OF THE CASE

Justin Jamal Lewis (Petitioner) is incarcerated with the South Carolina Department of Corrections serving a fifteen-year sentence. In June 2017, Petitioner was indicted by the Florence County Grand Jury for distribution of heroin (2017-GS-21-00764). This charge arose from a controlled buy where the State utilized a confidential informant.

On September 4-5, 2018, Petitioner proceeded to a bench trial before the Honorable Thomas A. Russo. Petitioner proceeded *pro se* with Wallace H. Jordan, Jr., Esquire (Jordan) as standby counsel. Deputy Solicitor Todd S. Tucker prosecuted the case. Petitioner was convicted as indicted, and the trial court sentenced Petitioner to fifteen years' imprisonment for distribution of narcotics, second offense. However, after realizing the offense was a first offense, the trial court amended the sentencing sheet to reflect a first offense but maintained the fifteen-year sentence.

On September 21, 2018, Petitioner filed a motion to reconsider his sentence. While the motion was pending, Petitioner filed a letter on October 29, 2018—not specifically addressed to anyone—indicating he wished to appeal. On December 17, 2018, the trial court issued an order granting Petitioner's motion for reconsideration and reducing his sentence to twelve years. Petitioner did not appeal.

Petitioner timely commenced this post-conviction relief (PCR) action on February 28, 2019, which was amended October 10, 2019. The State filed an Amended Return and Motion to Dismiss on December 13, 2019, contending Petitioner was not entitled to PCR as a matter of law because he waived his Sixth Amendment Right to Counsel and represented himself at trial. A hearing convened on December 16, 2019, at the Florence County Courthouse before the Honorable D. Craig Brown. Because the State's amended return was filed shortly before the hearing, the

Court heard brief arguments on the State's request for summary dismissal and then directed the parties to submit memoranda on the issue.

By order dated June 19, 2020, Judge Brown granted the State's motion and summarily dismissed Petitioner's PCR application with prejudice. Petitioner timely appealed the denial of his PCR application and filed a petition for writ of certiorari on March 22, 2021. On August 9, 2021, the State field a return opposing the petition. On June 7, 2022, this Court granted the petition for a writ of certiorari.

STATEMENT OF THE FACTS

At the outset of Petitioner's trial, Petitioner moved to relieve Jordan, his counsel. (App. 5). Petitioner informed the trial court he always wanted a trial but could never get in touch with Jordan. Petitioner also stated he had been unable to see a video[1] the State planned to present at trial. (App. 5-10). Jordan acknowledged his relationship with Petitioner was strained but refuted that he never attempted to communicate with Petitioner. (App. 10). Regarding the video, Jordan explained he had planned to watch the video and discuss it with Petitioner the prior week, which was when the solicitor obtained it from law enforcement. However, Jordan had several guilty pleas that day and Petitioner got tired of waiting and left. (App. 11-13, 24). Jordan indicated he was prepared for trial. (App. 11).

After hearing Petitioner's reasons for wanting to relieve counsel, the trial court denied Petitioner's motion to relieve counsel. (App. 10-33). Petitioner then indicated he wished to proceed *pro se*, and the trial court explained the dangers of self-representation. (App. 33-34, 40-48). The trial court also asked whether Petitioner wanted a jury or a bench trial, and Petitioner elected a bench trial. (App. 33-50, 52). The trial court granted Petitioner's request to proceed *pro se*, with Jordan as standby counsel. (App. 48).

At trial, Investigator Jason Pate, a narcotics officer, testified he and Investigator Rollins Rhodes set up a controlled drug buy targeting Petitioner. (App. 66-67). The investigators utilized David Daniels, a confidential informant. (App. 67). Prior to the buy, police searched Daniels' car for drugs, installed audio and video recording equipment in Daniels' car, and gave Daniels $75 for the buy. (App. 68-69, 84-85).

Daniels testified he called Petitioner and arranged to purchase heroin. (App. 86-87).

