R#23918

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

TERRENCE O'NEIL FRAZIER,

Appellant.

APPELLATE CASE NO 2015-002464

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The record demonstrates Appellant knowingly and intelligently waived his right to counsel based on his significant criminal record, his awareness of his ability to apply for a public defender, and his conduct during trial, including his defense that led to his acquittal for carjacking.

STATEMENT OF THE CASE

Appellant Terrence Frazier was indicted for carjacking, leaving the scene of an accident, breaking into a motor vehicle, grand larceny of a motor vehicle valued in excess of $10,000, and trafficking methamphetamine, all based on events occurring on July 9, 2015.

Frazier proceeded to jury trial pro se before the Honorable Eugene C. Griffith, Jr., on November 16-19, 2015. Following some pretrial motions, Judge Griffith provided Frazier with standby counsel, who was available to assist him throughout jury proceedings.

Frazier was convicted as charged, except the jury found him guilty of using a vehicle without permission as a lesser included offense of carjacking. Frazier was sentenced to twenty years imprisonment for trafficking methamphetamine and concurrent sentences for the remaining convictions.

STATEMENT OF FACTS

Like a tornado, Appellant Frazier blazed a trail through Greenwood businesses on July 9, 2015. Witnesses would describe the affected parts of Greenwood as chaotic. Those witnessing him that day would describe Frazier's behavior as erratic. At the end of trial, the prosecutor noted Frazier was likely high on methamphetamine that day, which explains a lot. R. p. 571. Yet Frazier still had more than nineteen grams of methamphetamine left in his pants when a hospital security guard searched him.

Events started at the Greenwood Chick-Fil-A. Brian Whitaker, manager at Chick-Fil-A, testified Frazier, holding a magazine in a wrapper, approached Whitaker at the walk-up window, and told him he believed the woman on the cover of the magazine was in the drive-thru line at Chick-Fil-A. Frazier threw four or five twenty-dollar bills on the ground, apparently wanting to wager whether or not the woman was actually the coverperson. Whitaker declined the wager, but Frazier left his money on the ground. Whitaker described Frazier's behavior as odd. Frazier started pulling on the door handle of Whitaker's pick-up truck. Whitaker was not so concerned since he did not have anything of value in his truck. Then Frazier jumped in a female customer's pick-up truck and sped away. R. pp. 97-103.

That female customer was Susannah Chatos. She parked in the handicap parking space at Chick-Fil-A and after she exited, Frazier approached her to tell her the woman on the cover of his pornographic magazine was in the drive-thru line. Perhaps sensing Chatos's disinterest, Frazier approached Whitaker at the walk-up window and put the magazine in front of him to look at. R. pp. 150-51. Chatos intervened: she took the magazine and gave it back to Frazier, telling him, "[L]ook, this is a Christian establishment, . . . we don't look at . . . garbage around here." R. p. 152, lines 2-6. Frazier was insistent – he told them he would bet a $100, throwing the wager on the ground. Frazier walked back to the parking lot. Whitaker offered to walk her back to her pick-up, but she declined. Walking back, she saw Frazier lifting the door handles on Whitaker's pick-up truck. She stepped in her truck and started to pull away when Frazier threw something at her truck. She got out, and confronted Frazier, and Frazier jumped in the pick-up truck. Through the driver window, she had her hands around his neck, but his sweat made him slippery – she fell backwards as he drove away with her truck. She ended up with a fractured rib from the ordeal. R. pp. 152-54. She found the

pornographic magazine in her truck the next day and called law enforcement to search the truck for drugs. R. p. 168. Deputy Brian Penn described her demeanor as shaking, upset, teary-eyed, and she nursed a hurt arm. R. pp. 186-87.

Officer Matt Emery testified he observed Frazier on a nearby convenience store surveillance video buying a case of beer, a bag of snacks, and a magazine. R. pp. 220-22. Deputy Johnston picked up the only remaining $20 from off the ground. R. pp. 206-07. He also retrieved a case of beer and a bag of snacks from the back of Whitaker's truck. R. p. 206.

Bessie Williams was the second victim falling in Frazier's path. She was driving her Lincoln out of Frank's Car Wash when Frazier smashed the stolen pick-up into her vehicle. Her Lincoln was totaled. Williams watched as Frazier left the truck, ran behind her vehicle, and began erratically yelling and screaming. To the best of her recollection, at no point before he left in a red Chrysler did Frazier even look in Williams's direction. He certainly never attempted to render her any aid. R. pp. 234-38.

