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STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF GREENWOOD)	INDICTMENT NOS. 2015-GS-24-1603, -1604, -1605, -1606, -1632 (APPELLATE CASE NO. 2015-002464)
STATE OF SOUTH CAROLINA,)	
Plaintiff,)	
v.)	**ORDER**
Terrence O'Neil Frazier,)	
Defendant.)	

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SC Court of Appeals

Procedural History

Terrence Frazier (Frazier) was tried for carjacking, leaving the scene of an accident, breaking into a motor vehicle, grand larceny of a motor vehicle valued over ten thousand dollars, and trafficking methamphetamine. *State v. Frazier*, Op. No. 2019-UP-371 at 2 (S.C. Ct. App. filed November 27, 2019). Frazier was tried before the Honorable Eugene C. Griffith, Jr., and a jury, from November 16 – 19, 2015. Frazier represented himself pro se but was assisted during part of the trial by standby counsel Patricia Bolen and Elizabeth Able. Standby counsel was appointed after jury selection and pretrial motions. ROA (Record on Appeal) 74, l. 16 – 75, l. 13. Brian Moroney (Moroney) and Micah Black prosecuted the case. ROA 10; ROA 76; ROA 77, ll. 9-14.

Frazier was found guilty of leaving the scene of an accident, breaking into a motor vehicle, grand larceny of a motor vehicle valued over ten thousand dollars, and trafficking methamphetamine. The jury found Frazier not guilty of carjacking, but convicted him of the lesser offense of using a vehicle without permission. ROA 563, l. 17 – 564, l. 24. The Court sentenced Frazier to concurrent terms of twelve months for leaving the scene of an accident, thirty-six months for using a vehicle without permission, sixty months for the breaking into a motor vehicle, sixty

months for grand larceny, and twenty years for trafficking methamphetamine, second offense. ROA 572, l. 25 – 573, l. 6.

Frazier directly appealed his convictions, and on November 27, 2019, the South Carolina Court of Appeals issued an opinion in which it found that the record did not demonstrate Frazier's decision to represent himself was made with an understanding of the risks of self-representation. *State v. Frazier*, Op. No. 2019-UP-371 (S.C. Ct. App. filed November 27, 2019). The Court of Appeals concluded that the record failed to show whether Frazier was either adequately warned of the dangers of proceeding pro se or had sufficient background to understand the risks of self-representation. *State v. Frazier*, Op. No. 2019-UP-371 at 6. The Court of Appeals remanded the case for an evidentiary hearing on the issue. *Id.*, at 7.

On March 3, 2023, this Court held a hearing to determine whether the defendant's waiver of his right to counsel was knowingly and intelligently made. The Court had before it the appellate court opinion remanding this case for an evidentiary hearing. The Court also had before it the transcript of the November 16 -19, 2015 trial contained in the Record on Appeal (ROA). The Court heard testimony from Brian Moroney, who prosecuted the case. The Court also heard testimony from the defendant, Terrence Frazier. During the hearing, admitted as exhibits were Frazier's arrest warrant for trafficking methamphetamine, and his indictment for the same offense. A transcript of this remand hearing was subsequently obtained (Remand Trans.).

Summary of Testimony

Assistant Solicitor's Testimony

Moroney testified that in the course of prosecuting Frazier, he met with Frazier "several times" at the local jail to hand-deliver discovery, since Frazier had filed a speedy trial motion and indicated he wished to represent himself. Remand Trans. 6, ll. 9-15. Moroney stated he explained

the plea offer of a cap of ten years which he was extending and went through a "cost/benefit analysis" of what Frazier was facing at trial versus what he would be facing if he accepted the plea offer. Remand Trans. 6, ll. 15-23. According to Moroney, he discussed the penalties that Frazier was facing, and the possibility that he could get consecutive, "double digit" sentences. Remand Trans. 15, ll. 3-17. Moroney said that his meetings with Frazier were approximately 30 minutes long. Remand Trans. 17, ll. 6-8.

Moroney stated he went through the penalty for each charge with Frazier. Moroney testified he could not recall whether he discussed the fact that Frazier was facing sentencing enhancements, but he said he would have gone over that. Remand Trans. 18, ll. 4-21. Moroney stated he discussed the fact that there were defenses to the charges. Remand Trans. 21, ll. 8-11. According to Moroney, he was "deferential" to Frazier by telling him he was a "smart guy," and that the jury would be able to tell Frazier was a "nice guy." Remand Trans. 19, ll. 21-25.