[1] The video was of the controlled buy. (App. 58).

Daniels then went to the gas station, got gas, and picked up Petitioner. (App. 88). Daniels drove his car around the block and purchased heroin from Petitioner. (App. 89-90). During the car ride, Petitioner asked Daniels if Daniels knew of anyone interested in purchasing Lortab. (App. 90, 115). After the transaction, Daniels drove back to the corner where he had picked up Petitioner, and Petitioner exited the car. (App. 90).

Daniels returned to a predetermined location to meet investigators and gave them a bag containing a substance that later tested positive for heroin. (App. 70-71, 92). Daniels told the investigators he purchased the heroin from Petitioner. (App. 72). The audio and video recordings corroborated Daniels' version of events. While cross-examining Daniels about the video, Petitioner admitted to being in the video. (App. 108). The recordings, the heroin, and the analysis of the heroin were admitted into evidence without objection from Petitioner. (App. 59, 192).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly dismissed Petitioner's PCR application without an evidentiary hearing when (1) Petitioner knowingly and voluntarily waived his Sixth Amendment Right to Counsel and elected to proceed pro se at trial, precluding any claims of ineffective assistance at trial and on appeal as a matter of law, and (2) Petitioner's claims of ineffective assistance of pretrial counsel all involve evidentiary issues that could have been raised at trial and on direct appeal, making them inappropriate for PCR.

Petitioner asserts the PCR court erred in summarily dismissing his PCR application based on its finding that Petitioner was barred from raising claims of ineffective assistance of counsel because Petitioner waived his Sixth Amendment right to counsel and elected to proceed pro se. Specifically, Petitioner contends he was denied his Sixth Amendment right to effective assistance of counsel *prior* to trial. In support of his contention, Petitioner asserts Jordan did not conduct a reasonable investigation because Jordan failed to request or procure (1) a copy of the chemical analysis report for establishing heroin and (2) sworn affidavits or statements from witnesses in the drug's chain of custody. (Pet. Br. 13). However, Petitioner could have raised any issues with the chemical analysis report and the heroin at trial by objecting when the evidence was admitted. Petitioner's failure to object to this evidence cannot now be couched as a claim of ineffective assistance of pretrial counsel. Further, Petitioner waived his Sixth Amendment right to counsel prior to the time for filing a notice of appeal and thus cannot now assert counsel was ineffective for not (1) advising him of his right to appeal and/or (2) filing a notice of appeal. When viewed in the light most favorable to Petitioner, Petitioner did not set forth any allegations to support a cognizable claim for PCR. Thus, the PCR court properly dismissed this application without an evidentiary hearing.

a. Petitioner waived his Sixth Amendment right to counsel when he elected to proceed pro se.

Petitioner knowingly and voluntarily waived his Sixth Amendment right to counsel pretrial when he elected to proceed pro se. Thus, he is precluded as a matter of law from raising any claims of ineffective assistance of counsel related to his trial conduct and an appeal.

The record establishes Applicant fully understood the consequences of waiving his right to counsel and proceeding *pro se*. For a knowing and intelligent waiver to occur, the defendant must be "(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Osbey v. State, 425 S.C. 615, 619, 825 S.E.2d 48, 50 (2019). Applicant was repeatedly advised of his right to counsel and warned about the dangers of representing himself. (App. 33-34, 40-48). Applicant knowingly and voluntarily waived his right to counsel and elected to proceed pro se, with Jordan acing only as standby counsel.[2] (App. 47-48).

There is "no constitutional right to hybrid representation," where the defendant "share[s] the duties of conducting [his] defense with a lawyer." United States v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997) (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) ("Faretta does not require a trial judge to permit "hybrid" representation of the type Wiggins was actually allowed")). Without a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective. See United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992) (explaining the "court knows of no constitutional right to effective assistance of standby counsel"); United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998) (holding "without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel"); cf. United States v. Cohen, 888 F.3d 667, 680 (4th Cir. 2018) (recognizing

[2] Notably, Petitioner does not dispute this issue, and he has not raised a claim that his waiver of counsel was unknowing or involuntary. He argues only that he should be allowed to proceed on allegations of pretrial ineffective assistance of counsel and a belated appeal.

a defendant has no right to the appointment of a standby counsel after he elects to proceed pro se).