Kimberly Searles was next. Frazier jumped in Searles's red Chrysler while it was getting washed at Frank's Car Wash. The attendant told Frazier, "You can't take this car." Searles added, "You can't take my car." Undaunted, Frazier took her Chrysler and sped away down the road, jumped the sidewalk as he turned the vehicle around, then sped in the opposite direction. R. pp. 257-58. The attendant, Clarence Woolridge, noted other employees needed to jump back to avoid being hit by Frazier as he pulled away with his second stolen car that day. R. p. 273. Lieutenant Caughman described Frank's Car Wash as "chaotic" when he arrived afterwards. The stolen truck was still running when he arrived. R. p. 284, p. 286.

Gwendolyn Gallaham drove by Frank's Car Wash, then noticed she was being followed by a

red Chrysler. She pulled into World Finance and got out of her vehicle the same time the driver, Frazier, got out of the Chrysler. He demanded she give him his money. Gallaham, undoubtedly perplexed, asked what money. Frazier repeated his demand and started rummaging through her car, including her trunk. She ran into World Finance and told the employees to call the police. She told them to lock the doors because she thought Frazier was about to pull out a gun when he fumbled with his pants. Instead of pulling out a weapon, Frazier urinated between the two cars. R. pp. 303-08. Law enforcement arrived and arrested Frazier. R. p. 312. Officer William Kay interviewed Gallaham and noted a puddle of liquid running down the parking lot where he was told Frazier urinated. R. p. 317, p. 330.

Officer Trotter first took Frazier to the jail. Officer Trotter escorted him to the patrol car and sat him in the back passenger seat. Officer Trotter was about to leave but Frazier "had gotten up on his seat and had his head bent over and he had his back end sitting up on the ledge of the back seat." R. p. 341, lines 15-20. Officer Trotter and another officer needed to fasten the hobble strap around Frazier's legs to keep Frazier in his seat belt. R. p. 341, lines 20-23. Frazier was sweaty, and he could not stay still. The nurse at jail told Officer Trotter that Frazier was intoxicated and told him to take Frazier to the hospital. R. pp. 340-41.

Officer Trotter never did a full-blown search of Frazier, just an initial pat-down to ensure he was not armed. However, at the hospital, the security guard gave Officer Trotter a bag of methamphetamine the guard found after the guard searched Frazier. R. pp. 343-45.

The security guard, Travis Rogers, testified Frazier was talkative and acted "very sexual" towards the nursing staff. He exposed himself, offering to have sex with the nurse. For the medical staff's safety, he searched Frazier and found a bag of drugs in his pants pocket. R. pp. 374-75. The

SLED chemist testified the substance seized was 19.92 grams of methamphetamine. R. p. 425.

Preliminary hearing

Frazier's preliminary hearing was held on September 1, 2015, before the Honorable Municipal Judge Lee Miller. Judge Miller noted for the record that Frazier was present without an attorney. Judge Miller explained for the record that he cautioned Frazier he should not go forward with the preliminary hearing without an attorney, noting it was a critical stage of the proceedings. Frazier confirmed this. Judge Miller then confirmed Frazier was waiving his right to counsel, and Frazier replied he was representing himself and waiving his right to counsel. (Preliminary hearing recording).

Bond hearing

At the October 15, 2015 bond hearing, as Frazier begged for a bond, the trial court asked Frazier why he did not have an attorney and Frazier responded:

> Because my family can't afford a lawyer and I am trying, I look at the cases very frivolous and I understand, I am not saying I am the smartest but I feel like I am smart enough to get through this myself **and I know a little about the law to make it through.**

R. p. 6, lines 1-5. The trial court warned Frazier, "You can represent yourself, I can't force a lawyer on you. These young lawyers are smart." R. p. 6, lines 6-7. Frazier responded he wanted to get out on bond and then work on trying to get an attorney. R. p. 6, lines 8-10. Frazier also advised the trial court that he filed a speedy trial motion. R. p. 8, lines 7-10.

