RECEIVED

Nov 18 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas
Judge R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-001179

William Coleman,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S STATEMENT OF THE ISSUES PRESENTED ii

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES PRESENTED ii

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 3

ARGUMENT 4

I. The PCR court correctly found Petitioner made a knowing and voluntary waiver of the right to counsel based on the multi-factor test set forth in State v. Cash, 309 S.C. 40, 419 S.E.2d 811 (Ct. App. 1992) 4

II. The PCR court correctly found Petitioner voluntarily waived his right to be tried in person based on his repeated failures to appear for his trials and other hearings despite knowing the dates and times of those proceedings. 9

III. The issues raised in Petitioner's petition for a writ of certiorari are procedurally barred because Petitioner could have, but did not, raise the issues on direct appeal. 11

CONCLUSION 12

PETITIONER'S STATEMENT OF THE ISSUES PRESENTED

1. Whether the PCR court erred in denying relief, where Petitioner was not provided counsel when charged with two offenses that resulted in periods of incarceration, where Petitioner was tried *in absentia* without counsel, and where the PCR court erred in finding a knowing and voluntary waiver of the right to counsel?

2. Whether the PCR court erred in finding Petitioner waived his right to be tried in person, where the trial court never determined he voluntarily waived that vital constitutional right?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. The PCR court correctly found Petitioner made a knowing and voluntary waiver of the right to counsel based on the multi-factor test set forth in *State v. Cash*, 309 S.C. 40, 419 S.E.2d 811 (Ct. App. 1992).

2. The PCR court correctly found Petitioner voluntarily waived his right to be tried in person based on his repeated failures to appear for his trials and other hearings despite knowing the dates and times of those proceedings

3. The issues raised in Petitioner's petition for a writ of certiorari are procedurally barred because Petitioner could have, but did not, raise the issues on direct appeal.

STATEMENT OF THE CASE

Applicant was arrested on Mach 7, 2017, for shoplifting (value $2,000 or less) and issued a citation by the City of Rock Hill. (Uniform Traffic Ticket #20172260076901). His ticket listed his date of trial as April 3, 2017. He was not represented by an attorney on this charge. Applicant did not appear, and a bench trial was held in his absence before the Honorable Jane Modla on April 3, 2017. He was found guilty and sentenced to thirty days in jail and a fine of $2,125. This judgment was entered April 4, 2017. Applicant filed a Motion to Reconsider on June 1, 2017, and this Motion was denied when Applicant failed to appear in court for his scheduled hearing. Applicant filed another Motion to Reconsider which was denied again on July 11, 2017, by the Honorable Ray Long. Applicant then filed a Motion to Rescind Bench Warrant. Applicant was given a date of August 7, 2017, to appear in court; when Applicant failed to appear, the Honorable Jane Modla denied the Motion. The original sentence was imposed on August 7, 2017.

Applicant was also arrested on March 24, 2017, for driving under suspension, 3rd offense, and issued a citation by the City of Rock Hill. (Uniform Traffic Ticket #20172280062407). His ticket listed the date of his trial as May 31, 2017. He was not represented by an attorney on this charge. Applicant did not appear, and a bench trial was held in his absence before the Honorable Ray Long on May 31, 2017. He was found guilty and sentenced to ninety days in jail and a fine of $2,100. Applicant filed a Motion to Reconsider, which was denied by the Honorable Ray Long on July 10, 2017, and the original sentence was imposed on August 7, 2017. Applicant did not appeal his convictions or sentences.

Petitioner filed his application for post-conviction relief on November 2, 2017. He alleged the following grounds for relief in his application:

1. "Because I was unlawfully convicted. I showed for court, June, July, and on the August 7th they slapped me in cuffs saying that I missed my court dates in May? Like where do they do that at?"
2. "I should have received a fair trial not a bench warrant. I was never a fugitive, I got locked up for showing up. Probably to spare the officer embarrassment for charging me with DUS 3rd while I was issued a valid route restricted to drive to and from work. And to spare the embarrassment of charging me with shoplifting when I didn't steal a thing…."

As relief, Applicant asked "for the court to vacate the charges and sentence, clear my record of any conviction imposed by the Rock Hill Municipal Court, and $300,000 for wrongful incarceration and loss of business. Immunity from arrest from Rock Hill Police.[1]"

Respondent filed its return and partial motion to dismiss on June 29, 2018. An evidentiary hearing into this matter was convened on June 29, 2021, at the Moss Justice Center in York, South Carolina before the Honorable R. Lawton McIntosh. Applicant was present at the hearing and initially represented by Matthew Burgess, Esquire. Assistant Attorney General Michael Neubauer, of the South Carolina Attorney General's Office, appeared on behalf of Respondent.