Further, Petitioner is expressly barred from raising ineffective assistance claims about his own conduct in trial. "[W]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

Finally, in waiving his right to counsel, Petitioner waived his right to have counsel advise him about an appeal and/or assist in his appeal. Contra White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974) ("Although there was a reasonable basis for trial counsel's conclusion or assumption that the defendant was fully aware of his appeal rights, counsel should not have rested upon that assumption. He should have made certain that the defendant was fully aware of his rights and in the absence of an intelligent waiver by the defendant either pursued an appeal in his behalf or else, if deemed appropriate by counsel, complied with the procedure set forth in Anders v. State of California, 386 U.S. 738 [(1967)]."); Dearybury v. State, 367 S.C. 34, 40, 625 S.E.2d 212, 215 (2006) ("If Petitioner did not knowingly and voluntarily waive his right to counsel, he is presumably entitled to a belated direct appeal."). This is not a situation where Petitioner was denied the right to effective assistance of counsel at a critical stage in the proceeding; rather, he waived his right to the effective assistance of counsel when he elected to proceed pro se. Contra Nelson v. Peyton, 415 F.2d 1154, 1156-57 (4th Cir. 1969) (concluding "petitioner was denied counsel at a critical stage in the proceeding" when counsel did not inform him of his right to a direct appeal).

To the extent Petitioner is framing this as an issue of whether he voluntarily waived his right to appeal, the State submits this is *not* a situation where Petitioner did not knowingly and voluntarily waive his right to appeal. Notably, on October 29, 2018, while his motion to reconsider

the sentence was pending, Petitioner filed the following letter with the Clerk of Court: "I would like to file an appeal to overturn my sentence. Please send me the necessary paperwork to start this process." (Supp. App. 1). On January 5, 2019, after Petitioner's motion to reconsider the sentence was granted, he filed a letter with the Clerk of Court stating, "I seek to have my [sic] along with all of its documents and records reviewed by the South Carolina Supreme Court. Please file this letter, forward it to whom it may concern, and provide me with any paperwork or information I may need to start this process." (Supp. App. 2). These letters show Petitioner was aware of his right to appeal and, rather than waiving it, actually sought to appeal. However, having knowingly and voluntarily waived his Sixth Amendment right to counsel, it was incumbent upon Petitioner to follow the proper procedure for filing an appeal. See Faretta, 422 U.S. at 834 n.46 (noting a pro se defendant is still obligated "to comply with relevant rules of procedural and substantive law"). Petitioner cannot now frame his failure to comply with appellate procedure as a claim for ineffective assistance of counsel. Because Petitioner is legally precluded from raising claims of ineffective assistance of counsel related to his trial conduct and an appeal, the PCR court properly dismissed these claims without an evidentiary hearing.

b. Petitioner's claims of ineffective assistance of pretrial counsel involve evidentiary issues that Petitioner could have raised during trial.

In an effort to circumvent his waiver of the Sixth Amendment right to counsel, Petitioner couches his claims as ineffective assistance of "pretrial" counsel and asserts Jordan was ineffective for failing to investigate. In support, Petitioner complains only that Jordan failed to procure a copy of (1) the chemical analysis report for the heroin and (2) affidavits to establish the chain of custody

for the drug evidence. Even if true,[3] any issue with the chemical analysis report was an evidentiary issue that Petitioner could have raised at trial. Petitioner waived any issue with the chemical analysis report by not objecting to its admission at trial. See Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974) (explaining post-conviction relief is not a substitute for an appeal); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (providing a PCR application cannot assert any issues that could have been raised at trial or on appeal).