Frazier's performance at trial

Upon the case being called, the trial court verified with Frazier that he refused the State's plea offer. He then advised the trial court he was moving for a change of venue. R. p. 18. Frazier

made an in limine motion to make sure the tickets for breaking into a motor vehicle and leaving the scene of an accident would not be admitted at trial. The motion was granted. R. p. 50.

Notably, Frazier asked for copies of the transcripts of his bond hearing and **"representation" hearing.** R. p. 69. The prosecutor then asked the trial court to provide Frazier Faretta warnings. In response to the trial court's inquiry, Frazier advised the trial court he was twenty-five years old, went to ninth grade in school, and cut grass and helped remodel houses. R. p. 72, lines 16-24. Frazier understood he could have a public defender appointed, but did not want one appointed because it would take longer before the case would be tried. R. p. 73.

The trial court noted he was well organized and did "fairly well" with the pretrial motions. The trial court offered to provide counsel to advise Frazier on procedural matters while he handled the witnesses since he was familiar with the facts. R. p. 73, lines 16-22.

Frazier asked if he filled out paperwork for a public defender and the trial was postponed, would he be able to get a bond reduction, and the trial court advised that he probably would not get a bond reduction. R. pp. 73-74. The trial court asked Frazier if he felt comfortable representing himself and Frazier indicated he did with the facts but wanted an attorney to sit with him. Frazier indicated a public defender previously was appointed to represent him on another charge. R. pp. 74-75.

During opening argument, Frazier implored the jury to observe the witnesses' demeanor, to look at the facts, and told the jury the charges were false. R. pp. 93-97. He concluded: "They are going to try [to] paint a picture in your head that oh, he is just a bad person. He's just a menace to society and dah, dah, dah, dah, dah. No, it's not like that. I want you to look at the facts that they paint, the pictures. Look at it. Look, listen, observe, study it, analyze it, and then make your

decision." R. p. 97, lines 18-23.

For the State's first witness, the trial court sustained Frazier's hearsay objection. R. p. 99. Then later, the trial court sustained Frazier's leading objection. R. p. 102. He was allowed to consult with his stand-by counsel during an in-camera argument regarding some surveillance video footage. R. p. 112-13. During cross-examination, Frazier used the statement to refresh the witness's recollection. R. p. 127.

With a later witness, the trial court required the prosecutor to rephrase a question following Frazier's objection that arguably suggested a legal conclusion. R. p. 155. He made an objection to the magazine being admitted into evidence based on chain of custody and lack of foundation, which resulted in the trial court requiring the prosecutor to make a proffer. R. pp. 159-60. Later, the trial court provisionally declined to allow the magazine into evidence through that witness in response to Frazier's argument. R. pp. 164-65. Frazier made successful hearsay objections again during Officer Penn, Officer Emery, Officer Moore, and Officer Caughman's testimony. R. p. 186; p. 223; p. 248; p. 286.

Frazier made a successful Rule 5, SCRCrimP, objection to prevent the recovered $20 bill from being admitted into evidence. R. pp. 207-13. Frazier knew to make a motion to suppress the methamphetamine (but was unsuccessful since it was a third-party search) and challenge the chain of custody (also unsuccessful). R. pp. 361-72. Frazier made a clever argument against admission of the chemist's report that momentarily seemed to catch the prosecution in a procedural trap. R. pp. 429-33. He later presented the trial court with citation to a case to argue his point. R. p. 435. He also made a reasonable argument against the authority cited by the prosecution. R. p. 438.

After the State rested its case, Frazier made an insightful, albeit unsuccessful, directed verdict

argument on the carjacking charge, arguing the lack of evidence to support force or intimidation. R. p. 447-48. During an informal charge conference, Frazier requested an instruction for grand larceny as a lesser offense of carjacking. Ultimately, the trial court provided unauthorized use of a vehicle as a lesser included offense. R. p. 530; p. 551-52.

Frazier let the jury know why he decided to represent himself:

> [B]ut I decide[d] to represent myself **because I got a little knowledge about the law**, know wrong from right, especially common sense. If you got common sense, it's – you may need a little help in certain areas, you may be right, but if you got common sense, the law is common sense.