At the start of the hearing, Applicant moved to relieve counsel Burgess and proceed *pro se*. The court conducted a colloquy with Applicant to ensure that he was aware of his right to counsel in this proceeding, that he understood the advantages of counsel and the risks of proceeding *pro se*, and that, despite these risks, he wanted to proceed *pro se*. Following this colloquy, Applicant's motion to relieve counsel was granted. Applicant was given an opportunity to examine Mr. Burgess' file to prepare for his evidentiary hearing. Following a

---

[1] Applicant was informed at his evidentiary hearing that his request for a monetary award and immunity from arrest are not valid forms of post-conviction relief. Applicant insisted the Court was allowed to award monetary damages in civil matters; however, the Court denied Applicant's request.

brief recess, Applicant indicated he was prepared to proceed with his evidentiary hearing.

Applicant testified in his own behalf at the hearing. He initially claimed to have appeared "a few minutes late" at the courthouse on the dates he was supposed to appear. In addition, he claimed that he wanted a public defender but never received one. However, he later admitted that he never requested a public defender; that he could not remember the dates he arrived at the courthouse; that, on the days he did appear, he was "thirty, forty minutes late except for the August the 7th date" where "I got there like one o'clock and I was supposed to be there like nine, ten o'clock." (App.pp.55–72). By written order dated September 2, 2021, Judge McIntosh denied and dismissed the application.

Petitioner thereafter filed a timely notice of appeal. By and through counsel Taylor D. Gilliam, Esquire, Petitioner filed a petition for writ of certiorari on August 1, 2022. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR court correctly found Petitioner made a knowing and voluntary waiver of the right to counsel based on the multi-factor test set forth in State v. Cash, 309 S.C. 40, 419 S.E.2d 811 (Ct. App. 1992).

Petitioner argues his rights were violated because he was tried without receiving the assistance of counsel. Respondent submits the PCR court's finding that Petitioner knowingly and voluntarily waived the right to counsel was correct based on the test set forth in *State v. Cash*, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992), and approved in the PCR context by the Supreme Court in *Gardner v. State*, 351 S.C. 407, 412–13, 570 S.E.2d 184, 186–87 (2002). The PCR court relied on evidence in the record including Petitioner's college education, his lack of mental or physical health issues that could impair his understanding, his prior contact with the criminal justice system, the fact that he had represented himself in past proceedings, his awareness of the charges he was facing, his understanding of legal defenses he could have raised to the charges he was facing, and his awareness of the right to counsel. Based on this evidence, the PCR court determined that Petitioner's decision not to avail himself of the right to counsel was made knowingly and voluntarily.

"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). In such cases, an indigent criminal defendant may request that an attorney be appointed to represent him. *State v. Thompson*, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct. App. 2003) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)). Here, Petitioner

unquestionably had the right to assistance of counsel at his trials because they both resulted in sentences of imprisonment.

However, a defendant may, through his conduct, waive or his Sixth Amendment right to counsel. *Id.* at 262, 584 S.E.2d at 134. In order to waive the right to counsel, a defendant must be (1) advised of the right and (2) adequately warned of the dangers of proceeding without counsel. *Gardner*, 351 S.C. at 411, 570 S.E.2d at 186. If the trial court fails to address both prongs, the reviewing court must look to record to determine whether the petitioner had sufficient background or was apprised of his rights by some other source. *Id.* "While a specific inquiry by the trial judge expressly addressing the disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." *Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (internal citations omitted).

In this case, there was no express colloquy between Petitioner and the trial judge; Petitioner repeatedly failed to appear at his scheduled trials and subsequent hearings, and those proceedings were, consequently, held in Petitioner's absence. In his Petition for a Writ of Certiorari, Petitioner acknowledges that "there is typically no clear way to verify whether *Faretta* warnings have ever been given to an unrepresented defendant," citing *Osbey v. State*, 425 S.C. 615, 622, 825 S.E.2d 48, 52 (2019) (James, J., concurring) (explaining the practical issues preventing courts from recording *Faretta* warnings, even when the defendant has appeared in court). (Pet.p.13). Notwithstanding this acknowledgment, Petitioner goes on to say that

because the record does not show Petitioner received *Faretta* warnings,[2] the PCR court's finding that Petitioner waived his right to counsel was not supported by the evidence. This argument ignores the clear import of *Wroten* and its progeny: that although a specific *Faretta* colloquy by the trial court is preferred, if the trial court fails to address the prongs of *Faretta* the reviewing court must determine from the other evidence in the record whether the defendant adequately understood his right to counsel and the dangers of proceeding without counsel. *See Wroten*, 301 S.C. at 294, 391 S.E.2d at 576; *Gardner*, 351 S.C. at 411, 570 S.E.2d at 186; *Osbey*, 425 S.C. at 621, 825 S.E.2d at 51.