Respondent is not aware of any case from the Supreme Court of the United States or the Supreme Court of South Carolina that addresses whether an applicant who has waived his Sixth Amendment right to counsel can later assert a claim of ineffective assistance of "pretrial" counsel. At least one jurisdiction, however, has determined that a defendant who voluntarily elects to proceed pro se waives any claim of ineffective assistance of counsel, including ineffective assistance of pretrial counsel. See Harper v. State, 404 S.W.3d 378, 383 (Mo. Ct. App. S.D. Div. 2, 2013) ("Thus, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel. This prohibition applies equally to claims involving errors made by pre-trial counsel prior to the movant's wavier of counsel." (internal quotation marks and citation omitted)); see also Wilkins v. State, 308 S.W.3d 778, 783-84 (Mo. Ct. App. S.D. Div. 1, 2010) (finding pro se defendant could not raise claim that pretrial counsel was ineffective for failing to investigate in part because he "waived a claim of ineffective assistance of counsel when he sought and was allowed to represent himself"). This is the only logical conclusion under Faretta. See Faretta, 422 U.S. at 835 ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional

[3] The State does not concede that Jordan failed to procure either the drug analysis report or the chain of custody for the report prior to trial. However, when deciding on summary disposition, the Court must view the facts in the light most favorable to the non-moving party.

benefits associated with the right to counsel."); id. at 834 n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"); Cook v. Ryan, 688 F.3d 598, 609-10 (9th Cir. 2012) ("Cook could have corrected those errors once he decided to represent himself. Faretta therefore precludes Cook from complaining about the 'quality of his own defense.'").

However, the Court does not need to decide this issue in the instant case because the "pretrial" issues raised by Petitioner, when closely scrutinized, are actually evidentiary issues that could have been addressed by Petitioner during trial. Although Petitioner loosely alleges counsel failed to investigate, the only items he contends counsel did not investigate are the drug analysis report and the chain of custody for the report. However, Petitioner had an opportunity at trial to object to the admission of the drug analysis report but did not do so. By failing to object at trial, he waived any issue with the drug analysis report and its chain of custody.

It is the State's burden to prove the elements of criminal offenses beyond a reasonable doubt. Thus, it was incumbent upon the State to prove that the substance Daniels purchased was in fact heroin. At trial, the State submitted the expert testimony of Mitchell Hansen to establish that the substance was in fact heroin. (App. 188-93). Petitioner did not object to the qualification of Hansen as an expert in chemical analysis. (App. 188). Likewise, Petitioner did not object to the admission of Hansen's drug analysis report. (App. 192). Even if Petitioner had never seen the report prior to trial, he had the opportunity at trial to examine the report and raise any issues prior to its admission. Likewise, Petitioner had the opportunity at trial to *voir dire* Hansen and raise any

concerns he may have had concerning his qualification as an expert. It is unclear how not seeing the report prior to trial precluded Petitioner from raising any issues with Hansen's qualification as an expert or with the drug analysis report during trial.

Likewise, it is unclear how not seeing affidavits concerning the chain of custody prior to trial precluded Petitioner from raising this issue at trial when it was the State's burden to prove the chain of custody. See State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable."). The proper time to raise any issue with the chain of custody was when the drug analysis report was admitted into evidence. Had Petitioner objected, it would have been the State's burden—not Petitioner's—to call witnesses to establish the chain.

Petitioner's claim that pretrial counsel was ineffective for failing to investigate centers on the drug analysis report. However, Petitioner had an opportunity at trial to object to the drug analysis report and raise any issues with it. Because Petitioner waived his Sixth Amendment right to counsel, it was incumbent upon him to raise evidentiary issues at trial. Petitioner did not do so, and he cannot now couch evidentiary issues as issues of ineffective assistance of pretrial counsel. See Faretta, 422 U.S. at 835 ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.").

c. *The rationale of Cook v. Ryan supports a finding that Petitioner's claims of ineffective assistance of pretrial counsel are legally barred.*