Moroney testified that Frazier referenced prior success at a magistrate-level trial. Moroney did not recall in which county the magistrate offense trial was held. Moroney stated he tried to explain to Frazier that this case was in a different posture from that case, that the rules of evidence were complicated, and that Frazier needed legal representation. Remand Trans. 7, ll. 4-24. Moroney stated Frazier was adamant these were "flimflam" charges and he would be able to get himself acquitted. Remand Trans. 23, ll. 4-8. Moroney said Frazier brought up issues that he saw in this case, such as "scrivener's errors" with his arrest warrants. Remand Trans. 21, ll. 8-11.

Moroney explained that Frazier wanted a private attorney, and Moroney told him that a public defender could be appointed to him. Frazier did not want a public defender, and he declined the offer of a public defender. Moroney said he told Frazier that representing himself was a dangerous prospect because of the time he faced, and that an attorney would help him navigate the

case. Remand Trans. 8, l. 7 – 9, l. 10; Remand Trans. 20, ll. 17-19. Moroney stated that an attorney could advise Frazier about his concerns regarding "scrivener's errors" and laboratory weights. Moroney testified that he did not recall if he mentioned the Fourth Amendment. Remand Trans. 20, l. 22 – 21, l. 17.

Moroney stated he had numerous discussions with Frazier in which Moroney cautioned Frazier about the perils of proceeding pro se. Moroney said he brought Frazier in front of Judge Edward Miller so that Judge Miller could provide Frazier with *Faretta*[1] warnings. Remand Trans. 8, l. 21 – 9, l. 25. According to Moroney, Judge Miller had a conversation with Frazier in the "small courtroom" and explained that these were serious charges, that attorneys had gone to law school and had legal training for several years, that Frazier did not have the benefit of that, and that Frazier could benefit from having someone to aid him in his defenses and assist with the case. Moroney stated Judge Miller told Frazier he would appoint counsel free of charge, but Frazier was adamant that he wanted to represent himself. Moroney believed Frazier's appearance before Judge Miller took place a term or two before his trial.[2] Remand Trans. 10, l. 1 – 11, l. 20; Remand Trans. 13, ll. 17-24.

Moroney was recalled after Frazier testified at the evidentiary hearing after Frazier's testimony "jog[ged] his memory." Remand Trans. 49, ll. 17-22. Moroney stated he did recall telling Frazier about enhanced sentencing provisions and Frazier was advised numerous times about the perils of proceeding unrepresented. Remand Trans. 50, l. 7 – 53, l. 1. Moroney said he did mention concepts such as the Fourth Amendment and suppression, topics about which a lawyer could advise Frazier. Remand Trans. 53, l. 23 – 54, l. 1.

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[1] *Faretta v. California*, 422 U.S. 806 (1975).

[2] A transcript of this hearing could never be located.

Defendant's testimony

Frazier testified that at the time of his trial, he was 25 years old. Frazier stated that as a child he had ADHD (Attention-Deficit/Hyperactivity Disorder) and he had been to the Beckman Mental Health Center. Frazier said it took him a long time to grow out of the ADHD and he still had trouble concentrating. Remand Trans. 26, ll. 4-19. Frazier explained that he took medication for anxiety but he did not take that medication at the time of his trial. Remand Trans. 26, l. 20 – 27, l. 4. Frazier stated that the last grade he completed in school was the eighth grade. Frazier said he did not finish the ninth grade. Remand Trans. 27, ll. 5-22. According to Frazier, he was a drug user when he was arrested on these charges. Remand Trans. 36, ll. 1-3.

Frazier stated that he had been to court previously for three or four cases, but most of his prior charges had been "basically thrown out or reduced to a lesser charge." Frazier explained that he had never been in a general sessions trial before this case. Frazier recalled that he had been to court in magistrate's court previously and he pled not guilty and the charge was "thrown out." Remand Trans. 27, l. 25 – 28, l. 14. Frazier explained the charge was a "30-day charge" against "a female" and he represented himself. Frazier stated it was a "hometown" "situation," and that he did not question witnesses. Frazier said the court heard the woman's side of the story and his own side of the story. Frazier did not recall if a jury was present. Frazier stated he had never watched a trial the whole way through, either in person or on television. Remand Trans. 28, l. 12 – 30, l. 1.