Because there was no record of an express *Faretta* colloquy between the trial judge and Petitioner, it was the duty of the PCR court to determine, from the available evidence in the record, whether Petitioner was aware of the right to counsel and the consequences of waiving that right. The PCR court applied the multi-factor test set forth in *Cash*, 309 S.C. at 43, 419 S.E.2d at 813, and subsequently approved in *Gardner*, 351 S.C. at 412–13, 570 S.E.2d at 186–87, to fulfill this obligation. Those factors include:

> (1) the accused's age, educational background, and physical and mental health;
> (2) whether the accused was previously involved in criminal trials;
> (3) whether he knew of the nature of the charge and of the possible penalties;
> (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case;
> (5) whether he was attempting to delay or manipulate the proceedings;
> (6) whether the court appointed stand-by counsel;

---

[2] It bears repeating that the lack of any express *Faretta* warnings in this matter was caused by Petitioner's own persistent failure to attend the trial court proceedings scheduled in this matter, despite advance notice of the time and date of those proceedings. A defendant's chronic absence from court naturally aggravates the challenges Justice James describes in his *Osbey* concurrence regarding the trial court's ability to provide an express, on-the-record *Faretta* warning. Respondent submits Petitioner should not be permitted to take advantage of a purported trial court error to which his own misconduct contributed. *See State v. Logan*, 279 S.C. 345, 348, 306 S.C. 622, 624 (1983).

> (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
> (8) whether he knew of legal challenges he could raise in defense to the charges against him;
> (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and
> (10) whether the accused's waiver resulted from either coercion or mistreatment.

Cash, 309 S.C. at 43, 419 S.E.2d at 813.

Based on its review of the record and the testimony presented at the PCR hearing, the PCR court correctly found Petitioner satisfied multiple elements of the *Cash* test. Petitioner testified he was in college and had no mental or physical health problems that impaired his understanding. (App.pp.35–36; p.60). He had previously represented himself in a criminal case regarding possession of a firearm. (App.pp.36–37). He testified that he was aware of the charges he was facing and their possible penalties. (App.p.66). He was aware of legal defenses he could raise to the charges brought against him; for example, he argued he was innocent of the shoplifting charge because he never stole anything, and he challenged the driving under suspension charge on the ground that he had a valid route restricted license at the time he was ticketed. (App.p.16; p.19). Moreover, when Petitioner asked to represent himself at the PCR hearing, he affirmed to the court that he understood he had the right to an attorney. (App.p.35). Nevertheless, he admitted he did not request a public defender. (App.pp.70–71). Each of these facts supported the PCR court's finding that Petitioner had the requisite understanding to knowingly and voluntarily waive his right to counsel by failing to request an attorney at any point during the criminal proceedings against him.

Petitioner does not challenge the PCR court's application of the *Cash* factors. Instead, Petitioner claims his case "is analogous to both *Wroten* and *Osbey*," in which this Court reviewed the record and determined the accused had not knowingly and voluntarily waived the

right to counsel. (Pet.p.13). Although both cases involve situations where the accused was not provided *Faretta* warnings, the facts of those cases are easily distinguishable from Peititoner's case.

Wroten had only a fifth-grade education. He requested an attorney from the public defender's office but was never contacted by an attorney. His only prior experience court experience was a single guilty plea in 1979. This Court held that this record did not demonstrate Wroten made an informed decision to proceed without counsel. *Wroten*, 301 S.C. at 295, 391 S.E.2d at 576–77.

In *Osbey*, this Court found there was nothing in record, apart from two prior convictions and probation and parole violations, to indicate that Osbey was aware of the dangers of representing himself. The Court held those prior convictions, by themselves, were insufficient to support a finding that Osbey's waiver of the right to counsel was knowing and voluntary. *Osbey*, 425 S.C. at 620–21, 825 S.E.2d at 51.

In Petitioner's case, however, the PCR court pointed out multiple facts in the record establishing the knowing and voluntary character of Petitioner's waiver of the right to counsel according to the *Cash* factors. Unlike Wroten, Petitioner was in college, never requested an attorney, and had experience representing himself on other charges in criminal court. Unlike Osbey, there was considerable evidence in the record apart from Petitioner's prior criminal charges to demonstrate the requisite awareness of the right to counsel and the consequences of waiving it, including his education, mental and physical health, prior experience with self-representation, and understanding of the charges against him and potential defenses.