In Cook v. Ryan, 688 F.3d 598 (9th Cir. 2012), a defendant sentenced to death for murder sought federal habeas corpus relief under Martinez v. Ryan, 566 U.S. 1, 9 (2012) (providing "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial" in a federal habeas proceeding). In finding Martinez did not apply to Cook's claims, the Court reasoned:

> Cook was represented by pretrial counsel from August 1987 through April 1988. Cook then made a knowing, intelligent, and voluntary waiver of his right to counsel, and represented himself at his trial and sentencing hearing. Even if Cook's pretrial counsel performed deficiently during the seven months he represented Cook (a contention we reject below), **Cook could have corrected those errors once he decided to represent himself. Faretta therefore precludes Cook from complaining about the 'quality of his own defense.'** It follows the reason given by the Supreme Court for creating an exception to the Colman rule in Martinez—"[t]o protect prisoners with a potentially legitimate claim of ineffective assistance of trial *counsel*"—does not apply to Cook.
>
> In short, Cook's trial counsel was, at his own request, Cook. Accordingly, he cannot claim he was denied effective assistance of counsel. Nor can Cook be prejudiced by PCR counsel's alleged failures to assert IAC by trial counsel where, again, Cook chose to forego trial counsel.

688 F.3d 609-10 (internal footnote omitted) (quoting Martinez, 132 S.Ct. at 1315) (first emphasis added) (second emphasis and alteration in Cook). Although the Court did "not hold that a Martinez claim can never be available to a defendant who represents himself," it found Martinez did not apply to Cook's claims when "the conduct of the trial and sentencing phases, and Cook's strategy, were his own." Id. at 610 n.12.

Although the procedural posture of Cook is different than the present case, the rationale in Cook is instructive. The Cook Court, citing Faretta, did not allow Cook to raise claims against pretrial counsel when Cook had the opportunity to correct any perceived errors himself. Like Cook, Petitioner had the opportunity at trial to address and correct the perceived errors he now complains about. Specifically, as discussed, Petitioner's claims that counsel failed to investigate relate to the drug analysis report and the chain of custody for that report. However, Petitioner had an opportunity at trial to object to the drug analysis report when it was entered into evidence.[4]

[4] Moreover, the trial court gave Petitioner numerous opportunities prior to trial to articulate some reason why he was so dissatisfied with Jordan's representation. Petitioner's only complaint was

Like the Court in Cook, this Court should find Petitioner cannot raise an allegation regarding Jordan's pretrial conduct when Petitioner assumed responsibility for correcting any perceived pretrial errors by electing to represent himself, had an opportunity at trial to raise issues with the drug analysis report, and neglected to do so.

Petitioner did not set forth any other allegations to support his claim that pretrial counsel failed to investigate. Because any issues with the drug analysis report itself could have been raised by Petitioner at trial, an evidentiary hearing was not necessary to further develop this issue. Thus, the PCR court properly granted summary dismissal.

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that Jordan did not view the drug-buy video until the week before trial, and Petitioner was upset regarding a miscommunication between him and Jordan. (App. 5-33). Although Petitioner averred Jordan was not ready for trial, he did not offer any specifics regarding investigation or research he wanted Jordan to do that was not done. Further, Jordan informed the trial court he spent the week before preparing extensively and was ready for trial. (App. 5-13, 24). Additionally, Petitioner never requested a continuance to allow time for further investigation and, in fact, repeatedly told the court he did not want a continuance. (App. 43, 45). Although Petitioner argues the request would have been futile, Petitioner assumed the responsibility for making a record for appellate and collateral review, and he did not do so. See Faretta, 422 U.S. at 834 n.46 (noting a pro se defendant is still obligated "to comply with relevant rules of procedural and substantive law").

CONCLUSION

Based on the foregoing, this Court should affirm the PCR court's summary dismissal of Petitioner's application for post-conviction relief.

Respectfully Submitted,

Danielle Dixon
Assistant Attorney General

ATTORNEY FOR THE RESPONDENT

This 7 day of November, 2022