Frazier explained he thought the charges in this case were non-violent, and that he was facing zero to ten years for the trafficking methamphetamine offense. Frazier stated he did not know he would be tried for all the offenses at once. Frazier said he thought the trafficking was non-violent because it was his "first time catching a trafficking charge" and he did not understand the nature of enhancement. Frazier testified he did not know the State was going to use a 2009

possession of cocaine convention to enhance his trafficking charge. Frazier stated he did not know he was facing trafficking, second offense, at trial. Frazier noted that neither his warrant nor his indictment said second offense. Frazier said he had no notification he faced an enhanced trafficking charge until sentencing. Remand Trans. 30, l. 2 – 33, l. 10; Remand Trans. 40, ll. 3-6.

Frazier recalled meeting with Moroney when Moroney brought him the plea offer. According to Frazier, he did not recall Moroney mentioning anything about not representing himself or representing himself. Frazier clarified that Moroney may have told him it was dangerous to represent himself and he could have a lawyer appointed in the last stages, but not when the plea offer was conveyed. Frazier stated he did not recall a conversation with Moroney about having a charge thrown out in magistrate's court. Remand Trans. 31, l. 15 – 32, l. 5; Remand Trans. 35, ll. 14-25; Remand Trans. 41, ll. 1-21; Remand Trans. 43, ll. 1-6.

Frazier testified he went to trial about a month after his mother died. Frazier stated his "mind wasn't in the right state" due to her death. Frazier said he did not want the public defender because he was trying to get his family to hire a lawyer. Frazier testified he was not trying to manipulate the courts. Remand Trans. 34, l. 20 – 35, l. 8. Remand Trans 37, ll. 6-9; Remand Trans. 38, ll. 9-12.

Frazier stated he went in front of Judge Miller and Judge Miller stated "something of the sort like . . . you don't have to represent yourself but if you decide to represent yourself, I can't force a lawyer on you or something." Remand Trans. 37, ll. 10-15. Frazier said Judge Miller did not go into details about what a lawyer could do for him. Frazier stated he told Judge Miller, "I do not waive my rights."[3] Remand Trans. 43, l. 14 – 44, l. 10. Frazier testified he thought the charges

[3] It appears Frazier was referring to a statement he made at his preliminary hearing in front of a municipal judge. *See State v. Frazier*, Op. No. 2019-UP-371 at 2.

were "flimflam" because he had two sets of warrants and he did not receive the warrants in a timely manner. Remand Trans. 37, l. 16 – 38, l. 8. Frazier stated he did not understand that he would have to comply with the criminal procedure rules at trial. Remand Trans. 38, ll. 18-20. Frazier said that no one had forced him to go to trial pro se or mistreated him in the case. Remand Trans. 38, l. 22 – 39, l. 2.

Applicable Law

To establish a valid waiver of the right to counsel, the accused must be advised of his right to counsel and adequately warned of the "dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open." *Faretta v. California*, 422 U.S. 806, 835 (1975); *Bridwell v. State*, 306 S.C. 518, 519, 413 S.E.2d 30, 31 (1992). "[T]o establish waiver of the right to counsel, it is incumbent upon the state to prove an intentional relinquishment or abandonment of the right." *State v. Cash*, 309 S.C. 40, 47, 419 S.E.2d 811, 815 (Ct. App. 1992) (citing *Brewer v. Williams*, 430 U.S. 387 (1977)).

"While a specific inquiry by the 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." *Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). In the absence of an inquiry by the judge, courts look to the record to determine if the accused had sufficient background to understand the disadvantages of self-representation or if he was apprised of his rights by some other source. "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*, 301 S.C. at 294-95, 391 S.E.2d at 576.

Factors the courts have considered in determining if an 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 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; (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. *State v. Cash*, 309 S.C. at 43, 419 S.E.2d at 813.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to consider the testimony of the witnesses and arguments presented during the remand hearing, and to consider the exhibits entered at the hearing, the Opinion of the Court of Appeals, and the trial transcript. This Court has had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law.

This Court finds Frazier's testimony that he was unaware he faced enhancement for trafficking methamphetamine, second offense, to be credible. His testimony was supported by his arrest warrant and indictment, neither of which indicated that he faced enhancement. His testimony that he did not realize a possession charge could enhance a trafficking charge was credible. This Court also finds credible Moroney's testimony that he did meet with Frazier and did at some point

mention enhancements. However, Moroney's own difficulty recalling this fact indicates any discussion of enhancements was not lengthy or detailed.

This Court finds Moroney's testimony about the importance of Frazier's appearance before Judge Edward Miller for *Faretta* warnings, is overstated in the context of the entire record. For example, on the first day of trial, Moroney stated to this Court that Frazier's appearance before Judge Miller for *Faretta* warnings was brief and was not in depth, and he requested this Court do additional *Faretta* warnings. ROA 72, ll. 8-16.