Because all of these factors, present in the record, support the PCR court's determination that Petitioner's waiver was knowing and voluntary, the PCR court did not err in finding

Petitioner was not unlawfully deprived of the assistance of counsel in his trials. Consequently, this Court should deny the petition for a writ of certiorari.

II. The PCR court correctly found Petitioner voluntarily waived his right to be tried in person based on his repeated failures to appear for his trials and other hearings despite knowing the dates and times of those proceedings.

Applicant alleges his due process rights were violated when he was tried in his absence. Applicant alleges he appeared for court on multiple occasions, however Applicant believes was unlawfully convicted after a trial in his absence. This Court finds this allegation is without merit.

Although the Sixth Amendment of the Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived. *State v. Bell*, 293 S.C. 391, 401, 360 S.E.2d 706, 711 (1987); *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976). Nonetheless, a waiver of such an important right is permitted only in limited circumstances. *City of Aiken v. Koontz*, 368 S.C. 542, 547, 629 S.EW.2d 686, 689 (2006). Therefore, before a defendant may be tried *in absentia*, the trial court must determine a defendant voluntarily waived his right to be present at trial, making 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. *Id.*; *see also* Rule 16, SCRCrimP. 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. *Id.* The South Carolina Court of Appeals has ruled that a court may not try a criminal defendant *in absentia* unless it finds that he received notice of the trial and voluntarily chose to be absent. *State v. Wrapp*, 421 S.C. 531, 808 S.E.2d 821 (2017).

At the evidentiary hearing, Applicant introduced both of his Uniform Traffic Tickets (#20172260076901, #20172280062407), along with records showing Applicant was tried in his

absence for both charges, as exhibits. Both tickets clearly reflect that Applicant was "summoned to appear before the trial court" on April 3, 2017, and May 31, 2017, respectively. (App.pp.1–2).

On cross-examination, Applicant acknowledged that his traffic tickets included the date, time, and place of the Applicant's trials as well as the offenses Applicant was charged with. After he failed to appear at his trials, he submitted motions to have his case reopened, and the court scheduled hearings on those motions, sending letters and subpoenas to Applicant apprising him of the dates of those hearings and stating he was "commanded to appear." (App.pp.3–11). Applicant testified those hearings were continued without his being present; however, he admitted that he arrived at court "thirty to forty minutes" late on those occasions. Applicant further testified that, after filing a motion to reconsider, he was given a new court date of August 7, 2017. Applicant testified he arrived to court "really late" on August 7, 2017, stating he had to wait for his ride to drive from Charleston to Rock Hill to drive Applicant and his daughter to the courthouse.

The PCR court correctly found Applicant was provided with adequate notice of the date, time, and location of his scheduled court appearances, sufficient to enable him to make an effective waiver of the right to be present. *See Koontz*, 368 S.C. at 547, 629 S.EW.2d at 689 ("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."). By stating that he attempted to be present at his various court dates but was late, Applicant implicitly admits that he knew he was required to appear at court on the scheduled dates. The sheer number of missed court dates also supports the PCR court's ruling. Not only did Applicant fail to attend his trials, but he also repeatedly failed to attend the hearings that were held—at his own request—to show why he failed to attend those trials. This chronic pattern of absences supports the PCR court's

finding that Applicant's failure to attend his trials was voluntary. *See Ellis*, 267 S.C. 257, 261, 227 S.E.2d 304, 306 ("The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an *intention* to obstruct the orderly processes of justice.") (emphasis added).

Because substantial evidence in the record indicated that Applicant received adequate notice of his many court dates and understood that he was required to attend, the PCR court's finding that Applicant voluntarily waived his right to be present should not be disturbed. Accordingly, this Court should deny the petition for a writ of certiorari.

III. The issues raised in Petitioner's petition for a writ of certiorari are procedurally barred because Petitioner could have, but did not, raise the issues on direct appeal.

Petitioner did not appeal his convictions or sentences. In its return to Petitioner's PCR application, and again at the PCR hearing, Respondent argued that Petitioner's claims should be dismissed because they could have been raised on direct appeal. (App.p.26; pp.75–76). Under the Uniform Post-Conviction Procedure Act, issues that could have been raised at trial or on direct appeal may not be the basis for a post-conviction relief application. S.C. Code Ann. § 17-27-20(b); *see Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."). At no point has Petitioner ever argued that he was unable to raise these issues on direct appeal. Therefore, Respondent submits all of Petitioner's PCR claims are barred under the PCR statute. While the PCR court's order did not discuss this point, Respondent raises it now as an additional ground for the denial of the petition for a writ of certiorari. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling,

order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417–23, 526 S.E.2d 716, 721–25 (2000).

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

By:
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

11/18, 2022