R. p. 501, lines 2-7.

Frazier was acquitted of one of the two major charges – carjacking, and instead convicted of unauthorized use of a vehicle as a lesser included offense. This favorable result is likely due to his effective closing argument. Frazier pointed out that Whitaker testified he did not see force used on Chatos. R. p. 505, lines 10-21. He then argued to the jury the surveillance video showed that Chatos got out of the truck willingly and not by force. R. p. 506, lines 7-14. He pointed out, "And in the victim's statement, which you will hear today, she admitted to getting out of her truck and that she was very angry, cussing at the suspect, and she attacked [the] suspect, so that, in fact, proves that she wasn't intimidated or scared." R. p. 506, lines 14-18.

Frazier then pushed his legal argument vehemently, advising the jury of the elements of carjacking, including the requirement of the use of "force or violence or by intimidation while the person was operating the vehicle or while the person was in the vehicle." R. p. 509, lines 20-24. Frazier argued, "She wasn't forced out of her truck. And if somebody threw something at your truck and you get out, you can't be intimidated." R. p. 510, lines 5-7.

Referencing the video, Frazier argued all it showed was the truck pulling off and Chatos walking away, without the appearance of being hurt. "She is not appeared to be injured. It's no proof of carjacking." R. p. 510, lines 22-24. Frazier argued again there was no proof of intimidation. R. p. 510, line 25 – p. 511, line 7.

Frazier turned to the point that "if any violence or force was used or established was or from by the victim [Chatos]. . . . She used physical force, not the suspect." Noting his own professed size of a 135 pounds, "soaking wet," Frazier argued the size disparity contradicted the element of intimidation. r. p. 512-13.

During sentencing, the prosecutor advised the trial court of Frazier's significant criminal history. Frazier was convicted of assault and battery of a high and aggravated nature on December 10, 2008. Frazier was convicted of simple possession of marijuana in August 2009. The same month, he was sentenced by the trial court for his conviction for possession of cocaine, first offence, and received a six month sentence. Frazier was convicted of simple possession and possession of beer or wine by a minor in November 2010. In September 2011, Frazier was convicted of unlawful carrying of a weapon. He was convicted the next month of driving with an expired vehicle license. In October 2014, he was convicted of pointing and presenting a firearm.

ARGUMENT

The record demonstrates Appellant knowingly and intelligently waived his right to counsel based on his significant criminal record, his awareness of his ability to apply for a public defender, and his conduct during trial, including his defense that led to his acquittal for carjacking.

Frazier contends the record fails to show he knowingly and intelligently waived his right to counsel. The record shows he was aware he could be appointed counsel and he knew he was expected to follow the rules and procedures. With the assistance of standby counsel, he proved effective in his defense, leading to favorable rulings and ultimately acquittal of one of the two most serious charges he faced from his bad afternoon. Further, the appropriate remedy is not a new trial, but a remand for the trial court to hold an evidentiary hearing to determine if Frazier freely and voluntarily waived his right to counsel.

Pursuant to both the United States Constitution and the South Carolina Constitution, a criminal defendant brought to trial in South Carolina "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); see U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both."). However, "[t]he right to defend is personal." Faretta, 422 U.S. at 834. As a result, a defendant is permitted to waive his right to counsel and represent himself during a trial in a pro se capacity. State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003); see State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) ("A South Carolina criminal defendant has the constitutional right to represent himself under both federal and state

constitutions."). Thus, even though it ultimately may be detrimental for a defendant to personally conduct his own defense, that defendant's choice to do so "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" Thompson, 355 S.C. at 262, 584 S.E.2d at 134 (citation omitted).

In order to effectuate a valid waiver of the right to counsel, a defendant must be advised of the right to counsel and adequately warned of the dangers of self-representation. Ex parte Jackson, 381 S.C. 253, 259, 672 S.E.2d 585, 588 (Ct. App. 2009). Before allowing a defendant to proceed pro se, the trial judge should determine whether the defendant knowingly and voluntarily waived his right to counsel, and the **preferred** method for doing so is for the trial judge to conduct a specific inquiry addressing the dangers and disadvantages of pro se representation with the defendant. Thompson, 355 S.C. at 262-263, 584 S.E.2d at 135; see United States v. King, 582 F.2d 888, 890 (4th Cir. 1978) (instructing "no particular form of interrogation is required" in order for a trial judge to determine whether a defendant's waiver of his right to counsel is knowing and intelligent). However, "the ultimate test is not the trial judge's advice but the accused's understanding." State v. Cash, 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992). Significantly, "[i]f 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).