In applying the *Cash* factors[4] to determine whether Frazier had sufficient background to understand the disadvantages of self-representation, this Court finds the following:

(1) "[T]he accused's age, educational background, and physical and mental health." This factor cuts both ways. Frazier was 25 years old, with an eighth-grade education, and he had ADHD and anxiety. His anxiety was untreated at the time of his decision to represent himself. His mother died while he was in pretrial detention. However, the court observed that Frazier is intelligent.

(2) "[W]hether the accused was previously involved in criminal trials." This factor weighs in favor of the defendant, since Frazier had no prior involvement in general sessions trials, although he had once represented himself in magistrate court.

(3) "[W]hether he knew of the nature of the charge and of the possible penalties." This factor also weighs in favor of the defendant. It was undisputed Frazier was aware of most of the offenses and punishments he faced. However, Frazier was not aware that he faced trafficking methamphetamine, second offense, and its enhanced penalty.

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[4] *State v. Cash*, 309 S.C. 40, 419 S.E.2d 811 (Ct. App. 1992).

(4) "[W]hether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case." This factor weighs in favor of the defendant, since Frazier was never represented by counsel during the pendency of the case.

(5) "[W]hether he was attempting to delay or manipulate the proceedings." This factor weighs in favor of the defendant. Frazier was not attempting to delay or manipulate the proceedings.

(6) Whether the court appointed stand-by counsel. This factor weighs neutrally. Standby counsel was not appointed until after the jury selection and pretrial motions were completed.

(7) "[W]hether the accused knew he would be required to comply with the rules of procedure at trial." This factor weighs in favor of the defendant. The Court of Appeals found the colloquy at trial was inadequate to warn Frazier of the dangers of proceeding without counsel. *State v. Frazier*, Op. No. 2019-UP-371 at 6. Moroney did not testify that there was any caution by Judge Miller about needing to comply with criminal procedure rules. Frazier also testified at the remand hearing he did not know he would be required to comply with the criminal procedure rules.

(8) "[W]hether he knew of legal challenges he could raise in defense to the charges against him. This factor does not weigh in favor of either party." It appears Frazier was both aware and unaware of various defenses he could raise. For example, Frazier did mount a successful defense to the offense of carjacking, but he did not attempt to suppress the drugs on Fourth Amendment grounds.

(9) "[W]hether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions." This factor cuts both ways. This Court's exchange with the defendant at trial on his desire to proceed pro se was not merely pro forma answers and

questions. However, the colloquy may have made Frazier feel more confident that he could represent himself because the Court told Frazier he was doing a "nice job" of being organized and doing "fairly well" with pretrial motions. ROA 73, ll. 8-11. Moroney's comments to Frazier that he was "smart" and a "nice guy," which would "come across to the jury" were not helpful in this regard.

(10) "[W]hether the accused's waiver resulted from either coercion or mistreatment." This factor weighs in favor of the State. The waiver was not caused by coercion or mistreatment.

Based upon the weighing all of the above factors that the weight of the sufficiency of the factors for the court to consider as whether the Defendant understood his understanding of his rights, This Court finds the lack of a knowing and intelligent waiver weighs in favor of the defendant.

Conclusion

Based on the foregoing, this Court finds and concludes that the defendant's decision to represent himself was not made with a sufficient understanding of the risks of self-representation. After considering the Court of Appeals' Opinion and the testimony at the remand hearing, this Court concludes the defendant was neither adequately warned of the dangers of proceeding pro se nor had sufficient background to understand the risks of self-representation. Therefore, the Court finds that the defendant's waiver of his right to counsel not knowingly and intelligently made.

AND IT IS SO ORDERED this 25 day of August, 2023.

Eugene C. Griffith, Jr.
Presiding Judge
Eighth Judicial Circuit

Newberry, South Carolina.

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SC Court of Appeals

October 3, 2023

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

Re: State v. Terrence O'Neil Frazier, Appellate Case No. 2023-001439

Dear Ms. Kitchings:

Pursuant to this Court's September 28, 2023, letter notifying me of a deficiency with our Notice of Appeal, enclosed please find a filed stamped copy of the order on appeal.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Joanna K. Delany
Appellate Defender

JKD/smm

cc: Joshua A. Edwards, Esq. (with enclosure)
David A. Spencer, Esq. (with enclosure)
David M. Stumbo, Esq. (with enclosure)

Enclosure: as stated