Factors used to determine if the accused had sufficient background to understand the disadvantages of self-representation 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 and 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;

(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.

In State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002), this Court examined whether McLauren, an admitted jailhouse lawyer, freely and voluntarily waived the right to counsel absent any express colloquy regarding the dangers of self-representation. This Court found McLauren's waiver was voluntarily made after assessing the Cash factors, finding in relevant part: (1) "McLauren was a mature man with both formal and informal education. There was no evidence in the record of any physical or mental impairment." (2) McLauren was previously involved in criminal proceedings with a record going back to 1965. (3) McLauren knew the nature of the charge, "address[ing] questions by the court and [making] motions." (4) The court appointed standby counsel to provide McLauren legal advice and sit with McLauren during trial. (5) There was no indication McLauren was attempting to delay or manipulate the proceedings, noting McLauren made a motion

for a speedy trial. (6) This Court reiterated McLauren was appointed standby counsel. (7) McLauren knew to comply with the rules and was familiar with them, making motions, calling witnesses, and objecting at times to the prosecutor's questions. (8) McLauren knew of legal challenges he could raise in defense to the charges against him. (9) The exchange between McLauren and the court did not consist of only pro forma answers to pro forma questions. McLauren's actions indicated he understood the legal system. (10) There was no evidence McLauren's waiver was the result of coercion or mistreatment: "McLauren expressly stated that he wanted to represent himself and that he would waive his right to an attorney." Id. at 495-96, 563 S.E.2d at 349-50.

By comparison, in the instant case: (1) Frazier was twenty-five years old with nothing in the record suggesting any physical or mental impairment. (2) Frazier accumulated a substantial criminal record which was probably the source of his legal knowledge he professed to the jury during closing argument. (3) Frazier clearly knew the nature of the charges, and made a sophisticated legal argument that resulted in Frazier being acquitted of carjacking. (4) Like McLauren, Frazier was not represented by counsel before trial, but was assigned standby counsel that was available to Frazier all through the jury proceedings to provide legal advice. (5) Nothing in the record indicated Frazier was attempting to delay or manipulate the proceedings. Like McLauren, Frazier requested a speedy trial. (6) Frazier received stand-by counsel. (7) The record indicates Frazier understood he needed to comply with procedural rules, and his objections and motions indicated some familiarity with the rules. (8) Frazier demonstrated he knew of several defenses to raise, including his successful defense to carjacking, one of the two major charges he was facing. (9) Frazier's actions, like McLauren's, were indicative of some understanding of the legal system. (10) Like McLauren, there is no indication Frazier's decision was the result of coercion or mistreatment. Instead, Frazier

unequivocally requested to represent himself. He was aware he could fill out paperwork to have a public defender appointed. R. p. 73, lines 23-24. He previously represented to the judge during the bond hearing that he had some legal knowledge. R. p. 6, lines 1-5. He chose to represent himself at the preliminary hearing despite warnings from the municipal judge.

As in McLauren, the record shows Frazier made a knowing and voluntary decision to proceed without counsel. Frazier was aware he could apply for a public defender, but declined to do so. He advised the trial court and jury he had legal knowledge or experience. His substantial criminal record shows his awareness of the legal system. He was provided standby counsel throughout trial, made plenty of motions and objections, and presented an articulate strategy that helped him gain an acquittal on the carjacking charge. Because the record demonstrates that Frazier knowingly and intelligently waived his right to counsel, the convictions and sentences should be affirmed.

However, should this Court find that the record falls short of showing that Frazier's waiver of counsel was knowingly and intelligently made, the proper remedy would be a remand to enable the trial court to hold an evidentiary hearing to establish whether, in fact, the waiver was knowingly and intelligently made. In re Christopher H., 359 S.C. 161, 169, 596 S.E.2d 500, 505 (Ct. App. 2004) ("The typical remedy for failing to show a knowing and intelligent waiver of counsel is to remand to the trial court for an evidentiary hearing to determine whether the wavier was, in fact, knowingly and intelligently made."); see also State v. Dixon, 269 S.C. 107, 109, 236 S.E.2d 419, 420-421 (1977) ("The case is remanded to the lower court for a determination of whether the wavier was intelligently made.").

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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